No. 12-8561

IN THE

Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA
AND AMY UNKNOWN,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR UNITED STATES SENATORS ORRIN G. HATCH, DIANNE FEINSTEIN, CHARLES E. GRASSLEY, EDWARD J. MARKEY, JOHN MCCAIN, PATTY MURRAY, AND CHARLES E. SCHUMER AS *AMICI CURIAE* IN SUPPORT OF AMY UNKNOWN

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QUESTION PRESENTED

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

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STATEMENT OF INTEREST[1]

Amici curiae are a bipartisan group of United States Senators who submit this brief in support of Amy Unknown. *Amici* include: Senator Orrin G. Hatch (R-UT); Senator Dianne Feinstein (D-CA); Senator Charles E. Grassley (R-IA); Senator Edward J. Markey (D-MA); Senator John McCain (R-AZ);

[1] The parties consented to the filing of this brief. Their letters of consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part. No one other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

Senator Patty Murray (D-WA); and Senator Charles E. Schumer (D-NY).

Each of the *amici* served in the 103rd Congress and supported legislation containing the provision at issue in this case. In addition, all are deeply interested in ensuring that child-pornography victims like Amy receive the restitution to which they are entitled. *Amici* also have a fundamental and institutional interest in seeing Congress's enactments enforced as they are written.

SUMMARY OF ARGUMENT

Time and time again, this Court has emphasized that "in interpreting a statute a court should always turn first to one, cardinal canon before all others." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992). That cardinal rule is this: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* at 253–54. In Section 2259, Congress said that courts must order child-pornography defendants to pay restitution for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). Congress went on to say precisely what it meant by "the term 'full amount of the victim's losses,'" identifying six categories of costs for which restitution is required. *Id.* § 2259(b)(3). One of these categories, subsection (F), is limited to costs a victim incurs "as a proximate result" of the defendant's offense. *Id.* § 2259(b)(3)(F). The other five are not. *Id.* § 2259(b)(3)(A)–(E).

The Congress of the United States thus directly answered the question presented when it enacted Section 2259. Qualifying as a "victim" under the statute is the only causal nexus required to recover for the five categories of specific costs listed in subsections (A)–(E). The sixth subsection is a catch-all category, which includes an undefined and potentially unpredictable set of costs. For costs falling into that less predictable category only, Congress included an additional "proximate result"

constraint. The statute's meaning is plain, and it should be enforced as it was written.

Even apart from the plain text of Section 2259, the drafting history—which *amici* are uniquely poised to evaluate—makes clear that Congress really did mean what it said. For instance, the original draft of the Violence Against Women Act included parallel restitution provisions containing *two* express "proximate result" limitations among the categories of recoverable costs—one in the catch-all category, and another in one of the specific categories. *See* S. Rep. No. 101-545, at 4, 16–17 (1990). The latter limitation was deleted from the Act's restitution provisions prior to its passage. This fact, together with other aspects of the statute's evolution, confirms that Congress acted intentionally when it included proximate-cause requirements for some kinds of costs and omitted them for others. This Court should decline Petitioner's invitation to read in additional limitations on victims' recovery where Congress chose to leave them out.

Several well-established canons of statutory interpretation also support this clear-cut reading of Section 2259. Chief among these is the rule of the last antecedent, which provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003). The canon's application here is straightforward: The "proximate result" limitation in subsection (F) cannot be read to cover the categories of losses described in subsections (A) through (E). The presumption against surplusage, the absurd-results canon, and the rule that remedial legislation should be read broadly all lead to the same conclusion.

Where the statute's plain text, its legislative history, and multiple canons of statutory interpretation all speak with one voice, the Court's job is not a difficult one. The Fifth Circuit decided this case correctly, and the Court should affirm.

