criminalize" his conduct. *See Class*, 138 S. Ct. at 805. We therefore reiterate our prior holding that Class waived his statutory claims. And to succeed on his constitutional challenge, it is not enough for Class to show that the *best* reading of the law requires proof of scienter. Instead, Class must show that the law is so difficult for the average person to understand that the Constitution *forbids* his conviction without such proof.

He cannot meet that heavy burden. As we discuss above, determining that the ban applies to the Maryland Avenue lot is not a perfectly straightforward exercise, but citizens are presumed to know the law, and the task of ascertaining the boundaries of the Capitol Grounds is not so difficult that Class's conviction violates the Constitution.

IV

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

UNITED STATES of America, Appellee

v.

Michael M. MONZEL, Appellant

No. 16-3108

United States Court of Appeals,
District of Columbia Circuit.

Argued January 23, 2019

Decided July 19, 2019

Background: After defendant's pleaded guilty to possession and distribution of child pornography, the government moved for an order of restitution for three of defendant's victims who were depicted in the child pornography he distributed and possessed. The United States District Court for the District of Columbia, No. 1:09-cr-00243-1, Gladys Kessler, J., 746 F.Supp.2d 76, granted the motion. One of the victims challenged the "nominal" restitution awarded by petitioning for writ of mandamus and by direct appeal. The Court of Appeals, Griffith, Circuit Judge, 641 F.3d 528, dismissed the appeal but granted the mandamus petition in part and instructed the District Court to consider anew the amount of the victim's losses. Subsequently, the District Court, Gladys Kessler, J., 2012 WL 12069547, denied the government's supplemental request for restitution, but the Court of Appeals issued mandate vacating the order and further instructed the District Court to redetermine restitution. The District Court, Gladys Kessler, J., 209 F.Supp.3d 73, granted the motion and awarded the victim $7,500 in restitution. Defendant appealed.

Holdings: The Court of Appeals, Millett, Circuit Judge, held that:

(1) award of $7,500 to victim was reasonable and circumscribed to fit defendant's contribution to victim's damages;

(2) the government's alleged deficiencies in its proof of the amount of losses incurred by victim whose image defendant possessed did not preclude an award of restitution;

(3) district court did not abuse its discretion by focusing on the more defendant-focused and market-perpetuating factors, rather than considering the number of future convictions and the total offenders predicted to possess victim's image;

(4) district court could rely on nearly ten-year-old economic report that estimated victim's losses;

(5) district court properly was not required to mathematically disaggregate the victim's losses from before the images entered the marketplace;

(6) district court sufficiently explained its decision to award $7,500 in restitution;

(7) there was no evidence that district court wrongly read Court of Appeals' prior decision in the case, which vacated original restitution award of $5,000, as setting a $5,000 floor below which restitution payment could not go; and

(8) the harm that defendant caused victim by possessing her image did not change just because of her then-to-date recovery for her losses from other sources.

Affirmed.

1. Sentencing and Punishment ⚿2141

The statute mandating that those convicted of child pornography offenses pay "full" restitution to their victims for any injuries they proximately caused recognizes that every perpetrator's viewing of a child's image inflicts distinct harm on that child in that it effects a repetition of the victim's abuse. 18 U.S.C.A. § 2259.

2. Criminal Law ⚿1156.9, 1158.34

Court of Appeals reviews a restitution order for an abuse of discretion, and it examines the factual findings underpinning the order for clear error.

3. Criminal Law ⚿1147

A district court by definition abuses its discretion when it makes an error of law.

4. Sentencing and Punishment ⚿2164

While every viewing of a child's pornographic image itself re-inflicts the victim's abuse, no discrete, readily definable incremental loss can easily be traced to each individual possessor's exploitation of the image, and as a result, there can be no precise algorithm for computing individual restitution awards. 18 U.S.C.A. § 2259.

5. Sentencing and Punishment ⚿2178

In cases in which the defendant was a non-distributing possessor of an image of child pornography that thousands have trafficked, the defendant's relative share of restitution should not be severe, but neither should it be token or nominal. 18 U.S.C.A. § 2259.

6. Sentencing and Punishment ⚿2178

The amount of restitution awarded in cases in which the defendant was a non-distributing possessor of an image of child pornography that thousands have trafficked should be reasonable and circumscribed, geared to the restitution statute's dual purposes of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims. 18 U.S.C.A. § 2259.

7. Sentencing and Punishment ⚿2163

There are seven rough guideposts that district courts might consider in navigating between the Scylla and Charybdis of prohibited severe and nominal restitution awards in child pornography cases, which include: whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); and

other facts relevant to the defendant's relative causal role. 18 U.S.C.A. § 2259.

8. Sentencing and Punishment ⚿2141

The factors that district courts might consider in awarding restitution in child pornography cases, as set forth by the Supreme Court in *Paroline v. U.S.*, 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714, are neither a mandatory checklist nor a rigid formula, but instead are meant to guide the sentencing court's wide discretion and sound judgment. 18 U.S.C.A. § 2259.

9. Sentencing and Punishment ⚿2143

Once a sentencing court has made its best judgment about a defendant's relative share of causal blame, the resulting amount of restitution to a child pornography victim, if it is both reasonable and circumscribed, is then deemed the amount of the victim's general losses proximately caused by the offense. 18 U.S.C.A. § 2259.

10. Sentencing and Punishment ⚿2163, 2178

District court's award of $7,500 in restitution to victim of child pornography, whose image defendant possessed, was neither severe, nor nominal, but rather reasonable and circumscribed to fit defendant's contribution to victim's damages; although victim's image had been held by thousands of possessors, defendant possessed only one single image of her, and there was no evidence he distributed her image, knew her, attempted to discover her identity or to contact her in any way, sought out her image in particular, paid for or sold her image, or groomed other minors for sexual exploitation using her image. 18 U.S.C.A. § 2259.

11. Sentencing and Punishment ⚿2188(4)

The government's alleged deficiencies in its proof of the amount of losses incurred by child pornography victim whose image defendant possessed did not preclude an award of restitution, but instead only had potential bearing upon the reasonableness of the $7,500 awarded, since an award of restitution was mandatory, given the government's showing that defendant possessed an image of the victim, and that she had outstanding losses caused by the continuing traffic in her images. 18 U.S.C.A. §§ 2259(b)(2), 3664(e).

12. Sentencing and Punishment ⚿2163

That the government did not request a specific amount of restitution on behalf of child pornography victim, whose image defendant possessed, did not, by itself, establish the unreasonableness of the district court's order that defendant pay victim $7,500 in restitution; the government was required to demonstrate the amount of the loss, not to propose a mathematical calculation or to specifically assert a dollar amount. 18 U.S.C.A. §§ 2259(b)(2), 3664(e).

13. Sentencing and Punishment ⚿2188(2)

A party's claim for a particular amount of restitution is not proof of causation.

14. Sentencing and Punishment ⚿2172

The government was not required to proffer, and the district court was not required to adopt, a formulaic methodology for computing the restitution award to child pornography victim, whose image defendant possessed. 18 U.S.C.A. §§ 2259, 3664(e).

15. Sentencing and Punishment ⚿2103

Courts must issue reasonable and circumscribed restitution awards to child pornography victims. 18 U.S.C.A. § 2259.

16. Sentencing and Punishment ⚿2172

The district court's judgment in awarding restitution to a child pornography victim cannot be a precise mathematical inquiry; algorithms and rigid formulas are not required. 18 U.S.C.A. § 2259.

17. Sentencing and Punishment ⚿2163, 2178

District court, in awarding $7,500 in restitution to child pornography victim whose image defendant possessed, did not abuse its discretion by focusing on the more defendant-focused and market-perpetuating factors, as well as the practical impact of the award, rather than considering the number of future convictions and the total offenders predicted to possess victim's image, which were two of the factors Supreme Court had suggested district courts might consider when awarding restitution to child pornography victims; district court accepted government's representations that it lacked sufficient, reliable data from which to make reasonable estimates of number of future convictions likely to involve victim's images, and that it had no way to estimate the broader number of offenders who possessed her images. 18 U.S.C.A. §§ 2259, 3664(e).

18. Sentencing and Punishment ⚿2141, 2188(1)

The factors that district courts might consider in awarding restitution in child pornography cases, as set forth by the Supreme Court in *Paroline v. U.S.*, 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714, are not rigid evidentiary requirements that the government is bound to satisfy, or that the district court is obliged to analyze, in every restitution case. 18 U.S.C.A. § 2259.

19. Sentencing and Punishment ⚿2141

The factors that district courts might consider in awarding restitution in child pornography cases, as set forth by the Supreme Court in *Paroline v. U.S.*, 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714, are permissive, and a district court is generally free to disregard them if it reasonably concludes they are unknowable or otherwise uninstructive. 18 U.S.C.A. § 2259.

20. Sentencing and Punishment ⚿2165

In addition to the nature of the perpetrator's role, the number of images of child pornography involved, and the number of acts of distribution, there can be other facts relevant to the defendant's relative causal role, for purposes of determining restitution amount, which often will include: (i) the frequency of views and shares, because every viewing is a repetition of the victim's abuse; (ii) the means by which the images were acquired (e.g., the trading of other images in exchange, the payment of money encouraging the abuse, requests for images of escalating levels of abuse); (iii) any stalking or attempts at victim contact; (iv) the defendant's individual contribution to the market for the victim's image over time, that is, whether he sought out this particular victim's images, the length of his involvement in child pornography, whether he displayed a pattern of offenses, and whether he has distributed other images; and (v) the use of images to groom other children for abuse or exposure to pornography. 18 U.S.C.A. § 2259.

21. Sentencing and Punishment ⚿2165

Considerations relevant to the defendant's relative causal role, for purposes of determining restitution amount to be award to child pornography victim, may include the imperative of ensuring that the individual perpetrator is internalizing the costs of harm to the victim, and the need to deter recidivism by encouraging the perpetrator to express remorse, to obtain treatment, or to otherwise pursue rehabilitative steps that will prevent him from

generating further demand for child pornography. 18 U.S.C.A. § 2259.

22. Sentencing and Punishment ⚿2188(4)

District court could rely on nearly ten-year-old economic report that estimated child pornography victim, whose image defendant, as well as thousands of others, possessed, would suffer $512,681 in future treatment expenses and $2,751,077 in future vocational losses, when awarding $7,500 in restitution based on defendant's possession of her image; there was no evidence that, had the report been updated with actual costs incurred by victim since report was prepared, there would be a significant temporal gap or a material dollar disparity, the projected treatment costs were only a minute fraction of victim's losses, and the record confirmed the core assumptions that underlay the report's projections for future treatment. 18 U.S.C.A. §§ 2259, 3664(e); Fed. R. Crim. P. 52(a).

23. Sentencing and Punishment ⚿2178

District court properly took into account that defendant was in no way connected to the initial production of child pornography images depicting victim, and court was not required to mathematically disaggregate the victim's losses from before the images entered the marketplace and were viewed by thousands of possessors, when ordering defendant to pay victim $7,500 in restitution based on his possession of one image of her; requiring disaggregation simply blinked away the compounding effects of demand for child-pornography images on their production in the first place, and it also ignored the distinct harm that victim suffered upon learning that the images of her already-completed abuse were being viewed for pleasure by perpetrators like defendant. 18 U.S.C.A. §§ 2259, 3664(e).

24. Sentencing and Punishment ⚿2195

District court sufficiently explained its decision to award $7,500 in restitution to child pornography victim whose image defendant possessed, as required to allow for appellate review; district court discussed each of the factors set forth by Supreme Court in *Paroline v. U.S.*, 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714, emphasizing and delineating defendant's relatively "minor" role as the possessor of a single image. 18 U.S.C.A. § 2259.

25. Sentencing and Punishment ⚿2195

District courts generally are required to articulate the specific factual findings underlying restitution orders in order to enable appellate review.

26. Criminal Law ⚿1156.9

When reviewing a restitution award to child pornography victim, Court of Appeals asks only whether the district court reasonably exercised its discretion in weighing the factors set forth by the Supreme Court in *Paroline v. U.S.*, 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714, and other relevant factors, applying them to the record in the case, and then choosing a circumscribed award that is consistent with the restitutionary purposes of the statutory scheme. 18 U.S.C.A. § 2259.

27. Sentencing and Punishment ⚿2195

District court did not fail to address any material mitigation arguments raised by defendant before ordering him to pay victim $7,500 in restitution based on his possession of one image of her; court acknowledged defendant's "minor" role, and it specifically emphasized the lack of evidence that he knew the victim, attempted to discover her identity, or attempted to contact her, sought out images of her in particular, paid for or received anything of value for her images, or groomed other

minors with her images. 18 U.S.C.A. § 2259.

28. Sentencing and Punishment ⚿54

A sentencing court must generally consider all nonfrivolous arguments for mitigation.

29. Criminal Law ⚿1192

There was no evidence that district court wrongly read Court of Appeals' prior decision in the case, which vacated original restitution award of $5,000 due to district court's own acknowledgement that the award was less than the amount of harm defendant caused child pornography victim by possessing her image, as setting a $5,000 floor below which defendant's restitution payment could not go, when ordering defendant to pay victim $7,500 in restitution; district court never indicated in any way that the $5,000 floor tied its hands, somehow forcing it to award more restitution than warranted. 18 U.S.C.A. § 2259.

30. Criminal Law ⚿1177.3(5)

Any error by district court, in both not subtracting $7,186 when calculating restitution amount defendant owed to child pornography victim whose image he possessed to exclude damages incurred prior to his arrest, and in underestimating victim's general losses by subtracting $20,563 in attorney fees because victim's submission consisted exclusively of vocational and treatment expenses, did not warrant reversal of court's $7,500 restitution award; the impact of the purported $7,186 over-inclusion of loss, if any, in determining defendant's share of victim's more than $3 million in losses was at best de minimis, and at worst incalculable, and any underestimation of victim's general losses could only have inured to defendant's benefit. 18 U.S.C.A. § 2259; Fed. R. Crim. P. 52(a).

31. Sentencing and Punishment ⚿2175

The harm that defendant caused child pornography victim by possessing her image did not change just because of her then-to-date recovery, from other sources, of her losses, for purposes of ordering defendant to pay restitution. 18 U.S.C.A. § 2259.

32. Sentencing and Punishment ⚿2101

Restitution to child pornography victim reflects not defendant's share of victim's unpaid balance, but rather defendant's contribution to her general losses, that is, the aggregate losses, including the costs of psychiatric treatment and lost income, that stem from the ongoing traffic in her images as a whole. 18 U.S.C.A. § 2259.

33. Sentencing and Punishment ⚿2103

Restitution to child pornography victim is a matter of discretion and sound judgment, not an exercise in long division. 18 U.S.C.A. § 2259.

34. Sentencing and Punishment ⚿2101

Restitution in child pornography cases is meant to address the very real and reverberating trauma that attends each perpetrator's acquisition and viewing of a victim's image. 18 U.S.C.A. § 2259.

Appeal from the United States District Court for the District of Columbia (No. 1:09-cr-00243-1)

Rosanna M. Taormina, Assistant Federal Public Defender, argued the cause for appellant. With her on the briefs was A.J. Kramer, Federal Public Defender.

Eric Hansford, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were Jessie K. Liu, U.S. Attorney, and Elizabeth Trosman, Elizabeth H. Danello, and David B. Kent, Assistant U.S. Attorneys.

Before: Rogers, Millett and Katsas, Circuit Judges.

Millett, Circuit Judge:

[1] Congress has mandated that those convicted of child pornography offenses pay "full" restitution to their victims for any injuries they "proximate[ly]" caused. 18 U.S.C. § 2259 (2012). That directive recognizes that every perpetrator's viewing of a child's image inflicts distinct harm on that child in that it effects "a repetition of the victim's abuse." *See Paroline v. United States*, 572 U.S. 434, 134 S.Ct. 1710, 1727, 188 L.Ed.2d 714 (2014).

In *Paroline*, the Supreme Court prescribed a general method and "rough guideposts" for trial courts to follow in determining a perpetrator's "relative causal role" in a victim's injury. 134 S.Ct. at 1728. This case asks what portion of a victim's damages a single, non-distributing possessor can be ordered to pay. Because the district court followed *Paroline* in calculating a restitutionary amount that is reasonably tailored to the defendant Michael Monzel's causal role, we affirm.

I

Section 2259(a) of Title 18 requires district courts to "order restitution for any offense" involving "Sexual Exploitation and Other Abuse of Children." 18 U.S.C. § 2259(a) (cross-referencing the offenses specified in Chapter 110 of Title 18). So as not to leave any doubt, Congress declared that "[t]he issuance of a restitution order under this section is *mandatory*." *Id.* § 2259(b)(4) (emphasis added). Both distribution and possession of child pornography offenses fall under Section 2259's mandatory restitution scheme. *See id.* § 2252(a)(2), (4)(B).

