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**In the United States Court of Appeals for the Ninth Circuit**

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SPENCER ELDEN,

*Plaintiff-Appellant,*

v.

NIRVANA, L.L.C.; UNIVERSAL MUSIC GROUP, INC.; THE DAVID GEFLEN COMPANY; GEFLEN RECORDS; MCA RECORDS, INC.; UMG RECORDINGS, INC.; KIRK WEDDLE; COURTNEY LOVE, As Executor of the Estate of Kurt Cobain, KRIST NOVOSELIC; DAVID GROHL,

*Defendant-Appellees.*

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On Appeal from the United States District Court  
for the Central District of California  
The Honorable Fernando M. Olguin  
District Court Case No. 2:21-cv-06836-FMO-AGR

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**BRIEF OF CHILD USA AND  
CANADIAN CENTRE FOR CHILD PROTECTION INC.  
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S  
APPEAL FOR REVERSAL OF THE DISTRICT COURT'S DISMISSAL**

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## DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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## **STATEMENT OF IDENTIFICATION AND INTEREST**

**CHILD USA:** CHILD USA is the leading national nonprofit think tank fighting for the civil rights of children. Its mission is to pair in-depth legal analysis with cutting-edge social science research to protect children, prevent future abuse and neglect, and bring justice to survivors. CHILD USA is interested in this case, because it will protect the expressive rights of children and make those who harm them through child sexual abuse materials (“CSAM”) accountable for the harm they cause.

CHILD USA engages in legal and social science research to determine the most effective public policies to protect children from sexual abuse and online exploitation and to ensure access to justice for victims. Distinct from an organization engaged in the direct delivery of services, CHILD USA produces evidence-based solutions and information needed by policymakers, organizations, courts, media, and society as a whole to increase child protection and the common good.

**Canadian Centre for Child Protection Inc:** Canadian Centre for Child Protection Inc. (“C3P”) is a Canadian charity dedicated to the personal safety of all children. C3P operates Cybertip.ca, Canada’s tipline to report online sexual exploitation of children. C3P developed Project Arachnid, which is a set of tools used to detect and facilitate the removal of images and videos over the Internet and dark web based on confirmed digital fingerprints of illegal child sexual abuse



content.<sup>1</sup> As of December 2022, over 18 million takedown notices have been sent through Project Arachnid. Project Arachnid also detects harmful-abusive content and sends removal notices to the electronic service providers (“ESPs”). Once a notice is sent, Project Arachnid re-crawls the offending URL every 24 hours, triggering subsequent removal notices until the content is no longer detected. Processing tens of thousands of images per second, Project Arachnid detects content at a pace that far exceeds traditional methods of identifying and addressing this harmful content. C3P works with twelve NGOs in eleven countries to assess CSAM detected by Project Arachnid. C3P also works with individual survivors, survivor advocacy groups, law enforcement agencies, and governments to identify online child exploitation, hold industry accountable, and assist policymakers in protecting children.

Hach Rose Schirripa & Cheverie, LLP’s attorneys believe in standing up for sexual abuse survivors and their families. The firm’s attorneys have litigated hundreds of cases in both state and federal courts through the United States and remain committed to protecting victims of wrongdoing. The firm’s interest in this case is directly correlated with its experience working with and supporting victims of sexual abuse and online exploitation.

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<sup>1</sup> See Project Arachnid website, <https://projectarachnid.ca/>.

Carol L. Hepburn is a private attorney who has litigated over forty-four years in both federal and state court. First as a state prosecutor, and then in matters of serious personal injury, family law, and sexual harassment, Ms. Hepburn has advocated for both child and adult survivors of sexual assault. She began representing survivors of CSAM crimes in 2008, and currently represents over 30 such clients. She supports her clients' interests in both litigation and in political and social advocacy efforts. Her interest in this case stems from her representation of CSAM survivors.

Amici's interests in this case are directly related to their work with and on behalf of victims of child sexual abuse and exploitation. Amici are experts on the proximate, immediate, and persistent harms borne by victims whose imagery is trafficked online and on the barriers to justice for victims.