ARGUMENT

I. CONGRESS INTENDED CHILD-PORNOGRAPHY VICTIMS TO RECOVER THE "FULL AMOUNT" OF THEIR LOSSES.

A. The Statute's Text Is Clear: The "Proximate Result" Requirement Applies Only To Subsection (F).

This case hinges on statutory language that could hardly be clearer. Section 2259 requires courts to order child-pornography defendants to pay restitution for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1); *see id.* § 2259(b)(4)(A) ("The issuance of a restitution order under this section is mandatory."). The statute specifies that "the term 'victim' means the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). And it goes on to define "full amount of the victim's losses":

> [T]he 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 losses suffered by the victim *as a proximate result of the offense*.

Id. § 2259(b)(3) (emphasis added).

Consistent with the statute's goal of compensating victims for the "full amount" of their losses, *id.* § 2259(b)(1), the first five categories of compensable

costs contain no additional nexus requirement, *see id.* § 2259(b)(3)(A)–(E). That is, once an individual establishes that she is a defendant's "victim," the court must order restitution for "any costs" incurred by that individual in those specific categories. *Id.* § 2259(b)(3).

For costs other than those falling within the five categories that Congress specifically enumerated, subsection (F) provides for restitution in more limited circumstances. Namely, restitution is required only when those "other losses," which could include a wide variety of costs, are the "proximate result of the offense." *Id.* § 2259(b)(3)(F).

That is the statute Congress wrote, and this Court need look no further than its plain language to decide this case. As the Fifth Circuit correctly concluded, one category of costs contains a "proximate result" requirement; the others require only that an individual qualify as a "victim." *See* In re *Amy Unknown*, 701 F.3d 749, 762 (5th Cir. 2012) (*en banc*).

B. The Drafting History Confirms What the Plain Text Says.

1. *The Violence Against Women Act Was Intended to Provide Generous Restitution to Victims Like Amy.*

Section 2259's drafting history "confirms that Congress intended the statute to mean exactly what its plain language says." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). To begin with, looking at Section 2259 as part of a bigger picture gives a clear view of Congress's aims. *See Writz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 469 (1968) (emphasizing that courts should consider a statute's text "in light of the objectives Congress sought to achieve").

Section 2259 was enacted as part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 16, 18,

and 42 U.S.C.), which itself was part of the larger Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. The Violence Against Women Act was the country's first comprehensive response to rape, domestic violence, and other forms of violence against women. The Act's original author, then-Senator Joe Biden, described it as "the cornerstone of the movement to make the United States a safer place for women." *Violence Against Women: Victims of the System: Hearing on S.15 Before the S. Comm. on the Judiciary*, 102d Cong. 1, at 185 (Apr. 9, 1991).

Congress viewed mandatory restitution for domestic-violence and sex-crime victims as a key mechanism for achieving the Act's goals. Prior to the Act's passage, the reality was that "[a]ll too often, restitution to victims [was] not ordered by the courts," *id.* at 6 (Statement of Sen. Thurmond), and then-existing law did "not * * * provide for a means to make victims whole," H.R. Rep. No. 104-16, 4 (1995). The Act's restitution provisions were designed to fill that gap by "requir[ing] and expand[ing] victim restitution in sex crime cases." 136 Cong. Rec. 14,491 (June 19, 1990) (Statement of Sen. Wilson). To that end, Section 2259 and related restitution provisions were written broadly, *see, e.g.*, 18 U.S.C. § 2259(b)(1) (directing restitution for "the *full amount* of the victim's losses" (emphasis added)), and made mandatory, *see, e.g.*, *id.* § 2259(b)(4)(A). The goal was to provide "powerful protection and assistance" to the "[w]omen and children who are the innocent victims of domestic violence." 139 Cong. Rec. 1281 (Jan. 26, 1993) (Statement of Sen. Rockefeller). And according to Senator Biden, the Act was "the most victim-friendly bill [the Senate] ever passed." 140 Cong. Rec. 23,654 (Aug. 22, 1994).