Under Section 2259, convicted defendants must pay their victim the "full amount of the victim's losses as determined by the court[.]" 18 U.S.C. § 2259(b)(1); *see also id.* § 2259(c) (defining the victim entitled to restitution as "the individual harmed as a result of a commission of a crime under this chapter"). The statute, in turn, defines the "full amount of the victim's losses" as including "costs incurred" for medical services (physical, psychiatric, and psychological), therapy, necessary transportation, temporary housing and child care expenses, lost income, and attorneys' fees, as well as "any other losses suffered * * * as a proximate result of the offense." *Id.* § 2259(b)(3)(A)–(F). The government bears the burden of "demonstrating the amount of the loss sustained by a victim as a result of the offense." *Id.* § 3664(e) (incorporated by reference in 18 U.S.C. § 2259(b)(2)).[1]

II

In December 2009, Michael Monzel pled guilty to one count each of distributing and of possessing child pornography. *See United States v. Monzel*, 641 F.3d 528, 530 (D.C. Cir. 2011) ("*Monzel I*"); 18 U.S.C. § 2252(a)(2), (4)(B). The child pornography collection amassed by Monzel included an image of "Amy." *See Monzel I*, 641 F.3d at

1. Congress has since amended Section 2259 to both codify *Paroline*'s basic approach and to set a restitution floor of $3,000. *See* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, 132 Stat. 4383 (2018). We agree with the parties that this amendment does not apply to this case. 18 U.S.C.A. § 2259B(d) (West 2019) (describing ''the sense of Congress'' that this amendment does not apply retroactively); Oral Arg. Tr. 62–63; *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 264, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (declining to apply civil law enacted on appeal because ''rules will not be construed to have retroactive effect unless their language requires this result'') (citation omitted).

530. Amy is the same victimized individual who sought restitution in *Paroline*. 134 S. Ct. at 1716. Her story is, at this point, tragically familiar. When she was "eight and nine years old, [Amy] was sexually abused by her uncle in order to produce child pornography." *Id.* at 1717. She underwent therapy from 1998 through 1999, and, according to her therapist, was "back to normal" "[b]y the end of this period." *Id.* But then a "major blow to her recovery came when, at the age of 17, she learned that images of her abuse were being trafficked on the Internet." *Id.* Naturally, "[t]he knowledge that her images were circulated far and wide renewed [Amy's] trauma and made it difficult for her to recover from her abuse." *Id.* By the time *Paroline* was decided in 2014, possessors of her image "easily number[ed] in the thousands." *Id.*

Following Monzel's conviction, the district court sentenced him to ten years of imprisonment. Amy then sought restitution for all of her losses on a theory of joint and several liability. *Monzel I*, 641 F.3d at 531. Monzel, on the other hand, thought Amy should receive only $100 because the government had failed to show "what portion of [her] losses he had caused." *Id.* at 530. The district court initially awarded Amy $5,000 of "nominal" restitution. *Id.* Although "the Government ha[d] not * * * suggested any rational, evidence-based procedure for ascertaining the dollar value of the harms" attributable to Monzel, the district court explained that it had "no doubt" the $5,000 award was "less than the actual harm" Monzel had caused. *United States v. Monzel*, Criminal Case No. 09-243 (GK), 2011 WL 10549405, at *2–3 (D.D.C. Jan. 11, 2011).

Amy filed a petition for a writ of mandamus in this court to challenge the amount of the district court's award. *See* 18 U.S.C. § 3771(d)(3) (authorizing mandamus actions by victims challenging restitutionary awards). This court granted the petition in part. While we held that the rule of joint and several liability does not apply to the child-pornography restitution scheme, we agreed that the district court could not "award[ ] an amount of restitution it acknowledged was less than the harm Monzel had caused." *Monzel I*, 641 F.3d at 539. We directed the district court on remand to "rely upon some principled method for determining the harm Monzel proximately caused." *Id.* at 540.

But, alas, the district court's quest for a fair causal benchmark proved unfruitful. "[F]or reasons *not* of its making," the district court explained, the government was unable to offer anything more than "speculati[on]" as to Monzel's individual causal contribution to Amy's harm. *See United States v. Monzel*, Criminal Case No. 09-243 (GK), 2012 WL 12069547, at *6, *4 n.4 (D.D.C. Nov. 6, 2012) (emphasis added). Recognizing that the result was "most unpalatable," the district court ruled that the government had left it no choice but to deny completely the restitution request. *Id.* at *6.

The government appealed, and while that appeal was pending, the Supreme Court granted certiorari in *Paroline*. *See Paroline v. United States*, 570 U.S. 931, 133 S.Ct. 2886, 186 L.Ed.2d 932 (2013). Because that case involved the same victim, the same crime, and the same underlying legal question, we held the appeal in abeyance pending the Supreme Court's disposition of *Paroline*. *See* Order, *In re: Amy, Child Pornography Victim*, No. 12-3093, 1:09-cr-00243-GK-1 (D.C. Cir. June 27, 2013).

Ten months later, the Supreme Court decided *Paroline*. 134 S.Ct. at 1710. *Paroline* rejected Amy's theory of joint and several liability, holding instead that restitution is available "only to the extent the

defendant's offense proximately caused a victim's losses." *Id.* at 1722.

This court vacated and remanded for the district court "to redetermine restitution for Amy consistent with" the *Paroline* framework. *See* Order, *In re: Amy, Child Pornography Victim*, No. 12-3093 (D.C. Cir. June 13, 2014).

The district court then awarded Amy $7,500 in restitution. *See United States v. Monzel*, 209 F. Supp. 3d 73, 77 (D.D.C. 2016) ("*Monzel II*"). The court began, as *Paroline* directed, by calculating Amy's total losses from the continued trafficking of her image, finding that they amounted to $3,243,195. *Id.* at 76. That amount was based on "the Government's second request for restitution," minus $20,563 for certain "specific expenses." *Id.*

To determine Monzel's individual causal contribution, the district court tracked *Paroline*'s "guideposts," 134 S.Ct. at 1728. The court adopted the government's statement that, to its knowledge, there had been "197 restitution orders on behalf of Amy." *Monzel II*, 209 F. Supp. 3d at 76. The court also accepted the government's representation that it lacked "sufficient, reliable data from which to make reasonable estimates" of two other *Paroline* guideposts: the anticipated number of future convictions related to Amy's image, or of "future offenders" who will possess and distribute Amy's image while evading conviction. *Id.*

Next, the district court found that Monzel's possession of a single image of Amy made only a relatively "minor" contribution to her losses. *Monzel II*, 209 F. Supp. 3d at 76. Based on Monzel's individual role, as well as information about "prior restitution awards for Amy," the district court, "in its discretion, determine[d] that an award of $7,500 in restitution [was] appropriate." *Id.* at 77. That amount, the district court found, "comport[ed] with [Monzel's] causal—but minor—role in Amy's ongoing losses resulting from the continued trafficking of her images." *Id.*

Monzel appeals.

III

[2, 3] We review a restitution order for an abuse of discretion, and we "examine the factual findings underpinning the order for clear error." *In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

A

[4] We are not the first, and surely will not be the last, court to wrestle with giving practical effect to Section 2259's proximate-cause test for mandatory restitution in the context of child-pornography offenses. While "every viewing" of a child's pornographic image itself re-inflicts "the victim's abuse," *Paroline*, 134 S.Ct. at 1727, no "discrete, readily definable incremental loss" can easily be traced to each individual possessor's exploitation of the image, *id.* 1726. As a result, there can be no "precise algorithm" for computing individual restitution awards. *Id.* at 1728.

[5, 6] Here, as in *Paroline*, the defendant was a non-distributing possessor of an image that thousands have trafficked. *Paroline*, 134 S.Ct. at 1727. In such cases, the perpetrator's relative share "[sh]ould not be severe," but neither should it be "token or nominal." *Id.* Instead, it should be "reasonable and circumscribed," geared to the statute's dual purposes of "helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-

pornography crimes, even simple possession, affect real victims." *Id.*

[7] To that end, *Paroline* identified seven "rough guideposts" that district courts "might consider" in navigating between the Scylla and Charybdis of prohibited "severe" and "nominal" awards. 134 S. Ct. at 1728. The considerations identified by the Court include:

- "[W]hether the defendant reproduced or distributed images of the victim";
- "[W]hether the defendant had any connection to the initial production of the images";
- "[H]ow many images of the victim the defendant possessed";
- "[T]he number of past criminal defendants found to have contributed to the victim's general losses";
- "[R]easonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses";
- "[A]ny available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted)"; and
- "[O]ther facts relevant to the defendant's relative causal role."

Id. The Court added that "restitution sought and ordered in other [like] cases" could also be informative. *Id.* at 1729.

[8, 9] The Supreme Court stressed that those factors are neither a mandatory checklist nor a "rigid formula," but instead are meant to guide the sentencing court's "wide discretion" and "sound judgment." *Paroline*, 134 S.Ct. at 1728, 1729. Once a sentencing court has made its best judgment about a defendant's relative share of causal blame, the resulting amount—if it is both "reasonable and circumscribed"—is then "deemed the amount of the victim's general losses" proximately caused by the offense. *Id.* at 1728.

B

[10] The district court's decision in this case reflects a reasonable exercise of discretion guided by the *Paroline* guideposts and principles of analysis. The court began, as it should have, by calculating Amy's general losses from the trafficking of her image. *Monzel II*, 209 F. Supp. 3d at 76. The court then marched carefully through each of *Paroline*'s factors and delineated Monzel's individual contribution to and responsibility for Amy's losses. *Id.*; *see also Paroline*, 134 S.Ct. at 1727–1729. The court emphasized that Monzel possessed "only one single image of Amy." *Monzel II*, 209 F. Supp. 3d at 76. There was no evidence he distributed her image, knew her, attempted to discover her identity or to contact her in any way, sought out her image in particular, paid for or sold her image, or "groom[ed] other minors for sexual exploitation" using her image. *Id.* In view of Monzel's real, but still "minor," role, the court's chosen award of $7,500 was neither "severe," nor "nominal," but rather "reasonable and circumscribed" to fit Monzel's contribution to Amy's damages, *Paroline*, 134 S.Ct. at 1727. That is all that *Paroline* requires.

C

Monzel's arguments on appeal fall into three general buckets. First, he argues that the government failed to carry its burden of proving "the amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. § 3664(e) (incorporated by reference in 18 U.S.C. § 2259(b)(2)). Second, he asserts that the district court's explanation for its award was insufficient and unreviewable. And he contends, third-

ly, that the district court made several fatal factual mistakes. None of those challenges succeeds.

1

[11] Monzel offers a laundry list of asserted deficiencies in the government's proof of the amount of Amy's losses. Specifically, he objects that the government failed (i) to identify a particular amount of restitution, (ii) to formulate a discrete methodology for the district court to follow, (iii) to submit evidence about total offenders and future prosecutions, (iv) to disaggregate Amy's initial-abuse losses from her general loss figure, and (v) to update the 2008 loss projections relied upon by the district court. Monzel's Br. 40–45. Those objections misunderstand the *Paroline* mission.

At the outset, Monzel's argument that the government's asserted evidentiary omissions preclude any award at all misses the mark. Monzel does not dispute that the district court put the burden of proof where it belonged—on the government. He makes no claim, for instance, that the district court erroneously assigned him the burden of proof for any aspect of the case. Nor does Monzel dispute the government's evidentiary showing that he possessed an image of Amy, and that Amy has "outstanding losses caused by the continuing traffic in those images." *Paroline*, 134 S. Ct. at 1727.

Given that showing by the government and the court's agreement with it, an award of restitution was mandatory. 18 U.S.C. § 2259(b)(4). The only question, then, is whether the district court abused its discretion in calculating the award based on the record before it. *See United States v. Dillard*, 891 F.3d 151, 161 (4th Cir. 2018) (faulting the district court for denying recovery even though the government had proven the defendant possessed the victim's image and that the victim had outstanding losses from trafficking) (citing *Paroline*, 134 S.Ct. at 1728); *United States v. Rothenberg*, 923 F.3d 1309, 1336–1337 (11th Cir. 2019) (agreeing with *Dillard* that, once the government proves possession and outstanding losses, restitution must issue).

So while the purported evidentiary gaps that Monzel has identified might bear upon the "reasonableness" of the amount awarded, they would not let him off scot free. *Cf. United States v. Sainz*, 827 F.3d 602, 607 (7th Cir. 2016) (explaining that failure of proof with respect to some *Paroline* factors "should not be a barrier to all compensation for victims of child pornography").

Viewed as challenges to the reasonableness of the restitution award, all five of Monzel's evidentiary arguments fail.

[12, 13] *First*, Monzel complains that the government did not request a specific amount of restitution on Amy's behalf. But that is neither here nor there. A party's claim for a particular amount of restitution is not proof of causation. Instead, Section 3664(e) requires the government to "*demonstrat[e]* the amount of the loss," not to propose a mathematical calculation or to specifically assert a dollar amount. 18 U.S.C. § 3664(e) (emphasis added). So the question on appeal is not what the government asked for, but what the district court found. We are, after all, reviewing the district court's judgment, not the United States' briefs. And the lack of a particular dollar amount in the government's request does not, by itself, establish as a matter of law the "unreasonableness" of the district court's order.

[14–16] *Second*, Monzel faults the government for failing to proffer, and the district court for failing to adopt, a formulaic methodology for computing the resti-

tution award. No dice. What *Paroline* requires is that courts issue "reasonable and circumscribed" awards. 134 S.Ct. at 1727. Beyond that, *Paroline* was explicit that the district court's judgment "*cannot* be a precise mathematical inquiry"; "algorithm[s]" and "rigid formula[s]" are not required. *Id.* at 1728 (emphasis added); *see also United States v. Rogers*, 758 F.3d 37, 39 (1st Cir. 2014) (per curiam) (affirming award in apparent absence of any formula); *Dillard*, 891 F.3d at 161 (district court made "fundamental error" when it decided not to order restitution because it disagreed with government's proposed formula); *cf. United States v. Halverson*, 897 F.3d 645, 650 & n.1, 654 (5th Cir. 2018) (endorsing a diversity of calculation methods because the *Paroline* factors "need not be converted into a rigid formula").

[17] *Third*, Monzel faults the government for failing to provide estimates on two of the *Paroline* factors—the number of future convictions and the total offenders predicted to possess Amy's image.

[18, 19] Again, *Paroline* says otherwise. Those numbers were only two among a number of "rough guideposts" flagged in *Paroline*. 134 S.Ct. at 1728. Those particular factors are not "rigid" evidentiary requirements that the government is bound to satisfy, or that the district court is obliged to analyze, in every restitution case. *United States v. Bordman*, 895 F.3d 1048, 1059 (8th Cir. 2018) (quoting *Paroline*, 134 S.Ct. at 1728), *cert. denied*, —— U.S. ——, 139 S.Ct. 1618, 203 L.Ed.2d 902 (Apr. 29, 2019). Instead, the factors are permissive, and a district court is generally free to disregard them if it reasonably concludes they are unknowable or otherwise uninstructive. *See id.*; *Sainz*, 827 F.3d at 606 ("We do not read *Paroline* as requiring district courts to consider in every case every factor mentioned."); *United States v. Knapp*, 695 Fed.Appx. 985, 988 (8th Cir. 2017) ("*Paroline* does not require an analysis of each of its permissive factors.").

Of course, it may not be reasonable for a district court to disregard those guideposts that describe the essential character of the individual perpetrator's offense, such as the number of images possessed and the number of acts of distribution. Those facts would generally seem to be indispensable to evaluating a defendant's relative causal role.

[20, 21] In addition to the nature of the perpetrator's role, the number of images involved, and the number of acts of distribution, there can be "other facts relevant to the defendant's relative causal role," *Paroline*, 134 S.Ct. at 1728, which often will include: (i) the frequency of views and shares, because "every viewing * * * is a repetition of the victim's abuse," *id.* at 1727; (ii) the means by which the images were acquired (*e.g.*, the trading of other images in exchange, the payment of money encouraging the abuse, requests for images of escalating levels of abuse); (iii) any stalking or attempts at victim contact; (iv) the defendant's individual contribution to the market for the victim's image over time—that is, whether he sought out this particular victim's images, the length of his involvement in child pornography, whether he displayed a pattern of offenses, and whether he has distributed other images; and (v) the use of images to groom other children for abuse or exposure to pornography. Additional considerations may also include the imperative of ensuring that the individual perpetrator is internalizing the costs of harm to the victim, and the need to deter recidivism by encouraging the perpetrator to express remorse, to obtain treatment, or to otherwise pursue rehabilitative steps that will prevent him from generating further demand for child pornography.

But the factors Monzel cites—those seeking to predict the future behavior of third parties—will often have less salience. For starters, those factors are aimed mainly at preventing over-compensation of the victim, which is not an issue in this case (or in many cases).