CHILD USA, Canadian Centre For Child Protection, Inc., Hach Rose Schirripa & Cheverie, LLP, and Carol L. Hepburn file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. Appellant consents to the filing of this brief. Appellees have deferred providing consent pending the review of the instant brief.

Counsel for the Appellant did not author the brief in whole or in part. Neither Appellant nor Counsel for Appellant contributed financial support intended to fund the preparation or submission of this brief. No other individual(s) or organization(s)

contributed financial support intended to fund the preparation or submission of this brief.



## SUMMARY OF ARGUMENT

Since the Supreme Court's earliest jurisprudence recognizing that child pornography harms child victims<sup>2</sup>, Congress has attempted to stem the tide and provide redress to the victims. Despite these efforts, child sexual abuse and exploitation remains a pervasive and growing problem. Today's online, networked environment enables abusive imagery to spread to thousands, even millions of users in mere minutes. The harm extends beyond the creation of the child sex abuse material ("CSAM") which is already deeply traumatizing: Each time an image is redistributed, collected, or viewed the subject is revictimized. Congress passed Masha's Law, 18 U.S.C. § 2255, to provide a cause of action for victims of CSAM-related crimes to sue -- at any time -- those initially responsible for the exploitation as well as those who later multiply the harm by possessing and distributing the CSAM.

The present case involves significant allegations that Defendants-Appellees created an explicit image of Spencer Elden as a 4-month-old infant and that they profited from its redistribution in the past until today. Yet, the District Court erroneously concluded that because Mr. Elden's claim was beyond the statute of

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<sup>2</sup> While the term "Child Pornography" is codified in federal and state criminal laws, Amici will refer to it as child sexual abuse materials or child sexual abuse exploitation imagery hereafter as it is a more accurate description of the victimization depicted in such content.

limitations (“SOL”). The law applied by the Court below was the 10-year SOL imposed by federal law. The District Court interpreted the governing law to impose a 10-year limit from the time Mr. Elden discovered the image, 18 U.S.C. §2255(b), and ignored the ongoing harm of the distribution of his image to this day. This interpretation failed to take into account the science of sexual exploitation of children and the plain purpose of Masha’s Law, 18 U.S.C. §2255. The District Court also misconstrues the plain language of Masha’s Law, thereby contravening decades of well-established case law and its purpose. For these reasons, this Court should reverse the District Court decision so that Mr. Elden may proceed on his claims.

### **ARGUMENT**

#### **I. THE DISTRICT COURT’S INTERPRETATION OF MASHA’S LAW REPRESENTS A FUNDAMENTAL MISUNDERSTANDING OF THE NATURE OF INJURY CAUSED BY THE DISTRIBUTION OF CSAM**

The rise of the internet has facilitated a mass expansion of online CSAM. As online platforms hosting CSAM and users become more sophisticated, millions of victims find themselves suffering significant and long-term harms, because their images are forever being traded online. Masha’s law was passed to disrupt the distribution chain and to provide victims redress for their CSAM related injuries. By conflating the initial victimization with the ongoing distribution related injuries to find Mr. Elden’s Masha Law claims untimely, the District Court’s decision perpetuates the myth that CSAM is a victimless crime.

**A. Curbing the Distribution of CSAM Is Critical as the Market Place for CSAM Has Reached Epidemic Proportions , Leading to an Exponential Increase in Harm to Children**

The expansion of the internet and widespread use of mobile digital technologies together have facilitated an explosive growth in the online marketplace for the production and trafficking of CSAM. At any given time, there are at least one million child sex offenders searching for CSAM online.<sup>3</sup> Millions of individual users consume more than 15 million child sexual abuse images in a market currently valued between \$3 and \$20 billion dollars annually.<sup>4</sup> Unfortunately, there are no signs that the market is slowing down.