2. *The Evolution of the Act's Restitution Provisions Makes Clear That Congress Did Not Intend To Impose A General Proximate-Cause Requirement.*

There is little guidance to be gleaned from the scant legislative history focusing directly on Section 2259. On the one hand, the Senate's Committee Report refers in passing to proximate causation. *See* S. Rep. No. 103-138, at 56 (1993) (noting that Section 2259 "requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime."). On the other hand, the Report gives a broader description of the statute just three sentences later: Section 2259, the Report provides, "requir[es] the court to order the defendant to pay the victim's expenses." *Id.* The Committee's brief discussion of Section 2259, accordingly, does not provide a clear indication of exactly how Congress intended causation requirements to apply to the enumerated categories of compensable losses.

Far more illuminating, however, is the drafting history of parallel restitution provisions in the Violence Against Women Act. The language Congress used in these parallel provisions evolved between the Act's early drafts and its final form. And tracing that evolution helps to clarify the intended scope of the "proximate result" limitation in Section 2259(b)(3)(F).

As originally drafted, the Violence Against Women Act contained multiple mechanisms for victim restitution. Although Section 2259 was not included in that first draft, two other restitution provisions were: 18 U.S.C. § 2248, which authorizes mandatory restitution for certain sex crimes, and 18 U.S.C. § 2264, which authorizes mandatory restitution for certain interstate domestic-violence crimes. *See* S. Rep. No. 101-545, at 4, 16–17 (1990). These two provisions developed in tandem, and in their final form they define "victim" and "the full amount of the victim's losses" in the same terms as Section 2259.

But it was not always so. As initially drafted, both Section 2248 and Section 2264 included *two* "proximate result" requirements among the categories of recoverable costs. Section 2248, for instance, defined the "full amount of the victim's losses" to include costs incurred for:

> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) any income lost by the victim *as a proximate result of the offense*;
>
> (D) attorneys' fees; and
>
> (E) any other losses suffered by the victim *as a proximate result of the offense*.

Id. at 4 (emphases added). Section 2264's definition was nearly identical. *See id.* at 16–17.

The original version of these provisions demonstrates that when Congress intends to limit restitution to proximately caused losses, it says so explicitly. Indeed, if Section 2259 looked like the initial draft of these parallel restitution provisions, this case could never have arisen. The additional "proximate result" limitation in the lost-income category makes absolutely clear that Congress's "selective inclusion and omission of causal requirements" was intentional, In re *Amy Unknown*, 701 F.3d at 768, and that the "proximate result" language was intended to apply only within the specified subsections. Had Congress meant the "proximate result" requirement in the final subsection to attach implicitly to all of the other subsections, Congress would not have said it twice.

The proximate cause language was deleted from the lost-income provisions of Sections 2248 and 2264 before Section 2259 was added to the Act in 1993. *See* S. Rep. No. 102-197, at 4–5, 18–19 (1991). As a

result, Section 2259, which was modeled on the earlier restitution provisions, has always contained only one "proximate result" requirement. *See* S. Rep. No. 103-138, at 5–6 (1993). And that fact underscores the point: Between the Act's initial draft and its passage, Congress *eliminated* one of the two "proximate result" requirements in the Act's mandatory-restitution provisions. It beggars belief that Congress's decision to *delete* the "proximate result" language in the lost-income subsection was a *sub silentio* decision to *incorporate* proximate-cause principles into all of the subsections. Instead, as this Court has recognized, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23–24 (1983).

Also revealing is the evolution of the parallel restitution provisions' definition of "victim." As originally drafted, Sections 2248 and 2264 defined the term as "any person who has suffered *direct* physical, emotional, or pecuniary harm as a result of a commission of a crime under this chapter." S. Rep. No. 101-545, at 5, 17 (emphasis added). Between the Act's initial draft and its passage, the "directness" requirement was dropped. Accordingly, when the statute was enacted all three mandatory-restitution provisions defined "victim" more broadly as "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. §§ 2248(c), 2259(c), 2264(c).