Beyond that, many courts have concluded that, as restitution factors, future convictions and total offenders are "virtually unknown and unknowable." *United States v. Crisostomi*, 31 F. Supp. 3d 361, 364 (D.R.I. 2014); *see United States v. Hite*, 113 F. Supp. 3d 91, 96 (D.D.C. 2015); *United States v. DiLeo*, 58 F. Supp. 3d 239, 245 (E.D.N.Y. 2014); *United States v. Wencewicz*, 63 F. Supp. 3d 1238, 1246 (D. Mont. 2014), *vacated and remanded on other grounds*, *United States v. Grovo*, 653 Fed.Appx. 512 (9th Cir. 2016); *United States v. Moody*, CR 417–256, 2018 WL 3887506, at *3 (S.D. Ga. Aug. 15, 2018); *United States v. Reddick*, CASE No. 2:17-CR-208-WKW, 2018 WL 445112, at *6 (M.D. Ala. Jan. 16, 2018); *United States v. Ayer*, Case No. 2:15-cr-86-APG-NJK, 2015 WL 7259765, at *2 n.2 (D. Nev. Nov. 17, 2015); *United States v. Romero-Medrano*, 2017 WL 5177647, at *4 (S.D. Tex. Nov. 8, 2017); *United States v. Schultz*, CRIMINAL ACTION NO. 14-10085-RGS, 2015 WL 5972421, at *2 (D. Mass. Oct. 14, 2015); *United States v. Gamble*, No. 1:10-CR-137, 2015 WL 4162924, at *2 (E.D. Tenn. July 9, 2015); *United States v. Campbell-Zorn*, No. CR-14-41-BLG-SPW, 2014 WL 7215214, at *6 (D. Mont. Dec. 17, 2014); *United States v. Bellah*, No. 13-10169-EFM, 2014 WL 7073287, at *3 (D. Kan. Dec. 12, 2014); *United States v. McIntosh*, No. 4:14cr28, 2014 WL 5422215, at *6 (E.D. Va. Oct. 22, 2014); *United States v. Daniel*, No. 3:07-CR-142-O, 2014 WL 5314834, at *2 (N.D. Tex. Oct. 17, 2014); *United States v. Reynolds*, No. 12-20843, 2014 WL 4187936, at *6 (E.D. Mich. Aug. 22, 2014); *United States v. Watkins*, No. 2:13–cr–00268 LKK AC, 2014 WL 3966381, at *6–7 (E.D. Cal. Aug. 13, 2014); *accord Sainz*, 827 F.3d at 607 (This information "may not even be reliably known."); *United States v. Grovo*, 826 F.3d 1207, 1221 (9th Cir. 2016) (same); *United States v. Evans*, 802 F.3d 942, 950 (8th Cir. 2015) (same).

The bottom line is that that *Paroline* provided a "starting point" for the district courts' analyses. The Supreme Court did not carve its permissive guideposts into doctrinal stone. *See Paroline*, 134 S.Ct. at 1728. In many cases, the district courts have concluded that total offenders and future convictions are unknowable and uninstructive. The government in this case stated that it lacked "sufficient, reliable data from which to make reasonable estimates" of the number of future convictions likely to involve images of Amy. *Monzel II*, 209 F. Supp. 3d at 76. The government added that it has no way to estimate the broader number of offenders who possess images of Amy. *Id.* The district court accepted both representations. *Id.* Under these circumstances, the district court did not abuse its discretion by focusing instead on the more defendant-focused and market-perpetuating factors, as well as the practical impact of the award. *See id.* at 77.

[22] *Fourth*, the district court relied upon a 2008 economic report that estimated Amy would suffer $512,681 in future treatment expenses and $2,751,077 in future vocational losses. Monzel argues that the government was obligated to update the report with the actual rather than predicted cost projections for the period between 2009 and 2015, and to adjust the report's future projections based upon more recent developments in Amy's treatment patterns.

But a determination of Monzel's relative causal role does not require a perpetual

nickeling and diming of the victim through the imposition of a never-ending accounting requirement—a mandate that would force the victim to constantly confront the growing number of offenders who trade in her image.

In any event, Monzel has not shown that, without his requested adjustments, there would be a significant temporal gap or a material dollar disparity between the initial projection and actual costs. For example, the projected treatment costs for the 2009 to 2015 period constituted only a minute fraction of Amy's losses. And even then, the record reveals no clear disparity between the report's projections and the costs actually incurred. *Cf.* FED. R. CRIM. P. 52(a). As for Amy's future treatment, the record confirms the core assumptions that underlay the 2008 projections. In other words, on this record, demanding an update for the sake of an update would not be worth the candle.

[23] *Fifth*, Monzel argues that the district court was required to formally back-out of Amy's lifetime of psychological treatment and social and vocational impacts those future damages attributable to both her initial abuse and the initial distribution of her image. That argument, again, seeks to impose a mathematical rigidity that *Paroline* eschews. The Supreme Court made "connection to the initial production of the images" one of several factors that could be considered. *See Paroline*, 572 U.S. at 460, 134 S.Ct. 1710. Here, the district court expressly took into account that Monzel was in no way "connected to the initial production" of Amy's images. *Monzel II*, 209 F. Supp. 3d at 76. *Paroline* requires no more than that.

The argument also proves too much. Courts already consider whether the defendant's conduct was connected to "the initial production of the images." *Paroline*, 134 S.Ct. at 1728. Monzel's demand that courts also mathematically disaggregate the losses from before the images entered the marketplace simply blinks away the compounding effects of demand for child-pornography images on their production in the first place. It also ignores the distinct harm that Amy suffered upon learning that the images of her already-completed abuse were being viewed for pleasure by perpetrators like Monzel. *Paroline*, 134 S. Ct. at 1717. For the type of long-term harms at issue here, courts cannot be expected to formally disaggregate the intertwined. *See Bordman*, 895 F.3d at 1059 (explaining that it would transform *Paroline*'s "rough guideposts" into a "rigid formula" to treat initial-abuse disaggregation as a threshold requirement) (citation omitted); *Rothenberg*, 923 F.3d at 1333–1334 (same); *cf. United States v. Miner*, 617 F. App'x 102, 103 (2d Cir. 2015) (explaining that, in the disaggregation context, *Paroline* does not require a "detailed accounting").

The Ninth Circuit has taken the opposite tack. *See United States v. Galan*, 804 F.3d 1287, 1290 (9th Cir. 2015) (reading *Paroline* as "plainly perceiv[ing] a need for separation"). But in our view, that court's categorical test demands a level of forensic precision in the causal analysis that fails to account for the synergistic effect of possessors' demand for images on the harms unleashed by production. The complexity of the Ninth Circuit's approach also demands in most cases more linear precision than a comparative "relative" causal role seeks to measure. Not to mention the continuing need to ensure, through the award, that each perpetrator internalizes the costs of his actions. *See Paroline*, 134 S.Ct. at 1727 (describing goal of "impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims").

The test's difficulties are seemingly reflected in the large number of district court cases within the Ninth Circuit in which victims have been denied restitution because the government cannot meet its "impossible [evidentiary] task" of disaggregating, in a coherent way, a victim's lifetime of costs from the marketing of her images. *See United States v. Chan*, CR No. 15-00224 DKW, 2016 WL 370712, at *2 (D. Haw. Jan. 29, 2016) (denying recovery because government could not surmount the "monumental difficulty associated with * * * disaggregation"); *accord United States v. Kugler*, No. CR 14-73-BLG-SPW, 2016 WL 816741, at *3 (D. Mont. Feb. 29, 2016) (same); *cf. United States v. Young*, 703 Fed.Appx. 520, 521 (9th Cir. 2017) (unpublished decision reversing for failure to disaggregate); *United States v. Massa*, 647 Fed.Appx. 718, 721 (9th Cir. 2016) (same); *United States v. Blurton*, 623 Fed. Appx. 318, 319 (9th Cir. 2015) (same); *Campbell-Zorn*, 2014 WL 7215214, at *4 (Disaggregation "only seems possible in the rather unique situation presented in *Paroline* where there is some kind of demarcation between the losses from the initial abuse and the losses from continued trafficking.") (emphasis omitted).[2]

2

[24] In addition to those evidentiary objections, Monzel takes aim at the district court's reasoning. He argues, first, that the opinion is so devoid of analysis as to be unreviewable for all intents and purposes. Monzel's Br. 46. Monzel contends, secondly, that the district court wrongly failed to address "any" of his mitigation arguments. *Id.* at 47. Both challenges are mistaken.

[25] As for reviewability, district courts generally are required to "articulate the specific factual findings underlying * * * restitution order[s] in order to enable appellate review." *United States v. Fair*, 699 F.3d 508, 513 (D.C. Cir. 2012) (citations omitted); *cf. Chavez-Meza v. United States*, —— U.S. ——, 138 S.Ct. 1959, 1965, 201 L.Ed.2d 359 (2018) (with respect to 18 U.S.C. § 3553(a)'s sentencing factors, district court's explanation must be sufficient "to allow for meaningful appellate review" in "the circumstances of the particular case").

The district court's opinion here easily passes that test. The court discussed each of the *Paroline* factors, emphasizing and delineating Monzel's relatively "minor" role. *Monzel II*, 209 F. Supp. 3d at 76–77. Whether or not those record-based determinations are correct, they are certainly amenable to appellate review.

Monzel insists the district court opinion must leave "*some* way for [us] to *trace* the derivation of the court's $7,500 award[.]" Monzel's Br. 46 (second emphasis added). The question, however, is not whether the district court showed every step of its homework. The decision being made is one of reasoned judgment, not formulaic computation. *Cf. Chavez-Meza*, 138 S.Ct. at 1964 (In sentencing, "[t]he appropriateness of brevity or length, conciseness or detail,

2. Certain statements from the Tenth Circuit's decision in *United States v. Dunn*, 777 F.3d 1171 (10th Cir. 2015), could also be read to endorse a categorical disaggregation requirement. *See, e.g., id.* at 1181. But context is everything, and the Tenth Circuit made its statements in the course of overturning a trial court decision that had held a distributor jointly and severally liable with the abuser for the entirety of the outstanding losses. So disaggregation, as *Dunn* deployed the concept, may have meant simply that distributors and possessors should pay only for their relative roles. *See Rothenberg*, 923 F.3d at 1333 ("*Dunn* must be read in the factual context of a reversal of a district court's ruling that a defendant was *jointly and severally liable* with all other defendants, including the abuser, for the entirety of the victim's * * * total losses[.]").

when to write, what to say, depends upon circumstances.") (quoting *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007)).

[26] So we ask only whether the district court reasonably exercised its discretion in weighing the *Paroline* and other relevant factors, applying them to the record in this case, and then choosing a "circumscribed" award that is consistent with the restitutionary purposes of the statutory scheme. *See Paroline*, 134 S.Ct. at 1727; *Massa*, 647 Fed.Appx. at 720 (upholding restitution award even though "[i]t would have been helpful for the court to have provided more detail as to how it reached the $8,000 figure for each victim," because "the awards appear 'reasonable and circumscribed,' and neither 'token or nominal' nor 'severe' "); *accord United States v. Beckmann*, 786 F.3d 672, 683 (8th Cir. 2015). The district court did just that, discussing the relevant factors and emphasizing Monzel's limited role as the possessor of a single image. *Monzel II*, 209 F. Supp. 3d at 76–77.

Taking a 180-degree turn, Monzel next argues that the district court was too mathematical in its approach. Monzel speculates that the district court randomly selected five post-*Paroline* awards, averaged the amounts to $7,432.63, and rounded that figure "to an even $7,500." Monzel's Br. 37, 45. But that reconstruction of the district court's reasoning is as implausible as it is uncharitable. First, Monzel concedes that his argument fudged the math. His calculation relied upon the $7,500 that was in fact "award[ed]" in *United States v. Bellah*, No. 13-10169-EFM, 2014 WL 7073287 (D. Kan. Dec. 12, 2014), rather than the $7,000 figure cited by the district court below. Monzel's Br. 37 n.15.

Anyhow, the district court here explained that its decision was based on "the parties' arguments, the relevant *Paroline* factors, * * * and * * * information provided regarding prior restitution awards *for Amy*," and *not* on the small and random sampling of post-*Paroline* awards stressed in Monzel's briefing. *See Monzel II*, 209 F. Supp. 3d at 77 (emphasis added). We take the district court at its word. For more than a decade, the court has been immersed in this litigation and, throughout, has consistently demonstrated a good-faith effort to properly implement the evolving legal standard for restitution awards. *See, e.g.*, *id.*; *Monzel*, 2012 WL 12069547, at *4; *Monzel*, 2011 WL 10549405, at *2. There is no basis for imputing a hidden and arbitrary decisionmaking process to the court.

[27, 28] Monzel's next objection is that the district court "did not address *any* of [his] arguments in mitigation[.]" Monzel's Br. 47. That argument falls flat. A sentencing court must generally consider all "nonfrivolous arguments for mitigation." *See United States v. Bigley*, 786 F.3d 11, 12, 14 (D.C. Cir. 2015); *accord United States v. McKeever*, 824 F.3d 1113, 1125–1126 (D.C. Cir. 2016). And that is what the district court did here. It acknowledged Monzel's "minor" role, and it specifically emphasized the lack of evidence that Monzel (i) knew Amy, attempted to discover her identity, or attempted to contact her; (ii) sought out images of Amy in particular; (iii) paid for or received anything of value for her images; or (iv) groomed other minors with her images. *See Monzel II*, 209 F. Supp. 3d at 76. With all of those considerations factored into the ultimate award, *id.* at 77, Monzel fails to identify any material mitigation arguments that the district court did not address.

3

Finally, Monzel offers a laundry list of factual errors he deems fatal to the district court's judgment. None are.

[29] *First*, he argues that the district court wrongly read *Monzel I* as setting a $5,000 floor below which his restitution payment could not go. And that erroneous starting point, Monzel contends, tainted the ultimate $7,500 award.

That argument is doubly flawed. As an exegetical matter, the district court's construction of *Monzel I* was quite reasonable. This court was explicit that it was "grant[ing] [Amy's] petition" because "the $5,000 the court awarded was, by [the district court's] own acknowledgement, *less than the amount of harm Monzel caused Amy*[.]" *Monzel I*, 641 F.3d at 534 (emphasis added). While the district court could have found that the dollar amount changed, the admonition not to order restitution in an amount less than what Monzel caused remained in place.

As a factual matter, the district court never indicated in any way that the $5,000 floor tied its hands in the wake of *Paroline*, somehow forcing it to award more restitution than warranted. *See* Order, *In re: Amy, Child Pornography Victim*, No. 12-3093 (D.C. Cir. June 13, 2014) (directing the district court "to redetermine restitution for Amy consistent with" the causation framework set out in *Paroline*). Monzel points to nothing in the district court's opinion that even hints that its post-*Paroline* analysis proceeded with a $5000 weight already on the damages scale.

[30] *Second*, Monzel claims the district court made a pair of factual errors, subtracting both too much *and* too little from Amy's general loss figure. According to him, the court should have subtracted $7,186 to exclude damages incurred prior to Monzel's arrest in 2009, and also should *not* have subtracted $20,563 in attorney's fees because Amy's submission consisted exclusively of vocational and treatment expenses. As to the purported $7,186 over-inclusion of loss, the impact—if any—in determining Monzel's share of Amy's more than $3 million in losses is at best *de minimis*, and at worst incalculable. And as to the asserted *underestimation* of Amy's general losses, that could only have inured to Monzel's benefit. *See* FED. R. CRIM. P. 52(a) (reversal only for prejudicial error). No harm, no foul.

[31, 32] *Third*, Monzel faults the district court for failing to mention the amount of Amy's then-to-date recovery. That argument asks the wrong question. Under *Paroline*, restitution reflects not Monzel's share of Amy's unpaid balance, but rather his contribution to her "general losses"—"the aggregate losses, including the costs of psychiatric treatment and lost income, that stem from the ongoing traffic in her images as a whole." *Paroline*, 134 S. Ct. at 1722. The harm that Monzel caused does not change just because other sources of compensation may have surfaced. *Cf.* 18 U.S.C. § 2259(b)(4)(B) (barring district courts from "declin[ing] to issue [restitution] because of * * * the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source").

Lastly, Monzel returns to the "math." He claims that $7,500 cannot represent his actual contribution to Amy's losses because it "essentially assumes that Mr. Monzel is one of 432 people ($3,243,195/$7,500) who have harmed and will harm Amy," when in fact thousands continue to trade in her image. Monzel's Br. 52. Any effort to apportion Amy's losses evenly among the full universe of offenders would, by Monzel's account, yield something between fifteen dollars and less than a penny.

[33] That is exactly the reasoning that *Paroline* rejected. *See* 134 S.Ct. at 1734 (Roberts, C.J., dissenting) (finding it "hard to see how a court fairly assessing this

defendant's relative contribution could do anything" other than "impose 'trivial restitution orders' ") (citation omitted). Under *Paroline*, restitution is a matter of "discretion and sound judgment," not an exercise in long division. 134 S.Ct. at 1728 (majority op.) (no "trivial" awards); *id.* at 1744 (Sotomayor, J., dissenting) ("[A] truly proportional approach to restitution would lead to an award of just $47 against any individual defendant. Congress obviously did not intend that outcome, and the Court wisely refuses to permit it.") (citation omitted).

* * * * *

[34] Restitution in child pornography cases is meant to address the very real and reverberating trauma that attends each perpetrator's acquisition and viewing of a victim's image. "[C]hild pornography is 'a permanent record' of the depicted child's abuse, and 'the harm to the child is [only further] exacerbated by [its] circulation.' " *Paroline*, 134 S.Ct. at 1717 (third alteration in original) (quoting *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)); *cf. Osborne v. Ohio*, 495 U.S. 103, 111, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (Child pornography "haunt[s] [the victim] in years to come."). What Monzel's slide-rule approach fails to come to grips with is that the harm to Amy became greater, not less, when he joined the ranks of perpetrators, reinflicting and perpetuating her trauma. To value that pain in pennies would make the restitution statute an insult to the victims. It would also wrongly allow the individual possessor to hide among the sea of wrongdoers. The district court was correct to hold Monzel accountable for the harm that he caused by acquiring and viewing for personal pleasure the image of Amy's abuse.

The judgment of the district court is affirmed.

So ordered.

D.C. ASSOCIATION OF CHARTERED PUBLIC SCHOOLS, et al., Appellants

v.

DISTRICT OF COLUMBIA, et al., Appellees

No. 17-7155

United States Court of Appeals, District of Columbia Circuit.