Before the digital age, CSAM could only be shared physically, thus making it risky to find, and costly to produce and duplicate. Today, the availability of encrypted messaging platforms, peer to peer networks, and the like, have made it

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<sup>3</sup> See Curbing the surge in online child abuse: The dual role of digital technology in fighting and facilitating its proliferation, 2, EUR. PARLIAMENTARY RSCH. SERV. (Nov. 2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EPRS\\_BRI\(2020\)659360\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EPRS_BRI(2020)659360_EN.pdf). Indeed, online exploitation and abuse of children has increased by 422% over the last 15 years. Federal Sentencing of Child Pornography: Production Offenses, 3, U.S. SENT'G COMM'N (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013\\_Production-CP.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013_Production-CP.pdf).

<sup>4</sup> See Michael H. Keller & Gabriel J.X. Dance, The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong?, NYTIMES.COM (Sep. 2019), <https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html?msclkid=531b2a24a55511ec9733999ed45d40bd>.

easier and cheaper for perpetrators to produce CSAM and to connect, collaborate and exchange such materials with individual users—and to do so with virtual anonymity.<sup>5</sup> Tragically, the demand for CSAM has reached epidemic proportions in recent years. As of 2018, there was a backlog of millions of suspected CSAM images and videos in need of review while police reported being overwhelmed by the increase in overall cases *and* the increased volume and severity of CSAM in each case.<sup>6</sup> The COVID-19 crisis created a “perfect storm” for CSAM to mushroom as children spent more, often unsupervised, time online. In 2020, 65.4 million images and video files of CSAM were reported to the National Center for Missing and Exploited Children’s (“NCMEC”) CyberTipline, the highest number of reports ever received in a single year.<sup>7</sup> Given the recent increases in online CSAM activity during the pandemic, the bottleneck of suspected CSAM requiring law enforcement review has likely expanded.

## **B. CSAM Victims Suffer Significant Short-and Long-Term Harms**

The trauma stemming from child sexual abuse is complex and individualized, and it impacts victims both in the short-term and throughout their

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<sup>5</sup> Id.

<sup>6</sup> Trends in online child sexual abuse material, ECPAT International (2018), <https://ecpat.org/wp-content/uploads/2021/05/ECPAT-International-Report-Trends-in-Online-Child-Sexual-Abuse-Material-2018.pdf>

<sup>7</sup> Overview, (2020), NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, <https://www.missingkids.org/gethelpnow/cybertipline>.



lifetimes.<sup>8</sup> Child sexual abuse takes a significant toll on victims' overall health, increasing the risk not only for depression, anxiety, substance abuse, post-traumatic stress disorder ("PTSD"), and suicidal ideation, but also for physical ailments such as high blood pressure and chronic illness.<sup>9</sup> The paradigm shift from tangible to digital CSAM has exacerbated these effects.<sup>10</sup> A victim's mere knowledge of the presence and distribution of their abusive imagery causes intense feelings of shame, humiliation, and powerlessness.<sup>11</sup> As explained by NCMEC, "[o]nce these images are on the Internet, they are irretrievable and can continue to circulate forever. The child is re-victimized as the images are viewed again and again."<sup>12</sup> Sadly, these

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<sup>8</sup> See generally, BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (Viking, 2014).

<sup>9</sup> See Fast Facts: Preventing Sexual Violence, CDC, NAT'L CENTER FOR INJURY PREVENTION AND CONTROL, DIV. OF VIOLENCE PREVENTION (last reviewed by the CDC on June 22, 2020), [https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences.html](https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences.html).

<sup>10</sup> See Von Weiler, J., Haardt-Becker, A., & Schulte, S. Care and treatment of child victims of child pornographic exploitation (CPE) in Germany, 16 J. SEXUAL AGGRESSION 211, 216 (2010).

<sup>11</sup> Id.