The elimination of the "directness" requirement tracks Congress's decision to retain the "proximate result" limitation only in the catch-all category of losses. Especially taken together, these changes are strong evidence that Congress did not intend to impose a general proximate-cause limitation on victims' recovery.

3. *Congress Knew How To Impose A General Proximate-Cause Requirement When It Wished To.*

A comparison to a restitution provision that expressly imposes a general proximate-cause limitation makes all the more clear that Congress intended no such limitation in Section 2259. Again, the Violence Against Women Act was part of the larger Violent Crime Control and Law Enforcement Act. In that larger Act, Congress also included the Senior Citizens Against Marketing Scams Act of 1994, Pub. L. 103-332, 108 Stat. 2082, which contains its own mandatory-restitution provision, 18 U.S.C. § 2327.

Unlike the restitution provisions in the Violence Against Women Act, Section 2327 of the Senior Citizens Against Marketing Scams Act contains a straightforward, unambiguous proximate-cause limitation on restitution. In point of fact, it contains two such limitations. First, the statute defines the term "victim" in accordance with 18 U.S.C. § 3663A(a)(2), which specifies that a victim is "a person *directly and proximately* harmed as a result of the commission of an offense for which restitution may be ordered." *Id.* § 2327(c). And second, it defines the "full amount of the victim's losses" as "all losses suffered by the victim as a *proximate cause* of the offense." *Id.* § 2327(b)(3) (emphasis added).

Section 2327 demonstrates that Congress knew how to impose a general proximate-cause requirement when it wished to. If Congress wanted to imbue Section 2259 with such a requirement, it could have done precisely what it did in Section 2327. But in Section 2259 Congress made a different choice. Instead of including a general provision for restitution of all proximately caused losses, Congress made a detailed list of the kind of costs victims can recover. It carefully explained that some costs are recoverable in all circumstances while others are recoverable only with a showing of proximate cause. This Court should be especially hesitant to "assume

that Congress has omitted from its adopted text requirements that it nonetheless intends to apply * * * when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

II. CANONS OF STATUTORY INTERPRETATION CONFIRM THAT SUBSECTION (F)'S "PROXIMATE RESULT" REQUIREMENT APPLIES ONLY TO SUBSECTION (F).

1. Even if the language itself were not plain, and even if the drafting history were unclear, numerous canons of statutory interpretation confirm that the proximate-cause requirement only applies to subsection (F). First, the rule of the last antecedent provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart*, 540 U.S. at 26. Also known as the rule of the nearest reasonable referent, *see* Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012), the canon is "the legal expression of a commonsense principle of grammar." *Id.* at 144.

This rule fits Section 2259 to a "T." "[A]s a proximate result of the offense" is a limiting phrase. Consistent with the rule of the last antecedent, as well as logic and grammar, that language modifies only the phrase it immediately follows, "any other losses suffered by the victim."

To be sure, "[l]ike all canons of interpretation, the rule of the last antecedent can be overcome by textual indication of contrary meaning." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1343–44 (2013). In *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U.S. 345 (1920), for example, the Court deviated from the rule where there were "special reasons" to construe limiting language to apply to both preceding phrases, *id.* at 348. The provision in question was a long sentence, separated only by commas, and uninterrupted by subsections. *See id.*

at 346–49. And the Court emphasized that its interpretation was necessary "to effectuate the general purpose of Congress" and avoid "assuredly unintended discrimination." *Id.* at 348–49.

But unlike the *Porto Rico* statute, Section 2259 contains nothing to justify tossing aside the rules of grammar and statutory interpretation. Quite to the contrary, Section 2259's structure makes clear that each subsection functions as a fully independent element. The provision opens with an introductory phrase ("[T]he term 'full amount of the victim's losses' includes any costs incurred by the victim for"), which is followed by elements that are individually lettered and separated by semicolons. Each of those elements completes the sentence the introductory phrase began. The bigger grammatical picture is thus entirely consistent: Each subsection is independent, and limiting language in one does not extend to the others. Moreover, unlike in *Porto Rico*, applying the rule to Section 2259 results in a reading that is more—not less—consistent with the statute's purpose because it provides fuller compensation for victims' losses.