Argued November 5, 2018

Decided July 19, 2019

Background: Association of chartered public schools brought action against the District of Columbia, alleging that the District underfunded charter schools relative to traditional public schools in violation of the School Reform Act, the Home Rule Act, and the Constitution. The United States District Court for the District of Columbia, Tanya S. Chutkan, J., 134 F.Supp.3d 525, granted District's motion to dismiss and, 277 F.Supp.3d 67, granted District's motion for summary judgment. Association appealed.

Holdings: The Court of Appeals, Srinivasan, Circuit Judge, held that:

(1) even if School Reform Act furnished cause of action, action challenging District's alleged inequitable funding of District's charter schools under the Act did not "arise under" federal law within meaning of the federal question jurisdiction statute;

the Arbitrator's ruling provides no evidence from which a reasonable juror could infer that Defendant's legitimate, non-discriminatory reason for terminating Plaintiff was pretext for retaliation.

V. CONCLUSION

For the foregoing reasons, the court grants Defendant's Motion for Summary Judgment. A separate order accompanies this Memorandum Opinion.

UNITED STATES of America, Plaintiff,

v.

Michael MONZEL, Defendant.

Criminal Case No. 09-243 (GK)

United States District Court,
District of Columbia.

Signed 09/19/2016

Background: Victim, who was depicted in child pornography possessed and distributed by respondent, petitioned for mandamus and by direct appeal, challenging "nominal" restitution awarded by the United States District Court for the District of Columbia, 746 F.Supp.2d 76, after accepting respondent's guilty plea. Government moved to dismiss victim's appeal. The Court of Appeals, Griffith, Circuit Judge, 641 F.3d 528, granted petition in part and dismissed appeal. Following remand, the District Court, Gladys Kessler, J., 2012 WL 12069547, denied the Government's supplemental request for restitution. The Court of Appeals issued mandate vacating the order and further instructed the Court to re-determine restitution.

Holdings: The District Court, Gladys Kessler, J., held that:

(1) District Court would consider only victim's original loss request, and not additional request based on reduction in the value of life, and

(2) award of $7,500 in restitution was appropriate given defendant's very minor contribution to causal process underlying victim's losses.

Motion granted.

1. Torts ⚿119

Proximate cause is a flexible concept that generally refers to the basic requirement that there must be some direct relation between the injury asserted and the injurious conduct alleged.

2. Sentencing and Punishment ⚿2143

In determining a restitution amount for child pornography possession under statute requiring an award of restitution for certain federal criminal offenses, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images, but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses; however, the restitution amount should be neither severe, nor token or nominal. 18 U.S.C.A. § 2259.

3. Sentencing and Punishment ⚿2172

To determine an appropriate restitution amount for child pornography possession under statute requiring an award of restitution for certain federal criminal offenses, District Court must first determine the amount of the victim's losses caused by the continuing traffic in the victim's images. 18 U.S.C.A. § 2259.

4. Sentencing and Punishment ⚿2143

After the District Court has determined the amount of the victim's total

losses, in determining proper amount of restitution for child pornography possession under statute requiring an award of restitution for certain federal criminal offenses, the Court must weigh several factors in determining the relative causal significance of the defendant's conduct in relation to the victim's total losses, including: the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved; whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role. 18 U.S.C.A. § 2259.

5. Sentencing and Punishment ⚿2186

In determining proper amount of victim restitution for child pornography possession under statute requiring an award of restitution for certain federal criminal offenses, District Court would consider only victim's original loss request, and not additional request based on reduction in the value of life; not only was additional request untimely, but it was significantly larger than the value of the life estimates cited in peer reports. 18 U.S.C.A. § 2259.

6. Sentencing and Punishment ⚿2172, 2178

An award of $7,500 in restitution for victim of child pornography offense was appropriate given defendant's very minor contribution to causal process underlying victim's losses; there was no evidence that defendant knew victim, attempted to discover victim's identity, or attempted to contact victim, that defendant specifically sought images of the victim, paid for or received anything of value for the victim's images, or that defendant groomed other minors for sexual exploitation using images of victim. 18 U.S.C.A. § 2259.

Cassidy Kesler Pinegar, Lindsay Jill Suttenberg, U.S. Attorney's Office for the District of Columbia, Washington, DC, for Plaintiff.

David Walker Bos, Rosanna Margaret Taormina, Federal Public Defender for the District of Columbia, Washington, DC, for Defendant.

MEMORANDUM OPINION

Gladys Kessler, United States District Judge

I. BACKGROUND

On December 10, 2009, Defendant Michael Monzel pled guilty to one count of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2) and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). On October 22, 2010, this Court found that Defendant's conduct was a proximate cause of the victim "Amy's" losses. [Dkt. No. 44]. On January 22, 2011, the Court ordered Defendant to pay $5,000 in restitution to Amy. [Dkt. No. 50].

On April 19, 2011, our Court of Appeals found that the restitution award to Amy was less than the harm the Defendant caused and remanded the case for reconsideration. United States v. Monzel, 641 F.3d 528 (D.C.Cir.), cert. denied, 565 U.S. 1072, 132 S.Ct. 756, 181 L.Ed.2d 508 (2011). Following remand, this Court issued an opinion on November 6, 2012, finding that the Government had failed to carry its burden of proving by a preponderance of the evidence the amount of Amy's losses caused by Defendant, and therefore denied the Government's Supple-

mental Request for Restitution. [Dkt. No. 70]. On August 8, 2014, our Court of Appeals issued its mandate vacating this Court's November 6, 2012 Opinion denying additional restitution to Amy and further instructing this Court to re-determine restitution for Amy in a manner consistent with the Supreme Court's decision in United States v. Paroline, —— U.S. ——, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014). [Dkt. No. 91].

This matter is again before the Court on the Government's Supplemental Motion for Restitution pursuant to 18 U.S.C. § 2259.

II. Legal Standard

[1] In Paroline, the Supreme Court examined "how to determine the amount of restitution a possessor of child pornography must pay to the victim whose childhood abuse appears in [the] pornographic materials possessed." 134 S.Ct. at 1716. The Court held that restitution is "proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses." Id. at 1722. Proximate cause is a "flexible concept" that "generally refers to the basic requirement that ... there must be some direct relation between the injury asserted and the injurious conduct alleged." Id. at 1719 (internal quotation marks and citations omitted).

[2] "[W]here it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." Id. at 1727 (emphasis added). However, the restitution amount should be neither "severe," nor "token or nominal." Id. An award that is neither severe nor nominal "serve[s] the twin goals of helping the victim achieve eventual restitution for all her [or his] child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims." Id.

[3, 4] The Supreme Court did not adopt a formula for determining restitution in this type of case. Indeed, the Court said, "[t]his cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment." Id. at 1728. To determine an appropriate restitution amount, the court must first determine "the amount of the victim's losses caused by the continuing traffic in the victim's images." Id. at 1728. After the court has determined the amount of the victim's total losses, the court must weigh several factors in determining the relative causal significance of the defendant's conduct in relation to the victim's total losses. The factors to be considered include:

> the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role.

Id. at 1728.

III. Analysis

a. Amy's Losses

In its first request for restitution, the Government estimated that Amy's total

loss was $3,263,758 for medical services, lost income, attorney's fees, and other costs. See Dkt. No. 44 at 17. In the Government's second request for restitution, the Government maintained that loss amount (with the exception of reducing her claim for specific expenses by $20,563). See Dkt. No. 70 at 1. In the instant motion, the Government makes an additional request for $8,886,300 for reduction in the value of life. See Mot. at 7; Ex. D, Report of Economic Losses, Dr. Stan Smith, dated September 15, 2008, at 4 [Dkt. No. 95-3] (filed under seal).

[5] The Court finds that Amy's additional request for $8,886,300 is untimely and she is bound by the initial loss amount of $3,263,758 minus $20,563 equaling $3,243,195. In addition, the economic loss report relied on by the Government does not make it clear whether the "reduction in value of life calculations" are applicable in instances where the victim is not deceased. Ex. D at 4-6. Finally the Government's most recent request of $8,886,300 is significantly larger than the value of the life peer-estimates cited in the report. See id. (citing peer reports showing the value of life between $1.6 million to $2.9 million in 1988, $4.7 million in 2000, and $5.7 million in 2008). For these reasons, the Court will exclude the request for reduction in the value of life, and will rely only on Amy's original loss request in this case, which is also the loss amount she has consistently requested in other cases. See, e.g., Paroline, 134 S.Ct. at 1718; United States v. Hite, 113 F.Supp.3d 91, 95 (D.D.C.2015).

The Court finds Amy's request for lost wages and future therapy to be sufficiently established and reasonable.

b. Restitution

The Court must now determine what portion of Amy's losses are attributable to Defendant's conduct based upon a weighing of each of the factors set forth in Paroline. With regard to the number of past criminal defendants found to have contributed to Amy's losses, the government has stated that it is aware of 197 restitution orders on behalf of Amy. Mot. at 8. As to a reasonable prediction of future offenders who will be convicted for contributing to Amy's losses, the Government has stated that it does "not have sufficient, reliable data from which to make reasonable estimates," which the Court accepts. Id. at 8. As to a reasonable estimate of future offenders, whether or not they are caught or convicted, the Government has stated that there is no way to calculate such an estimate, which the Court also accepts. Id. at 8-9.

[6] Pursuant to consideration of the Paroline factors, the Government has no evidence that the Defendant distributed any images of Amy or was in any way connected to the initial production of her images. Id. at 9. While the Defendant possessed over 800 files of pornography, he possessed only one single image of Amy. Opp'n at 29; Reply at 1 n. 1; Mot. at 9. "The government has no evidence that the defendant knows the victim, attempted to discover the victim's identity, or attempted to contact the victim. Nor does the government have any evidence that the defendant specifically sought images of the victim, or that the defendant paid for or received anything of value for the victim's images. The government is not aware of any efforts by the defendant to groom other minors for sexual exploitation using images of the victim." Id.

As in Paroline, the Defendant's "contribution to the causal process underlying the victim's losses was very minor, both compared to the combined acts of all other relevant offenders, and in comparison to the contributions of other individual offenders, particularly distributors (who may

have caused hundreds or thousands of further viewings) and the initial producer of the child pornography." Paroline, 134 S.Ct. at 1725.

The Government has not requested a specific restitution amount. It asserts that the Defendant has "proximately caused losses to 'Amy' " and that the Defendant's "conduct is a proximate cause of additional losses" to Amy, but does not attempt to quantify those additional losses. Mot. At 7. It asks only that the restitution be "non-token and non-nominal." Id. at 9.

The Court has reviewed the relevant case law, as well as restitution awards in a number of post-Paroline decisions. See, e.g., United States v. Santee, No. 14-CR-00118, Minute Entry (D.D.C. Sept. 24, 2014) (awarding $2,000 in restitution when defendant possessed four images); United States v. Campbell–Zorn, 2014 WL 7215214 (D.Mont. Dec. 17, 2014) (awarding restitution amounts of $23,825 and $3,136 to victims); United States v. Bellah, 2014 WL 7073287 (D.Kan. Dec. 12, 2014) (awarding amounts of $1,500, $5,000, and $7,000 to victims where number of images possessed of each victim ranged from one to sixty-eight); United States v. DiLeo, 58 F.Supp.3d 239 (E.D.N.Y.2014) (awarding $2,000 in restitution when defendant possessed one image); United States v. McIntosh, 2014 WL 5422215 (E.D.Va. Oct. 22, 2014) (awarding $14,500 in restitution where defendant possessed 51 images and 98 videos of victim). In light of the parties' arguments, the relevant Paroline factors, "which the Court treats as rough guideposts for determining an appropriate restitution amount," United States v. Hite, 113 F.Supp.3d 91, 99 (D.D.C.2015), and in light of the information provided regarding prior restitution awards for Amy, the Court, in its discretion, determines that an award of $7,500 in restitution is appropriate. The Court believes that such an amount comports with Defendant's causal—but minor—role in Amy's ongoing losses resulting from the continued trafficking of her images.

IV. CONCLUSION

For the foregoing reasons, the Court will **grant** the Government's Supplemental Motion for Restitution. An Order will accompany this Memorandum Opinion.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al., Plaintiff,

v.

FEDERAL ELECTION COMMISSION, Defendant,

American Action Network, Inc., Intervenor Defendant.

Case No. 1:14-cv-01419 (CRC)

United States District Court, District of Columbia.

Signed 09/19/2016

Background: Watchdog organization that filed administrative complaints with Federal Election Commission (FEC) brought action against FEC, claiming that reasons provided by certain FEC Commissioners for refusing to take action on its complaints over political committee registration, which resulted in FEC deadlocking, constituted de facto regulation, in violation of Administrative Procedure Act (APA) and Federal Election Campaign Act (FECA). The Court, 164 F.Supp.3d 113, dismissed plaintiff's APA claims. Organization moved for summary judgment based

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	Criminal Case No. 09-243 (GK)
MICHAEL MONZEL,	:	
Defendant.	:	

ORDER

On December 10, 2009, Defendant Michael Monzel pled guilty to one count of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2) and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). On October 22, 2010, this Court found that Defendant's conduct was a proximate cause of the victim "Amy's" losses. [Dkt. No. 44]. On January 22, 2011, the Court ordered Defendant to pay $5,000 in restitution to Amy. [Dkt. No. 50].

On April 19, 2011, our Court of Appeals found that the restitution award to Amy was less than the harm the Defendant caused and remanded the case for reconsideration. United States v. Monzel, 641 F.3d 528 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011). Following remand, this Court issued an opinion on November 6, 2012, finding that the Government had failed to carry its burden of proving by a preponderance of the evidence the amount of Amy's

losses caused by Defendant, and therefore denied the Government's Supplemental Request for Restitution. [Dkt. No. 70]. On August 8, 2014, our Court of Appeals issued its mandate vacating this Court's November 6, 2012 Opinion denying additional restitution to Amy and further instructing this Court to re-determine restitution for Amy in a manner consistent with the Supreme Court's decision in United States v. Paroline, 134 S. Ct. 1710 (2014). [Dkt. No. 91].

This matter is again before the Court on the Government's Supplemental Motion for Restitution pursuant to 18 U.S.C. § 2259.

WHEREFORE, upon consideration of the Motion, the Response, the Reply, and as more fully set forth in the accompanying Memorandum Opinion, it is this 19th day of September, 2016, hereby

ORDERED, that the Government's Supplemental Motion for Restitution is **granted**.

Gladys Kessler
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-3108 **September Term, 2019**

1:09-cr-00243-GK-1

Filed On: November 8, 2019

United States of America,

Appellee

v.

Michael M. Monzel,

Appellant

BEFORE: Rogers, Millett, and Katsas, Circuit Judges

O R D E R

Upon consideration of appellant's petition for panel rehearing filed on October 21, 2019, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-3108 **September Term, 2019**

1:09-cr-00243-GK-1

Filed On: November 8, 2019

United States of America,

Appellee

v.

Michael M. Monzel,

Appellant

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	**Criminal Case No. 09-243 (GK)**
	:	
MICHAEL M. MONZEL,	:	
	:	
Defendant.	:	

RESTITUTION ORDER

I. PROCEDURAL BACKGROUND

1. On October 22, 2010, this Court issued an Opinion in which it held (1) that the Government was not procedurally barred under 18 U.S.C. §§ 3664(d)(1) and (d)(5) of the Mandatory Victims Restitution Act of 1996 ("MVRA") from seeking a restitution order, (2) that the three victims in this case are "victims" within the meaning of that term as it is used in 18 U.S.C. § 2259, and (3) that Defendant's conduct is a proximate cause of the losses alleged by the victims because of the Defendant's possession of the pornographic materials.

2. The Court noted, at p. 27 of that Opinion, that the final issue which remains is what, if any, amounts claimed as losses by the victims Defendant should be held liable for and/or whether the Defendant should be liable for all of those losses or only the portion attributable to him.

3. The Court is well aware that the legal and practical issues raised in determining restitution under the MVRA have spawned a huge amount of District Court litigation throughout the country -- probably well over 50 opinions have been issued, all detailed and thoughtful.[1] It is telling that the legal analyses and the final conclusions reached vary significantly in these cases. The Court has read a great many of them and certainly all of those cited by the parties. In reaching its

[1] Interestingly, despite all this litigation, there is very little appellate law on the issue and none whatsoever in this Circuit.

conclusion in this case, the Court has relied on those District Court opinions which it has found most persuasive. Consequently, in the interest of economy of judicial resources -- and perhaps saving a tree -- this Court sees no need to write yet another lengthy Opinion examining the issues and will be incorporating the relevant language and rationales used in those cases with which it agrees.

II. RELEVANT FACTS

1. "Misty" has requested $3,134,332 in restitution.[2] "Vicky" has requested $228,903.60 in restitution. "Tara" is not requesting any amount of restitution because she has been paid in full by other defendants. "Vicky" has reduced her claim from $312,953.60 and now seeks $228,903.60. Both "Vicky" and "Misty" submitted numerous reports and assessments documenting the particular losses for which they claim restitution. In particular, each victim requests restitution for future counseling expenses, vocational losses, out-of-pocket expenses for expert evaluations, support requests, travel, attorneys' fees, loss of present and future income, and expert witness fees.