<sup>12</sup> Finkelhor & Mitchell, Child Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN (2005) [http://us.missingkids.com/en\\_US/publications/NC144.pdf](http://us.missingkids.com/en_US/publications/NC144.pdf).

feelings usually persist and even intensify over time over time.<sup>13</sup> The problem has taken on a new dimension as CSAM involves increasingly younger victims and is becoming more violent and graphic over time.<sup>14</sup>

In addition to the permanence of the imagery, CSAM victims are also traumatized by its reach. Many victims whose images have been distributed online experience debilitating anxiety about who has seen the images (*i.e.*, family members or coworkers, as well as the general public) and preoccupation with the context and motives of their viewing.<sup>15</sup> A difficult aspect of CSAM victims' ongoing revictimization is the knowledge that their images may be used to groom future victims as a way to normalize the abusive behavior.<sup>16</sup> Often, perpetrators strategically produce CSAM in which victims are seen smiling leading victims to worry that others will assume their enjoyment or implicate them in the abuse.<sup>17</sup> In

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<sup>13</sup> See The National Strategy For Child Exploitation And Prevention And Interdiction, US DOJ, 11 at D-12 (2010), <http://www.justice.gov/psc/docs/natstrategyreport.pdf> (finding that almost ninety-five percent of CSAM victims suffer lifelong psychological damage and may never overcome the harm, even after lifelong therapy).

<sup>14</sup> Id.

<sup>15</sup> Leonard, M.M., 'I did what I was directed to do but he didn't touch me': The impact of being a victim of internet offending, 16 J. OF SEXUAL AGGRESSION 249, 254 (2010).

<sup>16</sup> Id.

<sup>17</sup> See PALMER, T. & STACEY, L., JUST ONE CLICK: SEXUAL ABUSE OF CHILDREN AND YOUNG PEOPLE THROUGH THE INTERNET AND MOBILE PHONE TECHNOLOGY (Barkingside, UK: Barnardo's, 2013); Attorney General's

fact, it is common for victims to worry that they will be viewed as an active participant in their abuse, which in turn contributes to a range of psychological difficulties.<sup>18</sup> These worries are not entirely unjustified; indeed, the possession and viewing of CSAM enlarges the market and results in further exploitation and sexual abuse of children. See, e.g., United States v. Williams, 444 F.3d 1286, 1290 (11th Cir. 2006) (“Our concern is not confined to the immediate abuse of the children depicted in these images but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children.”).

Beyond physical and psychological injury, “[a]t a more fundamental level, child pornography victims’ rights of privacy and human dignity are violated when their images are circulated and viewed by others.”<sup>19</sup> The Supreme Court has recognized these privacy concerns from the outset of its child pornography

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Commission on Pornography, Final Report, 649, DOJ (1986) (footnotes omitted) (revealing that “[c]hild pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having ‘fun’ participating in the activity.”).

<sup>18</sup> Steel, J., et. al., Psychological sequelae of childhood sexual abuse: abuse-related characteristics, coping strategies and attributional style, 28 CHILD ABUSE & NEGLECT 785 (2004).

<sup>19</sup> Audrey Rogers, Child Pornography’s Forgotten Victims, 28 PACE L. REV. 847, 855 (2008); see also T. Christopher Donnelly, Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U. MICH L. REV. 295, 301 (1979).

jurisprudence. In New York v. Ferber, the Court stated that distribution of the material violates “the individual interest in avoiding disclosure of personal matters.” 458 U.S. 747, 759 n.10 (1982) (citing Whalen v. Roe, 429 U.S. 589, 598 (1977)). Congress has responded in kind, noting that pornographic images necessarily implicate the “privacy and reputational interests” of the children they depict. Child Pornography Prevention Act of 1996, H.R. 4123, 104th Cong. (1996) § 121(1)(7) (codified at 18 U.S.C. § 2241, et seq.). Congress further codified its stance on the harm caused by child pornography by passing the Adam Walsh Child Protection and Safety Act of 2006, in which it stated that “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.” Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (codified at 18 U.S.C. § 2251(2)(D) (2006)).

The fundamental right of human dignity not to be depicted in a degrading manner is recognized in contexts beyond the pornography arena.<sup>20</sup>

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<sup>20</sup> See e.g., Geneva Conventions III Relative to the Treatment of Prisoners of War, Art. 13–14 (1949) (establishing that prisoners of war and even enemy combatants are entitled to protection against “outrages on personal dignity, in particular humiliating and degrading treatment”); Nat’l Archives and Records Admin. v. Favish, 541 U.S. 157, 170 (2004) (holding that there is a “family members’ right to personal privacy with respect to their close relative’s death-scene images.”); Convention on the Rights of the Child, art 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

Importantly, these laws recognize that the existence of the image itself, separate from its creation, is harmful to victims and their families. Moreover, an image need not depict physical sexual abuse of a child for it to be the product of sexual exploitation. Indeed, even material that is not illegal can and does play a role in the offending cycle. This type of material, *i.e.*, “harmful/abusive material,” includes but is not limited to nude or partially nude images or videos of children that have become publicly available, whether altered or not.