2. Whereas the Fifth Circuit's construction of Section 2259 is consistent with grammar and established interpretative principles, Petitioner's construction runs afoul of a different canon of statutory interpretation—the presumption against surplusage. This long-standing rule provides that it is the Court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538–39 (1955)) (internal quotation marks omitted); *see also, e.g.*, *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "). Construing the statute as Petitioner does would create not one, but two

different superfluities in Section 2259's definition of the "full amount of the victim's losses."

First, if Petitioner were correct that Section 2259 simply "incorporates the traditional requirement of proximate cause," *United States* v. *Monzel*, 641 F.3d 528, 536 (D.C. Cir. 2011), subsection (F)'s explicit "proximate result" requirement would be completely superfluous. That is, the statute would have precisely the same meaning if that phrase were not in the statute at all. Congress's words should not be reduced to redundancy where a reading that gives them logical effect is readily available.

Second, if Petitioner were right that subsection (F)'s "proximate result" requirement implicitly extends to subsections (A)–(E), those subsections themselves would be wholly redundant. If Congress had simply said what it said in subsection (F)—that "the term 'full amount of the victim's losses' includes any costs incurred by the victim for * * * any * * * losses suffered by the victim as a proximate result of the offense," 18 U.S.C. § 2259(b)(3)(F)—nothing more would have been necessary to cover the five specific categories losses Congress went out of its way to enumerate. In fact, that is essentially what Congress did in Section 2327. *See id.* § 2327(b)(3) ("the term 'full amount of the victim's losses' means all losses suffered by the victims as a proximate result of the offense."). This Court should decline to adopt a reading that deprives not just one, but *five* statutory subsections of independent meaning.

3. In addition to rendering much of Section 2259 surplusage, Petitioner's reading also produces absurd results. Against the backdrop of a statute designed to fully compensate sex-crime victims for their losses, Petitioner advances an interpretation of Section 2259 that would preclude restitution for child-pornography victims whose images have been widely trafficked. That is because, as the district court in this case noted, it is essentially impossible to determine among literally thousands and thousands

of criminals who should pay for what share of a victims' losses. *See United States* v. *Paroline*, 672 F. Supp. 2d 781, 792–93 (E.D. Tex. 2009). So under Petitioner's reading, a child-pornography victim whose image has been possessed by only one defendant might receive full restitution for her losses. But as a practical matter, a victim like Amy, whose images have been traded among thousands of individuals, could never be fully compensated for the losses she has suffered.

"[A]bsurd results," of course, "are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Such an alternative interpretation of Section 2259 is readily apparent. By simply adhering to its plain text, no absurdity results.

4. And there is yet another canon of interpretation that supports the Fifth Circuit's straightforward reading of Section 2259. This Court has endorsed "the canon of construction that remedial statutes should be liberally construed" so as to effectuate their compensatory purpose. *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968). And Section 2259 is just such a statute. Enacted to expand restitution for sex-crime victims like Amy, Section 2259 should be read broadly so as to fully achieve that purpose.

5. Finally, this Court should reject Petitioner's attempt to rely on the rule of lenity. *See* Pet. Br. at 39–43. For starters, the rule applies only to penal statutes—and Section 2259 is not one of them. *See, e.g.*, *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (referring to the rule of lenity as "the canon of strict construction of criminal statutes"). But more importantly, the "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508–09 (2010) (internal citation and quotation marks omitted). Not so here.

What is plain from Section 2259's text is confirmed many times over in its "structure, history, and purpose." *Id.* Accordingly, even if the rule of lenity were relevant to this restitution statute, there is simply "no work for [it] to do." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013).

CONCLUSION

The Fifth Circuit's interpretation of Section 2259 is consistent with its plain text, its legislative history, and numerous canons of statutory interpretation. The Court should affirm.

Respectfully submitted,

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