III. ANALYSIS

1. The Government seeks restitution for the two victims pursuant to 18 U.S.C. § 2259 mandating the payment of restitution for medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy; loss of income, past and future; attorneys' fees; and any other loss suffered by the victims as a proximate result of the offenses.

2. The Government bears the burden of demonstrating the amount of a victim's losses by a preponderance of the evidence, pursuant to 18 U.S.C. § 3664(e). The Government need not prove the victim's losses with mathematical precision, but rather with reasonable certainty. United States v. Doe, 488 F.3d 1154, 1159-60 (9th Cir. 2007).

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[2] "Misty" is also known as victim "Amy."

3. As the Court indicated in its October 22, 2010 Opinion, the amount of the victim's loss is a separate and distinct issue from whether a defendant proximately caused harm to them. Before ordering any restitution amount, the Court "must be able to ascertain with reasonable certainty from the evidence presented what proportion of the total harm was proximately caused by this defendant and this offense." United States v. Van Brackle, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009) (emphasis in original).[3] As the Court stated in United States v. Berk, 666 F. Supp. 2d 182, 191 (D. Me. 2009), "[t]he difficulty lies in determining what portion of the [v]ictims' loss, if any, was proximately caused by the specific acts of this particular [d]efendant." See also United States v. Paroline, 672 F. Supp. 2d 781, 791 (E.D. Tex. 2009) ("[A]n award of restitution under section 2259 is appropriate only for the amount of the victim's losses proximately caused by the defendant's conduct.").

4. The Government has submitted a great deal of evidence, including expert witness reports, establishing the terrible psychological and emotional trauma suffered by the victims, the need for further counseling and treatment both now and in the future, the loss of income, and their attorneys' fees. What the Government has failed to submit is any evidence whatsoever "'as to what losses were caused by Defendant's possession of [the victim's] images.'" United States v. Church, 701 F.Supp.2d 814, 832 (W.D. Va. 2010) (citation omitted).

5. As Judge Moon noted in his very thoughtful and well-reasoned Opinion in Church, where "harm is done to the victim, some part of which was caused by the Defendant and some part of which was not, the burden is on the party seeking damages to prove, within a reasonable degree

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[3] Under § 3664(h), the Court may apportion liability among defendants to reflect the amount of loss to the individual victim.

of certainty, the share of the harm for which the Defendant is responsible." Id. at 833 n.8. Here, too, as in Church, the Government has not even suggested any rational, evidence-based procedure for ascertaining the dollar value of the harms suffered by each of these victims as a result of this particular Defendant's possession of the pornographic images. Consequently, here, as in Church, on the record presented to this Court, "there is no evidence upon which the Court could reasonably calculate the measure of harm done to the victim[s] proximately caused by the Defendant's conduct." Id. at 832.

6. As noted earlier, § 2259 of the statute makes an award of restitution mandatory. In this situation, the courts have often concluded that, when a specific amount of loss cannot be established by a preponderance of the evidence, the award of a nominal amount is appropriate. "Where a party 'establishes a wrong for actual losses therefrom, he or she is entitled to nominal damages at least . . . where the evidence fails to show the extent of the resulting damages." Id. at 834 (quoting 25 C.J.S. Damages, § 14 (2010)). See also Carey v. Piphus, 435 U.S. 247, 266 (1978).

7. In determining an appropriate nominal amount, Congress has provided some guidance. Section 2255(a) provides that any victim "shall be deemed to have sustained damages of not less than $150,000 in value." The nominal amounts ordered by district courts throughout the country have varied greatly. See United States v. Woods, 689 F. Supp. 2d 1102, 1110 (N.D. Iowa 2010).

8. Based upon the practice of many other district courts around the country, this Court concludes that, given the nature and severity of the original sexual abuse depicted in the pornographic images of the victims, given the fact that these victims have explained most eloquently in their victim impact statements how they are still deeply affected by the present, and probably

future, viewing of those images, each victim is entitled, at a very minimum, to a restitution award of $5,000 because of this Defendant's possession and viewing of their images. The Court has no doubt that this level of restitution is less than the actual harm this particular Defendant caused each victim. See United States v. Zane, No. 1:08-CR-0369-AWI, 2009 WL 2567832, *19 (E.D. Cal. Aug. 18, 2009). Consequently, the Defendant shall be ordered to pay a specific amount of $5,000 in restitution to "Vicky" and "Misty."

9. The Court is not ordering joint and several liability because of the substantial logistical difficulties in tracking awards made and money actually recovered.[4] See United States v. Hicks, No. 1:09-cr-150, 2009 WL 4110260, at 6 (E.D. Va. Nov. 24, 2009) ("[c]oordination of any potential future awards to avoid unjustly enriching [the victims] is unworkable, and there is no mechanism of which the Court is aware -- in the U.S. Probation Service or otherwise -- which is capable of managing such a scenario.").[5]

WHEREFORE, it is this 11th day of January, 2011, hereby

ORDERED, that Defendant Michael Monzel shall pay nominal restitution in the amount of $5,000 to the victim "Amy" and to the victim "Vicky"; and it is further

ORDERED, that during the period of incarceration: (1) if the Defendant Michael Monzel earns wages in a Federal Prison Industries (UNICOR) job, then the Defendant must pay 50 percent of wages earned toward the financial obligations imposed by this Restitution Order; or (2) if the

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[4] The Court is aware that these victims have filed many requests for restitution in different criminal cases and have collected at least some of the amounts awarded.

[5] At oral argument, the Government conceded that there was no formal tracking system in place to monitor payments to victims and avoid overpayments.

Defendant does not work in a UNICOR job, then the Defendant must pay a minimum of $25 per quarter toward the financial obligations in this Order; and it is further

ORDERED, that upon release from incarceration, the Defendant shall pay restitution at the rate of 10 percent of monthly gross earnings, until such time as the Court may alter that payment schedule. These payments do not preclude the Government from using other assets or income of the Defendant to satisfy his restitution obligations.

Gladys Kessler
United States District Judge

of material fact, the district court facing a request for attorney fees may not know whether the plaintiff's claims were meritorious. It should not be obligated to hold a full trial to find out.

Brayton argues that applying the summary judgment standard to evaluate the government's nondisclosure decisions will open the floodgates by transforming every motion for attorney fees into a mini-trial on the merits of the underlying FOIA claim. But the fee-entitlement rule the district court applied in this case has been in place for quite some time, even before *Buckhannon,* and the federal judiciary has yet to be deluged. By relying on the summary judgment standard, the rule preserves the discretion of courts in fee determinations to avoid the swamp of merits adjudication whenever material facts are in dispute.

It is undeniable that considering the merits of an agency's nondisclosure decision will frequently complicate the adjudication of motions for attorney fees. But on the other side of the ledger is the concern that courts should not dole out fee awards to plaintiffs who bring FOIA lawsuits that cannot survive a motion for summary judgment. We resolved this tension long ago when we stated that "there can be no doubt that a party is not entitled to fees if the Government's legal basis for withholding requested records is correct." *Chesapeake Bay Found.,* 11 F.3d at 216.

In closing, we note the irony that awarding fees to plaintiffs in Brayton's situation might prod government agencies to be less rather than more transparent. In this case, USTR was under no obligation to declassify the document and release it to the public as quickly as it did. Instead, it could have delayed the process and withheld the documents much longer, and its decision still would have remained correct as a matter of law. Under the rule applied by the district court, agencies in USTR's position can choose to relent for the sake of transparency and release requested documents without exposing themselves to monetary penalties: the fact that their initial nondisclosure decision rested on a solid legal basis creates a safe harbor against the assessment of attorney fees. Under Brayton's approach, however, agencies with legal authority to withhold requested documents would have no such safe harbor. Thus they might hesitate to release the documents, since doing so would risk creating a "substantially prevail[ing]" plaintiff who might be entitled to fees.

III

For the foregoing reasons, the district court's judgment is

Affirmed.

UNITED STATES of America, Appellee

v.

Michael M. MONZEL, Appellee

Amy, Appellant.

In re Amy, the Victim in the Misty Child Pornography Series, Petitioner.

Nos. 11–3008, 11–3009.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 7, 2011.

Decided April 19, 2011.

Background: Victim, who was depicted in child pornography possessed and distribut-

ed by respondent, petitioned for mandamus and by direct appeal, challenging "nominal" restitution awarded by the United States District Court for the District of Columbia, 746 F.Supp.2d 76, after accepting respondent's guilty plea. Government moved to dismiss victim's appeal.

Holdings: In deciding multiple issues of first impression, the Court of Appeals, Griffith, Circuit Judge, held that:

(1) traditional standard of review applied to mandamus petition brought under Crime Victims' Rights Act's (CVRA);

(2) restitution award was limited to harms respondent proximately caused; and

(3) victim could not directly appeal her restitution award.

Mandamus petition granted in part; appeal dismissed.

1. Federal Courts ⚿11
Mandamus ⚿61

Crime victim may not unilaterally waive Crime Victims' Rights Act's (CVRA) deadline for deciding mandamus petition challenging restitution award, but the passing of that deadline does not defeat court's jurisdiction to decide the petition. 18 U.S.C.A. § 3771(d)(3).

2. Mandamus ⚿172

Traditional standard of review applies to mandamus petitions brought under Crime Victims' Rights Act's (CVRA). 18 U.S.C.A. § 3771(d)(3).

3. Criminal Law ⚿1220
Sentencing and Punishment ⚿2154

Under Crime Victims' Rights Act's (CVRA), restitution award to victim, who was depicted in child pornography possessed and distributed by respondent, was limited to harms the defendant proximately caused; because record did not establish that respondent's possession of victim's image caused all of her losses, victim did not have a right to the full $3,263,758 she sought, however, she was entitled to the amount of her losses that respondent proximately caused. 18 U.S.C.A. §§ 2259(b), 3771.

4. Mandamus ⚿3(1)

Mandamus is a crime victim's only recourse for challenging a restitution order. 18 U.S.C.A. § 3771(d)(3).

5. Criminal Law ⚿1023.5, 1220

Crime victim could not directly appeal her restitution award under Crime Victims' Rights Act's (CVRA). 18 U.S.C.A. § 3771(d).

Appeal from the United States District Court for the District of Columbia (No. 1:09–cr–00243).

On Petition for Writ of Mandamus.

Paul Cassell argued the cause for and filed the petition for writ of mandamus for appellant/petitioner Amy. With him on the petition was James R. Marsh.

Nicholas P. Coleman argued the cause for and filed the response for appellee/respondent United States of America. Roy W. McLeese III, Assistant U.S. Attorney, entered an appearance.

David W. Bos, Assistant Federal Public Defender, argued the cause and filed the response for appellee/respondent Michael M. Monzel. With him on the response were A.J. Kramer, Federal Public Defender, and Neil H. Jaffee, Assistant Federal Public Defender.

Before: GINSBURG, ROGERS, and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge GRIFFITH.

GRIFFITH, Circuit Judge:

In December 2009, respondent Michael Monzel pled guilty to possession of child pornography. One of the images he possessed depicted the petitioner, who proceeds in this matter under the pseudonym "Amy." Amy subsequently sought $3,263,758 in restitution from Monzel. The district court, however, awarded what it called "nominal" restitution of $5000, an amount it acknowledged was less than the harm Monzel caused her. Amy challenges the award in a petition for mandamus and by direct appeal. We grant her petition in part because the district court admitted the restitution award was smaller than the amount of harm she suffered as a result of Monzel's offense, and we dismiss her direct appeal because it is not authorized by statute.

I

A

This case involves the interplay of three statutes. 18 U.S.C. § 3771, also known as the Crime Victims' Rights Act (CVRA), grants crime victims "[t]he right to full and timely restitution as provided in law." *Id.* § 3771(a)(6). If a district court denies the relief sought, the Act provides that the victim or the government "may petition the court of appeals for a writ of mandamus." *Id.* § 3771(d)(3). The court of appeals is then required to "take up and decide such application forthwith within 72 hours after the petition has been filed." *Id.*

18 U.S.C. § 2259 governs restitution awards for victims of child sexual exploitation and directs courts to award "the full amount of the victim's losses," *id.* § 2259(b)(1), defined as costs incurred for medical services; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorneys' fees and other litigation costs; and "any other losses suffered by the victim as a proximate result of the offense," *id.* § 2259(b)(3). Neither the defendant's economic circumstances nor the victim's entitlement to compensation from another source may diminish the amount of the victim's award. *See id.* § 2259(b)(4)(B).

Finally, 18 U.S.C. § 3664 sets forth rules for issuing and enforcing restitution awards. As relevant here, the statute provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." *Id.* § 3664(e). "The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" rests with the government. *Id.*

B

On December 10, 2009, respondent Michael Monzel pled guilty to one count of distributing child pornography in violation of 18 U.S.C. § 2252(a)(2) and one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The National Center for Missing and Exploited Children identified petitioner Amy as the minor depicted in one of the pornographic images Monzel possessed but did not distribute. Amy filed a victim impact statement seeking $3,263,758 in restitution from Monzel, an amount she claims reflects her total losses from the creation and distribution of pornographic images of her as a child—including images of her being sexually abused. Monzel argued that the district court should award Amy no more than $100 because the government had failed to show what portion of Amy's losses he had caused.

In an order entered on January 11, 2011, the district court awarded Amy $5000 in what it called "nominal" restitution. Even though the court had "no doubt" that this

amount was "less than the actual harm" Monzel caused Amy, Restitution Order at 5, it declined to award more because neither the government nor Amy had submitted evidence "as to what losses were caused by Defendant's possession of [the victim's] images," *id.* at 3 (alteration in original) (quoting *United States v. Church*, 701 F.Supp.2d 814, 832 (W.D.Va.2010)) (internal quotation marks omitted). The court also declined to hold Monzel jointly and severally liable for the entirety of the harm Amy has suffered as a result of the distribution and possession of her image by others, given "the substantial logistical difficulties in tracking awards made and money actually recovered" from such persons. *Id.* at 5.

Amy now petitions for a writ of mandamus under 18 U.S.C. § 3771(d)(3) directing the district court to order Monzel to pay her $3,263,758 in restitution. She has also challenged the award in a direct appeal and moves to consolidate her mandamus petition with the appeal. The government moves to dismiss Amy's appeal on the ground that crime victims may not directly appeal restitution orders. We have jurisdiction over her mandamus petition under § 3771(d)(3) but dismiss her direct appeal because it is not authorized by statute.

II

[1] As a preliminary matter, Amy has filed a motion to waive the 72–hour statutory deadline for deciding her mandamus petition. Monzel and the government both oppose her motion on the ground that the time limit cannot be waived at the sole discretion of the crime victim. We think Monzel and the government are right: Amy may not unilaterally waive the statutory deadline, but the passing of that deadline does not defeat our jurisdiction to decide her petition.

Amy asserts that the CVRA gives a crime victim a personal, waivable right to a decision on a petition for mandamus within 72 hours, but nothing in the language of the statute supports that view. No such right is mentioned among the enumerated protections afforded to crime victims, *see* 18 U.S.C. § 3771(a),[1] and the Act directs that the court of appeals "shall" decide the petition within the time limit. As we have previously recognized, " '[s]hall' is a term of legal significance, in that it is mandatory or imperative, not merely precatory." [2]

1. The CVRA states that "[a] crime victim has the following rights":

(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
(5) The reasonable right to confer with the attorney for the Government in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a).

2. Amy directs our attention to an unpublished order from the Eleventh Circuit that granted a victim's motion to waive the 72–hour deadline. *See* Order, *In re Stewart*, No. 10–12344 (May 21, 2010). Even were we inclined to give an unpublished decision from another circuit weight that we do not give our own, *see* D.C.Cir. R. 36(e)(2) ("[A] panel's decision to issue an unpublished disposition means

Exportal Ltda. v. United States, 902 F.2d 45, 50 (D.C.Cir.1990) (internal quotation marks omitted). Although the statute leaves us no room to set aside the 72–hour deadline, the multiple issues of first impression this case raises, involving several statutes and conflicting views among the circuits, called for oral argument and a published opinion that is being issued past the deadline.

Missing the deadline, however, does not deprive us of jurisdiction. In *Dolan v. United States*, —— U.S. ——, 130 S.Ct. 2533, 177 L.Ed.2d 108 (2010), the Supreme Court held that missing § 3664's 90–day deadline for determining a victim's losses does not deprive a sentencing court of power to order restitution, *id.* at 2539; *see* 18 U.S.C. § 3664(d)(5) ("If the victim's losses are not ascertainable ... 10 days prior to sentencing, ... the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing."). We think the Supreme Court's reasons for concluding that the 90–day deadline in *Dolan* was not jurisdictional apply with equal force to the 72–hour deadline here.

To begin with, like § 3664, the CVRA "does not specify a consequence for noncompliance with its timing provisions." *Dolan*, 130 S.Ct. at 2539 (internal quotation marks omitted). And just as § 3664 emphasizes "the importance of[ ] imposing restitution upon those convicted of certain federal crimes," *Dolan*, 130 S.Ct. at 2539, the CVRA stresses the need to "ensure that the crime victim is afforded the rights described in [§ 3771(a)]," 18 U.S.C. § 3771(b)(1). Moreover, as with the 90–day deadline for determining a victim's losses, "to read [the 72–hour deadline for deciding a mandamus petition] as depriving the ... court of the power to order [relief] would harm those—the victims of crime—who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit." *Dolan*, 130 S.Ct. at 2540. Finally, "neither the language nor the structure of [either] statute requires denying the victim [relief] in order to remedy [the] missed ... deadline," and "doing so would defeat the basic purpose of the [statute]." *Id.* at 2541. We thus conclude that the CVRA's 72–hour time limit for deciding mandamus petitions is not jurisdictional and exercise our authority to decide Amy's petition outside the deadline.