A child cannot legally consent to participating in the creation of child pornography as a matter of law, but with the reality of the ongoing distribution of an image, the victim’s right to consent to future distribution needs to be protected. Even images that may not be abusive in their creation raise important questions regarding a right to consent in today’s digital world where any image is “primed for entry into the distribution chain” of underground child pornographers. U.S. v. Hotaling, 634 F.3d 725, 730 (2nd Cir. 2011).

In the current environment, children’s digital footprints can endure eternally, and can have a severe and negative impact on the victim’s development. Accordingly, laws are evolving to reflect the need to give victims a right to control their digital footprints and to be compensated for the harm done by those who distribute them. For example, in 2015, California enacted a bill that gives children

the right to request and obtain the removal of certain material from publicly available sources online.<sup>21</sup>

Masha's Law is a reflection of this growing movement to provide justice to victims of CSAM that is reflective of the full harm inflicted.

## **II. MASHA'S LAW WAS ENACTED TO REFLECT CONGRESSIONAL INTENT TO ADDRESS THE REVICTIMIZATION ASSOCIATED WITH THE DISTRIBUTION OF CSAM**

The legislative history of Masha's Law reveals its role in Congress's broad campaign to curtail the ever-growing threat of CSAM and to provide redress for its harms to victims of child sexual abuse and exploitation.<sup>22</sup> To shrink the market for CSAM, Congress understood the importance of imposing severe criminal penalties on all culpable persons along the distribution chain. That is precisely what Congress set out to do when it passed the Adam Walsh Child Protection and Safety Act of 2006, 109 P.L. 248, 120 Stat. 587, 624 (2006).

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<sup>21</sup> SB 568, Privacy Rights for California Minors in the Digital World (2013-2014); see also Susan Ross, California enacts Right to be Forgotten for Minors, DATA PROTECTION REPORT (Jan. 14, 2015) <https://www.dataprotectionreport.com/2015/01/california-enacts-right-to-be-forgotten-for-minors/>.

<sup>22</sup> Cong. Rec. S14195 (12-20-05) (statement Sen. Kerry) ("Our legislation is a small piece of a larger battle that we believe will stop would-be child predators and protect our children.").



Prior to 2006, Section 2255 provided a cause of action for “[a]ny person who, while a minor, was a victim of a violation of [an applicable section of title 18] and who suffers personal injury as a result of such violation.” 18 U.S.C. § 2255 (1998); see also St. Louis v. Perlitz, 176 F.Supp.3d 97, 99 (D. Conn. 2016) (“Congress has recognized that distribution of child pornography on the Internet inflicts an injury on the minor victims depicted in the pornographic material.”). Federal courts, however, had interpreted the language to restrict recovery to plaintiffs under 18 years old, even if their images were still being distributed into adulthood. Congress viewed this as an unacceptable defect in the law which the amendment was designed to correct.<sup>23</sup> In 2018, the statute of limitation for Masha’s Law was amended to remove the language “the right of action[’s] first accru[al]” as the triggering event to start the limitations period and replaced it with discovery of the violation or injury “that form the basis for the claim,” thereby furthering Congress’s intent to provide redress to victims of child sexual abuse and exploitation without reference to age. 18 U.S.C. § 2255(b).

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<sup>23</sup> See 152 Cong. Rec. S8012-02 (daily ed. July 20, 2006) (statement of Sen. Isakson) (“In researching this case, we found that young Masha, and many others like her who have been abused in their lives, could not even recover under the laws as they existed.”); Cong. Rec. S8028 (7-20-06) (statement Sen. Leahy) (“The Bill will also ensure that victims of child pornography whose images remain in circulation after they have turned 18 can still recover when those images are downloaded. The injuries do not cease to exist simply because the victim has turned 18. They continue and so should the penalties.”).