III

[2] We must first decide the standard of review that applies to petitions for mandamus filed under the CVRA. This is an open question in our circuit. Monzel and the government both urge us to apply the traditional standard for mandamus, under which Amy must show that: (1) she has a clear and indisputable right to relief; (2) the district court has a clear duty to act; and (3) no other adequate remedy is available to her. *See Power v. Barnhart*, 292 F.3d 781, 784 (D.C.Cir.2002). Amy argues that even though Congress called the procedure it created under the CVRA "mandamus," 18 U.S.C. § 3771(d)(3), it intended to grant victims the ability to obtain ordinary appellate review, which in this case would mean *de novo* review of what it means to award "the full amount of the victim's losses." *See id.* § 2259(b)(1), (3).

There is a circuit split on the standard of review for mandamus petitions brought under the CVRA. Three circuits apply the traditional mandamus standard urged by

that the panel sees no precedential value in that disposition."), the Eleventh Circuit's order would not qualify for such consideration because it lacked any analysis of the merits of the motion.

Monzel and the government. *See In re Acker*, 596 F.3d 370, 372 (6th Cir.2010); *In re Dean*, 527 F.3d 391, 394 (5th Cir.2008); *In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir.2008). Four do not. *See Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017–18 (9th Cir.2006) (reviewing petition under the more generous "abuse of discretion or legal error" standard); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563–64 (2d Cir.2005) (reviewing petition for "abuse of discretion"); *see also In re Stewart*, 552 F.3d 1285, 1288–89 (11th Cir.2008) (granting petition without asking whether victim had a clear and indisputable right to relief); *In re Walsh*, 229 Fed.Appx. 58, 60 (3d Cir.2007) (unpublished) (stating in dicta that "mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771").

We think the best reading of the statute favors applying the traditional mandamus standard. To begin with, there is no indication that Congress intended to invoke any other standard. That Congress called for "mandamus" strongly suggests it wanted "mandamus." *See Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."). Furthermore, the paragraph that follows the mandamus provision states that the government may obtain ordinary appellate review of an order denying relief to a crime victim: "In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(4). That Congress expressly provided for "mandamus" in § 3771(d)(3) but ordinary appellate review in § 3771(d)(4) invokes "the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n. 9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (internal quotation marks omitted). If the government can obtain ordinary appellate review via mandamus, as Amy asserts, it is unclear what purpose § 3771(d)(4) serves by providing the government the same thing on direct appeal.

Finally, the abbreviated 72–hour deadline suggests that Congress understood it was providing the traditional "extraordinary remedy" of mandamus. *In re Brooks*, 383 F.3d 1036, 1041 (D.C.Cir. 2004). Courts will often be able to meet the compressed timeline under the traditional standard, because determining whether the lower court committed a "clear and indisputable" error will not normally require extensive briefing or prolonged deliberation. By contrast, full briefing and plenary appellate review within the 72–hour deadline will almost always be impossible. *Cf. Antrobus*, 519 F.3d at 1130 ("It seems unlikely that Congress would have intended *de novo* review in 72 hours of novel and complex legal questions . . . .").

Amy's arguments that Congress provided ordinary appellate review but called it "mandamus" are not persuasive. Instructing courts to "ensure" that a crime victim is afforded certain rights, 18 U.S.C. § 3771(b)(1) (directing court to "ensure that the crime victim is afforded the rights described in [§ 3771(a)]"), says nothing about the standard of review. Neither does the fact that the court of appeals must "take up and decide" a petition within 72 hours. *Id.* § 3771(d)(3). A court

that denies relief under the traditional mandamus standard has most certainly "take[n] up and decide[d]" the petition.[3]

Amy's resort to legislative history fares no better. She points particularly to a comment by Senator Feinstein, one of the CVRA co-sponsors, that § 3771(d)(3) makes "a new use of a very old procedure, the writ of mandamus." 150 CONG. REC. 7295 (2004). Even assuming that the words of a single lawmaker could determine the meaning of the CVRA, the Senator's statement says nothing about the standard of review for mandamus. More plausibly, her comment refers to the fact that prior to the CVRA most courts denied crime victims any opportunity to challenge lower court decisions impairing their rights as victims, whether through mandamus or otherwise. *See, e.g., United States v. McVeigh*, 106 F.3d 325, 336 (10th Cir. 1997) (dismissing for lack of standing victims' mandamus petition and appeal of district court order prohibiting victims from attending trial); *United States v. Mindel*, 80 F.3d 394, 398 (9th Cir.1996) (dismissing for lack of standing victim's appeal of restitution order and related mandamus petition); *see also United States v. Aguirre–González*, 597 F.3d 46, 54 (1st Cir.2010) ("[T]he default rule [is] that crime victims have no right to directly appeal a defendant's criminal sentence."). By providing victims the opportunity to challenge such decisions through mandamus, Congress did indeed make a "new use of a very old procedure." [4]

IV

To prevail on the merits of her petition for mandamus, Amy must show that she has a clear and indisputable right to relief, that the district court has a clear duty to act, and that she has no other adequate remedy. *See Power*, 292 F.3d at 784. Amy's petition satisfies each of these conditions.

A

[3] As a crime victim Amy has a "right to full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6), and the district court has a corresponding duty to "direct" Monzel to pay "the full amount of [her] losses as determined by the court," *id.* § 2259(b)(1). Because the record does not establish that Monzel's possession of her image caused *all* of her losses, Amy does not have a right to the full $3,263,758 she seeks. She is, however, entitled to the amount of her losses that Monzel proximately caused. Because the $5000 the court awarded was, by its own acknowledgement, less than the amount of harm Monzel caused Amy, we grant her petition in part.

3. Senator Feinstein's remark that "while mandamus is generally discretionary, [§ 3771(d)(3)] means that courts *must* review these cases," 150 CONG. REC. 7304 (2004) (emphasis added), is of no help to Amy, either. A court applying the traditional mandamus standard to a CVRA petition still "reviews" the petition.

4. Similarly, there is no reason to read Senator Feinstein's statement that § 3771(d)(3) permits crime victims to "in essence, immediately appeal a denial of their rights by a trial court," 150 CONG. REC. 7295, or Senator Kyl's comment that "appellate courts are designed to remedy errors of lower courts," *id.* at 7304, to suggest that either senator intended ordinary appellate review to apply. A crime victim's ability to "immediately appeal" a denial of her rights does not turn on the applicable standard of review, and a court applying the traditional mandamus standard can still remedy errors of law, provided the errors were clear and the petitioner has a right to relief. Here again, that Congress specifically provided for mandamus review suggests it intended appellate courts to remedy district court errors dealing with victims' rights only when such errors were clear and indisputable.

1

Section 2259 directs the district court to order the defendant to pay restitution to the "victim" of a crime of child sexual exploitation. *See id.* § 2259(a)-(b). "Victim" is defined as "the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). Read together, these provisions tie restitution awards to harms caused "as a result" of a defendant's crime.

Section 2259 further instructs the court to award "the full amount of the victim's losses," *id.* § 2259(b)(1), defined as "any costs incurred by the victim for" six categories: (A) medical services; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees and other litigation costs; and (F) a catch-all category of "any other losses suffered by the victim as a proximate result of the offense," *id.* § 2259(b)(3)(A)-(F). There is a circuit split over whether the proximate cause requirement in the catch-all category also applies to the preceding categories. Most circuits to consider the issue have held that it does. *See United States v. McDaniel,* 631 F.3d 1204, 1208–09 (11th Cir.2011); *United States v. Laney,* 189 F.3d 954, 965 (9th Cir.1999); *United States v. Crandon,* 173 F.3d 122, 125 (3d Cir.1999). The Fifth Circuit alone has held it does not. *In re Amy Unknown,* 636 F.3d 190, 198–99 (5th Cir.2011). We join the plurality in concluding that all of the categories require proximate cause. Unlike those circuits, however, our reasoning rests not on the catch-all provision of § 2259(b)(3)(F), but rather on traditional principles of tort and criminal law and on § 2259(c)'s definition of "victim" as an individual harmed "as a result" of the defendant's offense.

It is a bedrock rule of both tort [5] and criminal law that a defendant is only liable for harms he proximately caused. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. a (2010) (calling proximate cause a "requirement[ ] for liability in tort"); [6] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984) ("An essential element of the plaintiff's cause of action for negligence, or ... any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called 'proximate cause'...."); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464 (2d ed.2003) ("[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result."); *see also id.* § 6.4(c), at 471 ("The problems of [proximate] causation arise in both tort and criminal settings, and the one situation is closely analogous to the other.... [T]he courts have generally treated [proximate] causation in criminal law as in tort law...."). The purpose of this rule is clear: "legal responsibility must be limited to those causes

5. Although § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party. *Cf. United States v. Bach,* 172 F.3d 520, 523 (7th Cir. 1999) ("Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of Anglo–American law, when criminal and tort proceedings were not clearly distinguished."). Thus, tort doctrine informs our thinking here.

6. The *Restatement (Third) of Torts* uses the term "scope of liability" in favor of "proximate cause." *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. a.

which are so closely connected with the result and of such significance that the law is justified in imposing liability." KEETON ET AL., *supra*, § 41, at 264. Thus, we will presume that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply. *See Sherwood Bros. v. District of Columbia*, 113 F.2d 162, 163 (D.C.Cir.1940) (finding it "reasonable ... to assume" that where a common law rule "has become embedded in the habits and customs of the community, ... Congress had the common-law rule in mind when it legislated").

Here, nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause. By defining "victim" as a person harmed "as a result of" the defendant's offense, the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused. That the definition does not include an express requirement of proximate cause makes no difference. "Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor, and absence of contrary direction" here "[is] taken as satisfaction [of] widely accepted definitions, not as a departure from them." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) (quoting *Morissette*, 342 U.S. at 263, 72 S.Ct. 240) (internal quotation marks omitted).

We find the Fifth Circuit's argument to the contrary unpersuasive. In its recent decision, that court emphasized that other restitution statutes define "victim" as a person "*directly and proximately* harmed as a result of" the defendant's offense, *e.g.*, 18 U.S.C. § 3663(a)(2); *id.* § 3663A(a)(2); *id.* § 3771(e), whereas § 2259(c) defines "victim" as a person harmed merely "as a result" of the defendant's offense. But this difference in language tells us nothing about Congress's intent in passing § 2259, because the definitions in those other statutes were all enacted *after* § 2259. *Compare* Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, sec. 205(a)(1)(F), § (a)(2), 110 Stat. 1214, 1230 (codified at 18 U.S.C. § 3663(a)(2)), *id.* sec. 204(a), § (a)(2), 110 Stat. 1228 (codified at 18 U.S.C. § 3663A(a)(2)), *and* Justice for All Act of 2004, Pub.L. No. 108–405, sec. 102(a), § (e), 118 Stat. 2260, 2263 (codified at 18 U.S.C. § 3771(e)), *with* Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103–322, sec. 40113(b)(1), § (f), 108 Stat. 1796, 1910 (codified at 18 U.S.C. § 2259(c)). "[L]ater laws that 'do not seek to clarify an earlier enacted general term' and 'do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute,' are 'beside the point' in reading the first enactment." *Gutierrez v. Ada*, 528 U.S. 250, 257–58, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000) (quoting *Almendarez–Torres v. United States*, 523 U.S. 224, 237, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)). At most, the later statutes show that § 2259(c)'s use of the phrase "as a result of" is not the *only* way to impose a proximate cause requirement. They do not prove that the phrase abrogates the requirement.

We similarly find little reason to conclude that Congress intended to eliminate the requirement of proximate cause for the categories of loss in § 2259(b)(3)(A)-(E) by including an express requirement in paragraph (F)'s catch-all provision. *Compare* 18 U.S.C. § 2259(b)(3)(A)-(E), *with id.* § 2259(b)(3)(F) (instructing court to award restitution for "any other losses suffered by the victim as a proximate result of the offense"). Had Congress meant to abro-

gate the traditional requirement for everything *but* the catch-all, surely it would have found a clearer way of doing so. Proximate cause ensures "some direct relation between the injury asserted and the injurious conduct alleged." *Hemi Group, LLC v. City of New York*, —— U.S. ——, 130 S.Ct. 983, 989, 175 L.Ed.2d 943 (2010) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)) (internal quotation marks omitted). Without the limitation such a link provides, liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how "remote" or tenuous the causal connection.[7] *Id.; see also* KEETON ET AL., *supra*, § 41, at 266 (explaining that "the mere *fact* of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those [who] are to be held *legally* responsible," for "once events are set in motion, there is, in terms of causation alone, no place to stop" (emphasis added)). It is conceivable that Congress could intend that those who violate laws against child sexual exploitation should pay restitution for such attenuated harms, but it seems unlikely it did so here. "If Congress really had wished [courts to award restitution for losses defendants did not proximately cause], it could have provided that. It would, however, take a very clear provision to convince anyone of anything so odd." [8] *Field v. Mans*, 516 U.S. 59, 68, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995).

2

Because restitution awards under § 2259 are limited to harms the defendant proximately caused, we cannot say that Amy is clearly and indisputably entitled to the full $3,263,758 she seeks. Although the government submitted evidence that Amy suffered losses stemming from her sexual exploitation as a child, *see* Mot. for Restitution at 6–7; Gov't's Mem. of Law Regarding the Victims' Losses at 6–15, and argued persuasively that possession of child pornography causes harm to the minors depicted, Mot. for Restitution at 9–12; *see also New York v. Ferber*, 458 U.S. 747, 758–60, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), it made no showing as to the amount of Amy's losses traceable to Monzel. Whatever else may be said of his crime, the record before us does not establish that Monzel caused *all* of Amy's losses.

7. For example, without the requirement of proximate cause, if a victim who needed counseling as a result of Monzel's crime were to suffer injuries in a car accident on the way to her therapist, she would be entitled to restitution from Monzel for any medical expenses relating to the accident, *see* 18 U.S.C. § 2259(b)(3)(A) (providing restitution for "medical services relating to physical, psychiatric, or psychological care"), because those expenses would not have occurred but for his crime. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 ("Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."). An "intervening act" (or "superseding cause") disrupts proximate causation, but not causation in fact. *See id.* § 34 cmt. b.

8. The Fifth Circuit suggests that restricting the proximate cause requirement to § 2259(b)(3)(F)'s catch-all category would not "open the door to limitless restitution." *Amy Unknown*, 636 F.3d at 200. This is so, that court says, because § 2259 "includes a *general* causation requirement in its definition of a victim." *Id.* (emphasis added) (citing 18 U.S.C. § 2259(c) ("For purposes of this section, the term 'victim' means the individual harmed as a result of a commission of a crime under this chapter. . . .")). But a "general" causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all. So long as the victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury.

Nor can we say that Amy is clearly and indisputably entitled to the full $3,263,758 from Monzel on the ground that her injuries are "indivisible." Amy argues at length that the causes of her injuries cannot reasonably be divided among the unknown number of possessors and distributors of her images and that Monzel is therefore jointly and severally liable with other possessors and distributors for the full amount of her losses. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 12 (2000) ("Each person who commits [an intentional tort] is jointly and severally liable for any indivisible injury legally caused by the tortious conduct."); KEETON ET AL., *supra*, § 52, at 347 ("[E]ntire liability rests upon the obvious fact that each has contributed to the single result, and that no reasonable division can be made.").

But the very sources upon which Amy relies undermine her argument. Prosser, whom she quotes at length, states that "[s]uch entire liability is imposed" where two or more causes produce a single "result" and "either cause would have been sufficient in itself" to produce the result or each was "essential to the injury." KEETON ET AL., *supra*, § 52, at 347. Here, Monzel's possession of Amy's image, which the district court found added to her injuries, was not "sufficient in itself" to produce all of them, nor was it "essential" to all of them. Amy's profound suffering is due in large part to her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse. *See* Mot. for Restitution at 6 ("The truth is, I am being exploited and used every day and every night somewhere in the world by someone."); Gov't's Mem. of Law Regarding the Victims' Losses at 8 ("Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again."). Monzel's possession of a single image of Amy was neither a necessary nor a sufficient cause of all of her losses. She would have suffered tremendously from her sexual abuse regardless of what Monzel did. *See also* KEETON ET AL., *supra*, § 52, at 346 (stating that "entire liability" is generally not imposed "where there is [a] factual basis for holding that [the] wrongdoer's conduct was not a cause in fact of part of the harm"). Similarly, the *Restatement (Third) of Torts*, upon which Amy also relies, instructs that an "indivisible injury" is "one in which the *entire* damages were caused by every legally culpable act of each person." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 reporters' note cmt. g (emphasis added). As before, the government has not shown that Monzel caused the *entirety* of Amy's losses.

Joint and several liability may also be appropriate under § 3664(h) where there is more than one defendant and each has contributed to the victim's injury. *See* 18 U.S.C. § 3664(h) ("If the court finds that more than [one] 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."); [9] *see also United States v. Wall*, 349 F.3d 18, 26 (1st Cir.2003) ("Under 18 U.S.C. § 3664(h), a court issuing a restitu-

9. The government agrees with Amy that the best reading of § 2259 calls for joint and several liability in the full amount of Amy's losses from her sexual exploitation as a child, but, pointing to § 3664(h), maintains that the statute affords the district court discretion on whether to order joint and several liability. *See* Resp. of the United States to Pet. for Writ of Mandamus at 15–16; Oral Arg. Tr. at 42, 49.

tion order is permitted to . . . make each defendant liable for the full amount of restitution by imposing joint and several liability."); *accord United States v. Squirrel*, 588 F.3d 207, 212 (4th Cir.2009); *United States v. Moten*, 551 F.3d 763, 768 (8th Cir.2008); *United States v. Hunt*, 521 F.3d 636, 649 (6th Cir.2008); *United States v. Nucci*, 364 F.3d 419, 422 (2d Cir.2004); *United States v. Booth*, 309 F.3d 566, 576 (9th Cir.2002); *United States v. Diaz*, 245 F.3d 294, 312 (3d Cir.2001). It is unclear, however, whether joint and several liability may be imposed upon defendants in separate cases. The Fourth and Sixth Circuits have held, in unpublished opinions, that § 3664(h) does not apply to prosecutions where there is only one defendant. *See United States v. McGlown*, 380 Fed.Appx. 487, 490–91 (6th Cir.2010); *United States v. Channita*, 9 Fed.Appx. 274, 274–75 (4th Cir.2001). The Fifth Circuit, by contrast—without addressing § 3664(h)'s applicability—said a district court could order joint and several liability for a lone defendant such as Monzel under § 3664(m)(1)(A), which provides that a district court may "enforce[ ]" a restitution order "by all other available and reasonable means." *See Amy Unknown*, 636 F.3d at 201. We need not resolve this issue, because so long as the requirement of proximate cause applies, as it does here, a defendant can be jointly and severally liable only for injuries that meet that requirement. *See* RESTATEMENT (SECOND) OF TORTS § 879 cmt. b (1979). Because the record does not show that Monzel proximately caused all of Amy's injuries, the district court did not clearly and indisputably err by declining to impose joint and several liability on him for the full $3,263,758 she seeks.[10]

The district court did, however, clearly err by awarding an amount of restitution it acknowledged was less than the harm Monzel had caused. Under § 3664(e), the government bears the burden of demonstrating the amount of loss the victim suffered "as a result of the [defendant's] offense." In this case, because the government failed to submit "any evidence whatsoever" regarding the amount of Amy's losses attributable to Monzel,[11] Restitution Order at 3, the district court said it had no basis upon which to calculate the amount of harm Monzel had proximately caused her and so decided to award "nominal" restitution of $5000, *id.* at 5.

But in the very next sentence the court said it had "no doubt" that this award was "less than the actual harm" Monzel had caused Amy. *Id.* at 5. This was clear and indisputable error. A district court cannot avoid awarding the "full amount of the victim's losses," 18 U.S.C. § 2259(b)(1), simply because the attribution analysis is

10. Amy's effort to analogize Monzel's possession to participation in a "joint enterprise" with "mutual agency, so that the act of one is the act of all," Pet. for Writ of Mandamus at 24 (quoting WILLIAM L. PROSSER, THE LAW OF TORTS § 52, at 315 (4th ed.1971)), also fails. There is no evidence at all in the record that Monzel acted "in concert" with others to distribute and possess Amy's image, as is required for such enterprise liability to apply. KEETON ET AL., *supra*, § 52, at 346.

11. In an opinion issued several months prior to the restitution order, the district court concluded that Amy's "alleged losses were proximately caused by Monzel's possession of [her] image[ ]." *United States v. Monzel*, 746 F.Supp.2d 76, 88 (D.D.C.2010). The court made clear, however, that it was *not* deciding at that point the amount of Amy's losses that Monzel had caused. Rather, the court was "only identif[ying] the losses alleged for the purposes of considering the causal connection between them and [Monzel's] conduct." *Id.* at 84 n. 12. Whether "the Government ha[d] met its burden to prove the losses or the amount to be apportioned to Monzel" were issues to be decided later. *Id.*

difficult or the government provides less-than-ideal information. The court must order restitution equal to the amount of harm the government proves the defendant caused the victim. *See id.* § 3664(e) ("Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."). Certainly the court cannot award *less* restitution than it determines the victim is entitled to.

We recognize, of course, that determining the dollar amount of a victim's losses attributable to the defendant will often be difficult. In a case such as this one, where the harm is ongoing and the number of offenders impossible to pinpoint, such a determination will inevitably involve some degree of approximation. But this is not fatal. Section 2259 does "not impose[ ] a requirement of causation approaching mathematical precision." *United States v. Doe,* 488 F.3d 1154, 1160 (9th Cir.2007). Rather, the district court's charge is "to estimate, based upon facts in the record, the amount of [the] victim's loss with some reasonable certainty." *Id.*

On remand, the district court should consider anew the amount of Amy's losses attributable to Monzel's offense and order restitution equal to that amount. Although there is relatively little in the present record to guide its decisionmaking on this, the district court is free to order the government to submit evidence regarding what losses were caused by Monzel's possession of Amy's image or to order the government to suggest a formula for determining the proper amount of restitution. The burden is on the government to prove the amount of Amy's losses Monzel caused. We expect the government will do more this time around to aid the district court. We express no view as to the appropriate level of restitution, but emphasize that in fixing the amount the district court must rely upon some principled method for determining the harm Monzel proximately caused.

B

[4] To prevail on her petition, Amy must also show that mandamus is her only adequate remedy. *See Power,* 292 F.3d at 784. Since the enactment of the CVRA, every circuit to consider the question has held that mandamus is a crime victim's only recourse for challenging a restitution order. *See Aguirre–González,* 597 F.3d at 52–55 (1st Cir.); *United States v. Hunter,* 548 F.3d 1308, 1317 (10th Cir.2008) ("We hold that individuals claiming to be victims under the CVRA may not appeal from the alleged denial of their rights under that statute except through a petition for a writ of mandamus as set forth by 18 U.S.C. § 3771(d)(3)."); *cf. Amy Unknown,* 636 F.3d at 198 (5th Cir.) ("affirm[ing]" that "[a crime victim] likely has no other means for obtaining review of the district court's decision not to order restitution" besides mandamus (quoting *In re Amy,* 591 F.3d 792, 793 (5th Cir.2009)) (internal quotation marks omitted)).[12] We agree.

12. The Sixth Circuit's position on the issue is unclear. In *In re Acker,* 596 F.3d 370 (2010), the Sixth Circuit held that a putative victim has no right to directly appeal a district court decision not to award restitution where the victim simultaneously files a mandamus petition raising "identical issues" as the appeal, *see id.* at 373. *Acker* distinguished an earlier Sixth Circuit decision, *In re Siler,* 571 F.3d 604 (2009), that permitted victims to directly appeal a district court's denial of their motion under the CVRA to obtain the defendants' presentence reports, *id.* at 607–09, on the ground that the *Siler* victims had "been effectively treated as intervening parties" by the district court and did not assert their rights

[5] Although we "have jurisdiction of appeals from all final decisions of the district courts," 28 U.S.C. § 1291, the general rule is that "one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Karcher v. May,* 484 U.S. 72, 77, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987). However, "[t]he Supreme Court has 'never ... restricted the right to appeal to named parties to [a] litigation,' " *In re Sealed Case (Med. Records),* 381 F.3d 1205, 1211 n. 4 (D.C.Cir. 2004) (omission and second alteration in original) (quoting *Devlin v. Scardelletti,* 536 U.S. 1, 7, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002)), and "if [a] decree affects [a third party's] interests, he is often allowed to appeal," *id.* (second alteration in original) (quoting *Castillo v. Cameron Cnty.,* 238 F.3d 339, 349 (5th Cir.2001)).

Amy argues that even though she was not a party below, she has a direct interest in the district court's restitution order and should therefore be allowed to appeal. Her argument, however, overlooks that she is seeking to appeal part of Monzel's *sentence.* Regardless of the rules that govern nonparty appeals in other contexts, "the default rule [is] that crime victims have no right to directly appeal a defendant's criminal sentence." *Aguirre–González,* 597 F.3d at 54; *see also Hunter,* 548 F.3d at 1312 ("[W]e are aware of no precedent for allowing a non-party appeal that would reopen a criminal case following sentencing.").

Amy claims that several cases from this and other circuits reflect "well-recognized authority ... permitting non-parties to appeal decisions in criminal cases which directly harm their rights." Pet'r's Mot. to Consolidate Appeal with Mandamus Pet. at 8. But none of the cases she cites involved a request by a victim to alter a defendant's sentence. Rather, all of them concerned disclosure of information in which the non-party had some interest. *See id.* at 8–9 n. 4 (citing *United States v. Antar,* 38 F.3d 1348 (3d Cir.1994); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559 (11th Cir.1989); *Anthony v. United States,* 667 F.2d 870 (10th Cir.1981); *In re Smith,* 656 F.2d 1101 (5th Cir.1981); *United States v. Hubbard,* 650 F.2d 293 (D.C.Cir.1980); *United States v. Briggs,* 514 F.2d 794 (5th Cir.1975)); *see also* Amy's Resp. to Gov't Mot. to Dismiss at 17 (citing *Doe v. United States,* 666 F.2d 43 (4th Cir.1981)); *Hubbard,* 650 F.2d at 311 n. 67 ("Federal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed."). Here, by contrast, Amy is asking the court to revisit her restitution award, which *is* part of Monzel's sentence.[13] *See, e.g.,* 18

under the CVRA until "eighteen months after the criminal proceedings had concluded," *Acker,* 596 F.3d at 373.

13. The *only* case Amy points us to where a court has allowed a crime victim to appeal part of a defendant's sentence is *United States v. Kones,* 77 F.3d 66 (3d Cir.1996), in which the Third Circuit heard a victim's appeal of a district court order denying restitution, *see id.* at 68. *Kones*'s persuasive value on this point is negligible, however, given that the government did not contest the court's jurisdiction to hear the victim's appeal, *see* Def.-Appellee's Br. at 1, *Kones,* No. 95–1434 (3d Cir. Aug. 16, 1995), and the court's statement of its jurisdiction was one sentence long and devoid of discussion, *see* 77 F.3d at 68; *see also Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (stating that "drive-by jurisdictional rulings" where jurisdiction is "assumed by the parties[ ] and ... assumed without discussion by the Court" have "no precedential effect"); *Lewis v. Casey,* 518 U.S. 343, 352 n. 2, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.").

U.S.C. § 3663A(a)(1) ("[W]hen sentencing a defendant convicted of an offense described in subsection (c), the court shall order ... that the defendant make restitution to the victim of the offense ...."); *id.* § 3664(*o*) ("A sentence that imposes an order of restitution is a final judgment...."); *United States v. Cohen,* 459 F.3d 490, 496 (4th Cir.2006) ("[R]estitution is ... part of the criminal defendant's sentence."); *United States v. Acosta,* 303 F.3d 78, 87 (1st Cir.2002) ("It is undisputed that restitution is part of a sentence."); *United States v. Syme,* 276 F.3d 131, 159 (3d Cir.2002) ("Restitution orders have long been treated as part of the sentence for the offense of conviction...."). Amy thus runs headlong into the rule against direct appeals of sentences by crime victims.

The CVRA does not alter this rule. To begin with, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortg. Advisors, Inc. v. Lewis,* 444 U.S. 11, 19, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). That the CVRA expressly provides for mandamus review makes us reluctant to read into it an implied right to direct appeal. Moreover, the CVRA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 254, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (quoting *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 146–47, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)). Not only does the CVRA provide for mandamus review, but it also expressly authorizes the government to assert crime victims' rights on direct appeal, *see* 18 U.S.C. § 3771(d)(4), and sets forth specific rules for when crime victims may move to reopen sentences, *see id.* § 3771(d)(5). That Congress included these provisions but did *not* provide for direct appeals by crime victims is strong evidence that it did not intend to authorize such appeals.

It is also significant that while Congress expressly authorized the government to assert victims' rights on direct appeal under § 3771(d)(4), it made no such provision for victims themselves. *See id.* § 3771(d)(4) ("In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). This contrasts with § 3771(d)(3), which authorizes both the government *and* victims to bring mandamus petitions. *See id.* § 3771(d)(3) (stating that any "movant" who has asserted a crime victim's rights before the district court may petition for mandamus); *id.* § 3771(d)(1) (providing that the crime victim, the crime victim's representative, and the government may assert a victim's rights before the district court). Had Congress intended to allow victims to directly appeal, it seems likely it would have provided them that right under § 3771(d)(4) just as it provided them mandamus petitions under § 3771(d)(3). *Cf. Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[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.").

Amy also argues that she is entitled to a direct appeal because two other circuits permitted crime victims to appeal restitution orders prior to the enactment of the CVRA, a statute that was intended to broaden, not narrow, available remedies. *See United States v. Perry,* 360 F.3d 519, 524–33 (6th Cir.2004) (permitting crime victim to appeal vacatur of lien enforcing

victim's restitution award under the Mandatory Victims Restitution Act, 18 U.S.C. §§ 3663A, 3664); *United States v. Kones,* 77 F.3d 66, 68 (3d Cir.1996) (hearing crime victim's appeal of district court order denying restitution under the Victim and Witness Protection Act, 18 U.S.C. § 3663); *see also* 150 CONG. REC. 7301 (statement of Sen. Kyl) ("It is not the intent of [the CVRA] to limit any laws in favor of crime victims that may currently exist, whether these laws are statutory, regulatory, or found in case law."); *id.* (statement of Sen. Feinstein) ("[I]t is not our intent to restrict victims' rights or accommodations found in other laws."). But even if two circuits allowed crime victims to appeal restitution orders prior to the enactment of the CVRA, a plurality of circuits did not. *See Mindel,* 80 F.3d at 398 (9th Cir.); *United States v. Kelley,* 997 F.2d 806, 807 (10th Cir.1993); *United States v. Johnson,* 983 F.2d 216, 217 (11th Cir.1993); *United States v. Grundhoefer,* 916 F.2d 788, 793 (2d Cir.1990). There was no settled right of appeal for the CVRA to narrow.[14]

Amy responds that the cases preventing victims from appealing restitution orders are irrelevant because they were decided under the Victim and Witness Protection Act (VWPA), which, unlike § 2259, makes restitution discretionary rather than mandatory, takes into account the defendant's financial circumstances, and does not provide victims much opportunity to influence sentencing proceedings. *See* 18 U.S.C. § 3663(a). We should look instead, she argues, to *United States v. Perry,* 360 F.3d 519, a 2004 Sixth Circuit decision that permitted a crime victim to appeal an adverse restitution order under the Mandatory Victims Restitution Act (MVRA), a statute more analogous to § 2259, *id.* at 524–33. *Perry* expressly declined to follow the VWPA cases on the ground that the MVRA is "dramatically more 'pro-victim' " than the VWPA, *id.* at 524: the MVRA makes restitution mandatory, not discretionary, *see* 18 U.S.C. § 3663A(a)(1); requires the court to award full restitution regardless of the defendant's financial circumstances, *see id.* § 3664(f)(1)(A); and gives victims a role in the sentencing process, *see id.* § 3664(d)(2).

But the victim in *Perry* was not appealing an order *awarding* restitution; rather, she was appealing an order affecting her ability to *enforce* an order awarding restitution. *See Perry,* 360 F.3d at 522 (describing victim's appeal of order vacating judgment lien she had obtained to enforce her restitution award). Granting the victim relief would not have altered the defendant's sentence. Here, by contrast, Amy is appealing the order awarding her restitution and is seeking a higher award. Granting her relief *would* alter the defendant's sentence.[15]

Moreover, the CVRA and the MVRA differ significantly in the extent to which they provide remedies for challenging restitution orders. The MVRA may provide victims an opportunity to submit affidavits detailing their losses, *see* 18 U.S.C. § 3664(d)(2), but it does not provide a

14. Moreover, only one circuit had ever allowed a victim to appeal the *amount* of restitution. *See Kones,* 77 F.3d at 68 (3d Cir.). Another circuit had allowed a victim to appeal an order impairing her ability to *collect* restitution, *see Perry,* 360 F.3d at 522, 524–33 (6th Cir.), but did not consider whether the victim could appeal the actual amount of the award.

15. In any event, *Perry* is not the only case to consider a victim's right to appeal an MVRA restitution order. In *United States v. United Security Savings Bank,* 394 F.3d 564 (8th Cir. 2004) (per curiam), the Eighth Circuit said that a crime victim may *not* appeal a restitution order made under the MVRA, *id.* at 567. Thus, a victim's right to appeal under the MVRA is far from settled.

right to petition the court of appeals for mandamus, grant the government express power to assert crime victims' rights on appeal, or set forth procedures by which victims may move to reopen sentences. Thus, the Supreme Court's teaching that a "statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly,' " *Mertens*, 508 U.S. at 254, 113 S.Ct. 2063 (quoting *Russell*, 473 U.S. at 146–47, 105 S.Ct. 3085), applies with much greater force here than in *Perry*.

For these reasons, we hold that Amy may not directly appeal her restitution award and we grant the government's motion to dismiss her appeal.[16] Mandamus is Amy's only recourse to challenge the award.

V

We grant Amy's petition for mandamus in part and instruct the district court to consider anew the amount of her losses attributable to Monzel and to order restitution equal to that amount. We further dismiss Amy's direct appeal of her restitution award and dismiss as moot her motion to consolidate her mandamus petition with her direct appeal.

So ordered.