Masha’s law was designed to address the revictimization associated with the redistribution of CSAM, consistent with Congress’s understanding that “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse,” Pub. L. 109–248, title V, §501, July 27, 2006, 120 Stat. 623, § 2(D), and that “[t]he illegal production, transportation, distribution, receipt, advertising and possession of child pornography . . . is harmful to the physiological, emotional and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.” Pub. L. 109–248, title V, §501, July 27, 2006, 120 Stat. 623 § 1(A). It is a remedial statute designed to hold those who traffic in CSAM responsible over the long-term so that victims of these heinous crimes can continue to seek redress.

### **III. THE DISTRICT COURT’S MISREADING OF MASHA’S LAW CREATES A DANGEROUS PRECEDENT THAT IS INCONSISTENT WITH ITS REMEDIAL PURPOSE**

Despite a determination that Mr. Elden’s image fell within the federal statutory definition of CSAM, the District Court concluded that the statute of limitations for Masha’s Law barred Mr. Elden from proceeding on his claims—even though the image is still being distributed. The Court’s reasoning is flawed on several accounts: it ignores that each distribution of an illicit image inflicts a new injury; it conflates the terms “victim” and “injury,” and it fails to recognize that the injury that triggers the limitations period can occur regardless of Mr. Elden’s age.

**A. The District Court Ignores the Injuries Inherent in the Redistribution of CSAM**

In granting Defendants-Appellees' Motion to Dismiss, the District Court concluded that the limitations period extended, at the latest, to Mr. Elden's 28th birthday, even if Defendants continued to reproduce and distribute the album covering featuring the illicit image after that point. By re-defining "injury" as the "moment when Mr. Elden is victimized by Defendant's predicate offense," the District Court implies that victims are only injured, and therefore only eligible for relief under Section 2255, for the first violation of an enumerated predicate offense. Such a view undermines the law's fundamental purpose of providing victims redress for the harms associated with redistribution and contravenes decades of well-settled case law. See, e.g., Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002) ("Like a defamatory statement, each new publication of the [pornographic images of children] would cause new injury to the child's reputation and emotional well-being."); United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) ("The victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography."); United States v. Hardy, 707 F.Supp.2d 597, 613–14 (W.D. Pa. 2010) ("[T]he real issue is not whether Defendant has caused Amy harm—he has, because he circulated the images—but whether his doing so is a substantial factor in her overall harm . . .

[I]n this Court’s estimation, Amy has shown [as much] by a preponderance of the evidence . . .”). Such a reading also contravenes the settled science that shows that the harm of CSAM is not limited to its initial creation. To the contrary, the harm persists as long as the image is available online.

The District Court’s misreading ignores the fact that distribution, sale, advertising, and criminal acts related to CSAM, constitutes separate factual examples of the predicate statutes that provide for liability under 18 U.S.C. § 2255. If we apply the lower Court’s injury standard to the criminal context, criminal defendants would only be subject to punishment for the earliest action that is a violation of a child pornography statute and each subsequent violation could not sustain a criminal charge. Instead, child pornography statutes are violated separately by each prohibited use of the illicit material. Likewise, in the civil context, each and every violation of a predicate offense—transportation, reproduction, advertisement, promotion, distribution, provisioning, and receipt—is a distinct violation that necessarily inflicts a discrete injury upon the victim. United States v. Hargrove, 714 F.3d 371, 377 (6th Cir. 2013) (each possessor of child pornography contributes to the conduct that indisputably causes harm to the victims”) (Clay, C.J., concurring in part); Doe v. Boland, 698 F.3d 877, 881 (6th Cir. 2012) (“A child abused through a pornographic video might have one § 2255 claim against the [content’s] creator as soon as it is produced and another against the distributor who sells a copy of the

[content] twenty years later.”); The Eastern District of Virginia describes two types of harm victims experience:

“‘Type I’ which stem[s] from the direct abuse . . . and ‘Type II’ abuse which stems from the ‘knowledge of the dissemination and proliferation of the images of [the victim] at [the] times of greatest humiliation and degradation.’ . . . Type II trauma represents a chronic, toxic condition, the knowledge of which continuously works like corrosive acid on the psyche of the individual.”

United States v. Hicks, No. 1:09-CR-150, 2009 WL 4110260, at \*5 (E.D. Va. Nov. 24, 2009).

The court below states that “[a] statute that runs from the date of one’s reasonable discovery cannot be suspended indefinitely while a plaintiff is fully on notice that a known person does the same thing to him, in the same manner, for more than 10 years.” No. CV 21-6836 FMO (AGRx), 2022 WL 4079271, \*4 (C.D.Cal. 2022). Yet, this is precisely what the statute permits and indeed was intended to do. As long as distribution is ongoing, the 10-year statute of limitations should begin anew with each violation of a predicate offense. Thus, while it is undisputed that Mr. Elden has known about his photo for more than ten years, his image continues to be distributed every time an album or merchandise featuring the same is distributed. If the photo violates the child pornography statutes, as Mr. Elden alleges and the District Court accepts, each new distribution of the image is in statute and independently entitles Mr. Elden to restitution under 18 U.S.C. § 2255. Otherwise,

if accepted, the District Court's interpretation of injury will take us back to a time when CSAM was thought to be a victimless crime.

In summary, if the photo violates the child pornography statutes as Mr. Elden alleges, each new distribution of the image independently violates the child pornography statutes. This is not a case where an isolated offense took place over ten years ago and the Plaintiff is just now suing; this is a case where Defendants have repeatedly engaged in conduct that independently violates the applicable statutes. In the criminal context, each new distribution of the image, standing alone, would be sufficient to sustain a criminal charge. The same should be true of the civil context. Mr. Elden's Complaint even specifies that he is only suing for the new violations that have taken place between 2011 and 2021. Consequently, Mr. Elden's claim should not be time-barred under Masha's Law.

**B. The Statute Provides A Civil Remedy for Subsequent Injuries Without Regard to Age**

The language of 18 U.S.C. § 2255 evidences that the civil right of action it provides is available to "*any person* who, while a minor, was a victim of a violation of [certain statutes resulting in personal injury]" . . . , "*regardless of whether the injury occurred while such person was a minor.*" 18 U.S.C. 2255(a) (emphasis added); see also, Boland, 698 F.3d at 881. The express text belies any argument that the provision applies strictly to those under 18 years old. All that is required under the statute is that plaintiff be a minor when they are a victim of a sex crime and if

that element is met, the individual is allowed to recover for injuries based on the predicate offense, anytime.

An injury necessarily occurs with each violation of the predicate act—here, the reproduction and distribution of the Nevermind album cover—and that offense is ongoing to this day. It is of no consequence that the injuries are occurring while the Mr. Elden is an adult. See Doe v. Hesketh, 828 F.3d 159, 168, 171 (3rd Cir. 2016) (explaining that the text of Section 2255 is “consistent with Congress’s remedial scheme for child victims” which is to provide both compensation to victims and a measure of deterrence to those responsible for the creation and distribution of child pornography).

As explained above, the legislative history makes clear Congress’s intent to provide victims redress for the injuries arising from the redistribution of their CSAM when it amended the law in 2006. The lower court’s misreading of the statute should not “thwart the purpose of the over-all statutory scheme or lead to an absurd result.” Wilshire Westwood Assocs. v. Atl. Richfield Corp., 881 F.2d 801, 804 (9th Cir. 1989) (citing Brooks v. Donovan, 699 F.2d 1010, 1011 (9th Cir. 1983)). If the District Court’s logic were adopted, then every predator could simply wait for the 28-year clock to run and then distribute the illicit images with immunity.

## CONCLUSION

For the foregoing reasons, this Court should allow the Plaintiff-Appellant's claims to proceed. This Court should reverse the District Court's granting of Appellees' Motion to Dismiss.

Dated: December 9, 2022

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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