16. Amy also argues that she is entitled to appeal the district court's restitution order under the collateral order doctrine. Because she cannot directly appeal her restitution award in any event, the collateral order doctrine is of no help to her.

UNITED STATES of America, Appellant

v.

Paul Alvin SLOUGH, et al., Appellees.

No. 10–3006.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 8, 2011.

Decided April 22, 2011.

Rehearing En Banc Denied July 19, 2011.

Background: Defendants, who were charged with voluntary manslaughter and weapons violations in connection with shooting incident that occurred during defendants' employment in Iraq with private security contractor, moved to dismiss indictment. The United States District Court for the District of Columbia, 677 F.Supp.2d 112, granted motion. Government appealed.

Holdings: The Court of Appeals, Williams, Senior Circuit Judge, held that:

(1) in determining whether evidence presented to grand jury was tainted by exposure to defendants' immunized statements, district court had to segregate tainted parts of evidence from those that either could not have been tainted or were shown to be untainted by a preponderance of the evidence;

(2) in determining whether evidence presented to grand jury was tainted, district court erred by finding, under independent-source analysis, that any evidence responding to allegations that defendants' team was attacked was tainted;

(3) exclusion of witness's testimony and journal was warranted only if witness would not have written journal or testi-

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	**Criminal Case No. 09-243 (GK)**
	:	
MICHAEL M. MONZEL,	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

I. BACKGROUND

Defendant, Michael Monzel, pled guilty on December 10, 2009 to one count of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2).[1] Thereafter, there was extended litigation pertaining to provision of restitution for "Amy," a pseudonym for one of the victims of the Defendant. Amy's attorneys provided packages of materials in support of her initial request for $3,263,758 in restitution for their client, which the Government then submitted to opposing counsel and the Court. Since that time, Amy's attorneys have modified that amount substantially. The Government indicated in its Supplemental Request for Restitution, on March 30, 2012, that as of December 17, 2010, Amy had already received approximately $245,084.81 in restitution, presumably from other defendants in other criminal cases. In addition, the Government indicated that Amy was reducing her claim for certain specific expenses by $20,563. Suppl. Request at 3 n. 2. However, at oral argument on November 5, 2012, the Government reported that of the $3,263,758 she originally

[1] In its Supplemental Request for Restitution [Dkt. No. 63], the Government for some reason stated that the Defendant also pled guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). However, the Superseding Indictment [Dkt. No. 8] to which he plead, charges only one count of distribution of child pornography.

requested, she had already received $1,674,707.30, had withdrawn her request for attorneys' fees and expert witness costs, and, as of that date, was asking for $1,693,774.70.

On October 22, 2010, this Court ruled that Defendant's conduct was the proximate cause of Amy's losses [Dkt. No. 44]. Following additional litigation on the issue of restitution and the precise amount of damages to be awarded, on January 11, 2011, this Court ordered Defendant to pay $5,000 in restitution [Dkt. No. 50]. On January 24, 2011, attorneys for Amy filed a Petition for Writ of Mandamus in the Court of Appeals, pursuant to the Crime Victims' Rights Act. [In re Amy, Court of Appeals, Dkt. No. 11-3009]. On April 19, 2011, the Circuit Court issued its opinion in United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011), *cert. denied* 132 S.Ct. 756 (2011).

What is relevant to the present restitution litigation is the ruling of the Court of Appeals in Monzel that the $5,000 restitution award to Amy was less than the harm that Defendant had caused her. 641 F.3d at 539. The Court of Appeals remanded the case for consideration of the amount of Amy's losses attributable to the Defendant's conduct and for an order of restitution equal to that specific amount. Id. at 540. As part of this consideration, the Court stated that the Government might "suggest a formula for determining the proper amount of restitution." Id. On March 30, 2012, the Government filed the pending Supplemental Request for Restitution, on October 15, 2012, the Defendant filed his Response [Dkt. No. 67], and on October 31, 2012, the Government filed its Additional Supplement to Request for Restitution [Dkt. No. 69]. No additional evidence has been submitted by either the Government or the Defendant.

II. ANALYSIS

A. The Statute

18 U.S.C. § 2259 governs restitution awards for victims of child sexual exploitation and requires district courts to award "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). Defendant has never contested that his conviction for distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2), subjects him to paying restitution to the victim as part of his sentence.

Section 2259 states in pertinent part:

> a. In general -- Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense. . . .
>
> b. . . .
>
> (1) Directions -- The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).
>
> . . . .
>
> (3) Definition -- For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for --
>
> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and

(F) any other loss suffered by the victim as a proximate result of the offense.

In addition, 18 U.S.C. § 3664 provides that "[a]ny dispute as to the proper amount of type of restitution shall be resolved by the court by a preponderance of the evidence." The burden of demonstrating the amount of loss sustained by the victim as a result of the offense rests with the Government. 18 U.S.C. § 3364(e).

B. Requirements of the Statute

In order for a victim of child pornography to recover restitution under the statute, the Court must make three separate determinations. In United States v. Kennedy, the Court of Appeals for the Ninth Circuit set forth those three "determinations" that must be made before restitution can be awarded. 643 F.3d 1251, 1263 (9th Cir. 2011).

First, there must be a determination that the individual seeking restitution is a "victim" of the defendant's offense. Id.; Section 2259(b)(1), (c). There is no question that Amy was a "victim" as defined in the statute.

Second, there must be a determination that the defendant's offense was a proximate cause of the victim's losses. Id. (citing United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999)). That determination was made by this Court in its ruling of October 22, 2010, and affirmed by our Court of Appeals in its decision of April 19, 2011.

Third, there must be a determination that the losses caused by the defendant's offense can be calculated with "some reasonable certainty." Id. (quoting United States v. Doe, 488 F.3d 1154, 1160 (9th Cir. 2007)).

C. Calculation of Amy's Losses

It is fair to say that both the district courts and appellate courts have struggled mightily to find a method of calculating the losses of a victim of child pornography in an objective, principled, non-arbitrary way, so as to carry out the statute's mandate to award restitution for the victim's losses, but also to take into account the culpability of the individual defendant who is required to pay a portion of the victim's total losses.

As noted earlier by our Court of Appeals, "[t]he burden is on the Government to prove the amount of Amy's losses Monzel caused." Monzel, 641 F.3d at 540. In attempting to carry its burden, the Government has offered a number of different approaches in different federal courts. For example, in this case, the Government is recommending that the Court "divide the pool of Amy's proven losses by the number of defendants convicted of possessing Amy's image, which today is approximately 150." Govt. Suppl. Request at 10. In Kennedy, the Government suggested simply averaging all the awards which had already been made to Amy after omitting the highest and lowest ones, and then giving her the average amount of the remaining awards. 643 F.3d 1251. In a number of cases, the Government has simply asked for a flat amount -- for instance, $1,000 as in Unites States v. Veazie, No. 2:11-cr-00202-GZS, 2012 WL 1430540, at *2 n. 1 (D. Me. April 25, 2012).

The courts, as well as the Government, have also taken very different paths in dealing with this thorny problem. For example, in United States v. McDaniel, 631 F.3d 1204, 1206-07 (11th Cir. 2011), at the district court level, the Government sought approximately $185,000 for past psychological services and future counseling and therapy, as well as $3,500 for the victim's attorneys' fees. The district court ordered the defendant to pay $12,700 in restitution. The Court of

Appeals affirmed the award of the district court, merely saying that "the district court did not clearly err in finding that McDaniel's possession [of the pornographic material] proximately caused [the victim's] losses." There was absolutely no explanation by either the district court or the court of appeals of the legal or numerical basis for this award.

In other cases, judges have analyzed the specific facts and have given very concrete justifications for the amounts they awarded. For example, in United States v. Brunner, No. 5:08cr16, 2010 WL 148433 at *3-5 (W.D.N.C. Jan. 12, 2010), the district court carefully outlined the differences in the personal situations of the two victims who requested very different amounts of restitution, ordering restitution of $1,500 to one victim and $6,000 to the other victim. The trial judge also factored in that the defendant was convicted of "mere possession of pornographic images," had never had any contact with the victims, and the fact that "there are many individuals who possess similar images." Id. at *4. He also pointed out that the most substantial cause of one of the victim's losses was her initial abuse by a family member, and, therefore, discounted half of the restitution amount which he determined to be attributable solely to that victim's abuser. As to the other victim, he relied upon the fact that the loss of earnings was largely attributable to her inability to finish college, and her inability to finish college was due to the psychological problems stemming from her knowledge that the pornographic images of her were still being distributed on the internet. Very few of the cases have provided this kind of in-depth analysis of the victim's claims.[2]

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[2] In United States v. Evers, 669 F.3d 645 (6th Cir. 2012), the Court of Appeals, relying upon a very detailed statement of facts from the district court, affirmed the district court's restitution order of $1,500 for lost income, and reversed its order of $140 for child care expenses. However, Evers presented a factual situation which greatly differs from the vast majority of § 2259 cases. (continued...)

Finally, some judges have ordered large amounts of restitution, with joint and several liability. See, e.g., United States v. Lundquist, 847 F. Supp. 2d 364 (N.D.N.Y. 2001); United States v. Staples, No. 09-14017-CR, 2009 WL 2827204 (S.D. Fla. Sept. 2, 2009).

In remanding this case, our Court of Appeals recognized that "determining the dollar amount of a victim's losses attributable to the defendant will often be difficult." Monzel, 643 F.3d at 540. While the Court did not direct the use of any specific method or formula for reaching the appropriate restitution amount, it acknowledged that "there is relatively little in the present record to guide [the district court's] decision making." What it did emphasize was that "in fixing the amount, the district court must rely upon some principled method for determining the harm Monzel proximately caused," id. (emphasis added). The Court made it clear that the "burden is on the government to prove the amount of Amy's losses Monzel caused." Id.[3]

On remand, this Court ordered the parties to submit their responses to the issue remanded by the Court of Appeals and to submit any further evidence they wished. No further evidence was submitted by either party and, therefore, the Court is still limited, as it was originally, to the documents submitted by the Government from Amy's attorneys. Those documents consist of the oft-used types of expert reports on loss of wages, future costs of therapy, etc., that are presented in any traditional tort case.

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[2](...continued)
While the defendant was convicted of production and possession of child pornography, there was nothing to suggest that there had been any showing of the pornographic images of the victim on the internet. At most, the defendant had shown the pictures he had taken to only one family member. Consequently, Evers did not pose the difficult restitution apportionment problems faced by most of the § 2259 cases.

[3] The Court also noted that it expected that "the government will do more this time around to aid the district court." Id.

As noted earlier, the Government has suggested in this case that restitution be based on an average of the total restitution ordered for Amy in all cases with the 150 or so[4] convicted defendants. It should be noted that Amy's attorneys have made no attempt to address the issue at hand -- namely, identifying a principled and non-arbitrary method for determining the amount of Amy's losses Monzel caused, given that the Defendant is only one of many different people and events which have contributed to Amy's profound injuries, past, present, and future.

This Court concludes that the Government has simply failed to demonstrate how its "averaging of awards" approach comports with the "bedrock rule of both tort and criminal law that a defendant is only liable for harm he proximately caused." Monzel, 641 F.3d at 535. There is absolutely no evidence as to what degree Monzel's conduct contributed to the injuries suffered by Amy, and, therefore, it is impossible to fashion a formula that pinpoints his degree of responsibility for Amy's suffering.

Use of the Government's suggested "averaging approach," would treat both the victim and the Defendant unfairly. As to the victim, she will be getting lower and lower awards of restitution as time goes on because the amount of money sought will be divided by a larger and larger number of convicted defendants. As to the Defendant, the averaging approach fails, as required by the Court of Appeals, to establish the "connection between the act or omission of the defendant and the damages which the [victim] has suffered." Id. at 535. In short, the Government has not presented

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[4] At oral argument, the Government suggested that the Court consider a figure between the 150 convicted defendants who have restitution orders and the approximately 733 cases in which Amy's attorneys have asked for such orders. As Government counsel commendably conceded, such a procedure is "completely speculative." Monzel's counsel also pointed out that many of these cases have been sealed, so that the figure of 150 is far too low.

any principled calculation, formula, or procedure which would limit the Defendant's financial losses to those "traceable to Monzel." Id. at 537.

Finally, the actual evidence submitted by Amy's attorneys does not justify any restitution in this case because all of the amounts requested are based upon reports written in 2008 or earlier. Monzel did not possess Amy's image until 2009. Clearly, he cannot be held responsible for any pre-2009 expenses, since he had committed no criminal offense before that time. The 2008 reports, based upon pre-2008 losses and estimated losses, are not sufficiently current to justify an award of restitution for post-2009 expenses based upon reliable up-to-date information. For example, Amy's receipt of $1,674,707.30 is but one example of how circumstances may have changed in four years, especially when dealing with emotional and psychological injuries.

As the court pointed out in United States v. Van Brackle, No. 2:08-cr-042-WCO, 2009 WL 4928050, at *5 (N.D. Ga. Dec. 17, 2009):

> The government has presented ample evidence of tragic harms both past and future, and the court is profoundly aware of what the claimants have and will continue to suffer as victims of child abuse and child pornography. However, the government has not presented any evidence whatsoever that would permit the court to estimate with reasonable certainty what portion of the claimants' harm was proximately caused by defendant's act of receiving child pornography, as opposed to the initial abuse or unknown other acts of receipt and distribution that occurred before and independent of defendant's act.

These words apply directly to this case.

In a very scholarly and thoughtful recent opinion in which the Government was suggesting the same restitution calculation as it does in this case, the district court, relying upon Monzel, 641 F.3d at 535, 537, pointed out that "the government does not explain how its approach squares with

the 'bedrock principles' in both tort and criminal law that a defendant can only be held liable for the harm he proximately caused . . . Other than pointing to the total economic losses [the victim] has suffered, the Government has submitted no evidence itemizing which of those losses are attributable to which of the numerous perpetrators . . . The Government does not argue, nor can it be the case, that Tallent's conduct alone has proximately caused all of Vicky's losses." United States v. Tallent, No. 1:11-cr-84, 2012 WL 2580275, at *11 (E.D. Tenn. June 22, 2012).

This Court agrees with Judge Collier in Tallent that

> [t]he fault here lies not with the government, but with the particular language Congress has used in this statute. Indeed, the Court cannot imagine how the government could meets it [sic] burden to provide specific evidence delineating that quantum of damages proximately caused by Tallent, or any other defendant convicted of a possession or receipt offense. The statute promises more than it can deliver. It makes a court's imposition of restitution mandatory, but it then demands the government to prove what is in essence unprovable: identifying, among the vast sea of child pornography defendants, how the conduct of a specific defendant occasioned a specific harm on a victim. . . . The government has not made that showing here, and the Court is at a loss to determine how it could have made such a showing.

Id. at *12.

It is also true that "Congress surely neither anticipated nor desired the result the Court reaches today." Id. at *13. Moreover, there is no question that this Court takes no pleasure in reaching a result that fails to make a victim whole, fails to impose a meaningful financial sanction against the perpetrator of the victim's losses, and does not carry out Congressional intent. However, the Court is bound by our "bedrock principles" as set forth in Monzel. As the Ninth Circuit said in Kennedy, the responsibility lies with Congress, not the courts, "to develop a scheme to ensure that defendants . . . are held liable for the harms they cause through their participation in the market for child

pornography." 643 F.3d at 1266. Different options have, in fact, been suggested: for example, creation of a national compensation fund which would include minimum and maximum amounts to be awarded to victims, or statutory damages of a fixed amount depending upon specified factors, or statutory damages allowing a certain percentage of the victim's total proven losses. Tempting as it may be for the courts to attempt to fashion such a remedy, only the legislative branch of our government has the authority under our Constitution to do so.

While this conclusion is most unpalatable, it is simply crystal clear that the Government -- for reasons not of its making -- has failed to carry its burden of proving by a preponderance of the evidence, "the amount of Amy's losses Monzel caused." Monzel, 641 F.3d at 540. For that reason, the Government's Supplemental Request for Restitution is **denied**.

November 6, 2012

Gladys Kessler
Gladys Kessler
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3093 **September Term, 2013**

1:09-cr-00243-GK-1

Filed On: June 13, 2014

In re: Amy, Child Pornography Victim,

Petitioner

Consolidated with 12-3100

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Randolph, Senior Circuit Judge

O R D E R

Upon consideration of the motion of Michael Monzel to govern future proceedings; the motion of the United States of America to vacate and remand in appeal No. 12-3100 and to thereafter dismiss as moot Amy's mandamus petition in No. 12-3093; the motion of Amy to intervene or, in the alternative, to participate as amicus in No. 12-3100; and the lodged brief, it is

ORDERED that the motion to govern be denied. It is

FURTHER ORDERED that in No. 12-3100, the motion to intervene be denied and the motion to participate as amicus curiae be granted. The Clerk is directed to file the lodged brief. It is

FURTHER ORDERED that the motion to vacate and remand in No. 12-3100 be granted to the following extent: the amended judgment is hereby vacated insofar as it awards no restitution to Amy or Vicky, and this case is hereby remanded to the district court with instructions to redetermine restitution for Amy consistent with the Supreme Court's opinion in Paroline v. United States, 134 S. Ct. 1710 (2014), and to reinstate Vicky's original $5,000 restitution award. It is

FURTHER ORDERED that the petition for writ of mandamus in No. 12-3093 be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3093 **September Term, 2013**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 12-3100 until 7 days after disposition of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk