No. 12-7515

IN THE
Supreme Court of the United States

MARCUS ANDREW BURRAGE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Bifulco v. United States, 447 U.S. 381 (1980)..... 6

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Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 19

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) 29

Sherwood Bros., Inc. v. District of Columbia, 113 F.2d 162 (D.C. Cir. 1940) 25

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Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994) 23

Sykes v. United States, 131 S. Ct. 2267 (2011) 14

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United States v. Harris, 701 F.2d 1095 (4th Cir. 1983) 28

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United States v. Hayes, 589 F.2d 811 (5th Cir. 1979) 28

United States v. Houston, 406 F.3d 1121 (9th Cir. 2005) 28

United States v. Kearney, 672 F.3d 81 (1st Cir. 2012), *cert. dismissed*, 133 S. Ct. 1521 (2013) 24

United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011) 24

United States v. Lanier, 520 U.S. 259 (1997) 9

United States v. Main, 113 F.3d 1046 (9th Cir. 1997) 27

United States v. Marler, 756 F.2d 206 (1st Cir. 1985) 28

United States v. Martinez, 588 F.3d 301 (6th Cir. 2009) 28

United States v. McIntosh, 236 F.3d 968 (8th Cir. 2001) 27

United States v. Monnier, 412 F.3d 859 (8th Cir. 2005) 21

United States v. Monzel, 641 F.3d 528 (D.C. Cir.), *cert. denied*, 132 S. Ct. 756 (2011) 24, 26

United States v. O'Brien, 130 S. Ct. 2169 (2010)..... 14

United States v. Patterson, 38 F.3d 139 (4th Cir. 1994) 27

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United States v. Robinson, 167 F.3d 824 (3d Cir. 1999) 27

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United States v. Spinney, 795 F.2d 1410 (9th Cir. 1986).....26, 28

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United States v. Webb, 655 F.3d 1238 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1131 (2012) 28

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United States v. Yeaman, 194 F.3d 442 (3d Cir. 1999) 28

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Van Houten v. State, No. 50657-9-I, 2003 WL 22766074 (Wash. Ct. App. Nov. 24, 2003)..... 23

Watson v. United States, 552 U.S. 74 (2007) 14

STATUTES, REGULATIONS, AND RULES

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 ..... 4, 13, 14

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21 U.S.C. § 841(b)(1)(C) 1, 4, 5, 6, 13, 15, 19, 20, 25, 27, 28, 29

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18 U.S.C. § 924(c)(1) 14

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18 U.S.C. § 3553(e) 11

Sentencing Guidelines § 2K2.1(c) 29

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LEGISLATIVE MATERIALS

132 Cong. Rec. 22,991 (Sept. 11, 1986) 30

132 Cong. Rec. 26,436 (Sept. 26, 1986) 13

132 Cong. Rec. (Sept. 27, 1986):

p. 26,728 30

p. 26,731 30

p. 26,823 30

132 Cong. Rec. (Sept. 30, 1986):

p. 27,173 30

p. 27,177 30

p. 27,183 30

132 Cong. Rec. (Oct. 8, 1986):

p. 29,610 30

p. 29,624 30

132 Cong. Rec. 30,477 (Oct. 14, 1986) 13

132 Cong. Rec. 32,722 (Oct. 17, 1986) 30

ADMINISTRATIVE MATERIALS

United States Sentencing Comm'n:

Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (Nov. 2004), *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/index.cfm 10, 11

Report to the Congress: Federal Child Pornography Offenses (Dec. 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/index.cfm 13-14

Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Oct. 2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm 11, 13

Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Aug. 1991)..... 9, 11

OTHER MATERIALS

Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *in Benchmarks* 196 (1967)..... 3, 7

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 16, 17, 18, 22, 23, 26

Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf..... 10

Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003).....16, 19, 26, 27

Model Penal Code (1985)..... 27

Herbert L. Packer, *The Limits of the Criminal Sanction* (1968)..... 9

Restatement (Second) of Torts (1965)..... 18

Restatement (Third) of Torts: Liability for Physical & Emotional Harm (2010) 18

1 Paul H. Robinson, *Criminal Law Defenses* (1984) 16

INTEREST OF *AMICUS CURIAE*[1]

Amicus Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational criminal justice policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. Founded in 1991, FAMM currently has more than 50,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

This case is important to FAMM for two reasons: the specific statute at issue, and more general principles that apply to all mandatory minimum sentencing statutes. The court of appeals and the government have adopted an interpretation of 21 U.S.C. § 841(b)(1)(C) that departs from traditional understandings of causation-in-fact and of proximate cause. By doing so, they have increased the likelihood that individual defendants will be subjected to lengthy, mandatory, and essentially arbitrary prison sentences based on events for which they cannot properly be held responsible under the law.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief, and letters reflecting their consent were filed contemporaneously with this brief.

In addition to the opportunity to correct that harmful misinterpretation of the law, this case offers this Court an excellent vehicle to reaffirm the important role of the rule of lenity in the context of a particularly extreme mandatory minimum sentencing statute. As FAMM's members are keenly aware, the exact boundaries of the mandatory minimums that apply to particular conduct often have an even greater impact on individual defendants' lives and liberty than do the boundaries of the lesser offenses that would otherwise apply to that conduct, but that are subject to ordinary, discretionary sentencing. Where, as here, the government seeks an innovative and expansive interpretation of a mandatory minimum, FAMM has a strong interest in advocating for rigorous judicial scrutiny.

INTRODUCTION AND SUMMARY

I. The rule of lenity has an important role to play in the interpretation of mandatory minimum sentencing statutes and should be given special force in cases that involve them. The reasons for that approach fall into two categories. *First*, the costs of erroneously broad interpretations of mandatory minimums – both to individual liberty and to the sentencing system as a whole – are particularly high. The costs of erroneously narrow interpretations, by comparison, are low. *Second*, the likelihood of error in construing mandatory minimums is particularly high, because such statutes often do not result from a considered drafting process.

A. The most obvious cost of overreading a mandatory minimum provision is the cost that it imposes on the liberty of the individual who is erroneously sentenced to a longer (often much longer) prison term than a correct reading of the law would

permit. Errors of that kind offend the courts' "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *in Benchmarks* 196, 209 (1967). The aggravated offenses associated with mandatory minimums also impose a heightened stigma on the offender that should reflect a genuine legislative judgment rather than a mistake by an overzealous prosecutor or court.

In addition, mandatory minimums impose costs on the sentencing system by detracting from its fairness and proportionality. Errors in construing such statutes too broadly magnify those costs for no good reason. Even sentencing uniformity – the ostensible goal of mandatory minimums – often is poorly served by them, because they place enough power in the hands of prosecutors to invite inconsistent and arbitrary application. Applying the rule of lenity rigorously to such statutes reduces those systemic costs and ensures that they are incurred only when Congress has truly found them justified.

By contrast, construing a mandatory minimum too narrowly creates few problems that cannot be solved, or at least mitigated. Where a district court finds that the circumstances of a particular case justify a sentence as severe as the one prescribed by an inapplicable minimum, that court usually can impose an appropriate sentence in the exercise of its sentencing discretion. Moreover, where the courts err in narrowing a minimum further than Congress intended, the government is well situated to press for corrective legislation.

B. The risk of error is higher when courts interpret mandatory minimums because such statutes

often are written quickly and without due consideration. The Anti-Drug Abuse Act of 1986, which included the provision at issue here, provides a concrete example: It was passed as emergency legislation as a result of public concern about a small number of well-publicized deaths by overdose. In other cases as well, Congress has created mandatory minimum sentences that have enormous effects on future defendants with little consideration of their details. The rule of lenity provides a needed safeguard when those statutes turn out vague.

II. The rule of lenity should lead this Court to reverse the judgment of the court of appeals. Petitioner Burrage correctly argues that 21 U.S.C. § 841(b)(1)(C) should be read in his favor, even without the rule of lenity. If there is any residual doubt, however, lenity ought to dispose of it. A statute that provides for a decades-long sentence when "death . . . results from" drug use should not lightly be interpreted to eliminate the traditional requirements of cause-in-fact and proximate cause.

A. There is no doubt (or even dispute) that § 841(b)(1)(C) requires proof of causation-in-fact. Because the statute does not specify any particular standard for assessing causation, it should be read to incorporate the traditional common law requirement of but-for causation: the prohibited result would not have happened but for the defendant's conduct. Modern tort law has developed looser causation standards such as the "substantial factor" test, but this Court has been hesitant to depart from but-for causation even when interpreting civil statutes – much less criminal ones. In any event, the weight of authority holds that substantial-factor causation is a limited exception to ordinary but-for causation that

applies only in cases where multiple sufficient causes "overdetermine" the result of a particular harm. This case does not involve a jury finding of multiple sufficient causes – quite the contrary, the jury instructions did not ask whether Burrage's conduct was sufficient to cause death.

The "contributing cause" standard applied by the court of appeals is unmoored from the statutory phrase "death . . . results from." The government's suggestion in its opposition to certiorari that Burrage's conduct could be "combined" with the conduct of others to support a finding of but-for causation attempts to extend to criminal law a rule that has met with only limited acceptance even in its original context of tort law. That remarkable position would be unlikely to succeed even without invoking the rule of lenity. But as the government seeks to do all this without any grounding in the statutory text, lenity should be enough to decide the matter.

B. Section 841(b)(1)(C) also should be read to include the common law concept of proximate causation. Proximate cause is and should be read into every criminal statute unless Congress says otherwise, and Congress did not say otherwise here. The rule of lenity demands that Congress's silence be construed in favor of the criminal defendant, rather than against him.

ARGUMENT

I. THE RULE OF LENITY SHOULD BE APPLIED RIGOROUSLY TO MANDATORY MINIMUM SENTENCING STATUTES

A court may not "interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). That principle – called the "rule of lenity" when applied to construe a statute – dictates that "doubts in the enforcement of a penal code [be resolved] against the imposition of a harsher punishment." *Bell v. United States*, 349 U.S. 81, 83 (1955). Consistent with that purpose, the rule applies "not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *United States v. R.L.C.*, 503 U.S. 291, 306 (1992) (plurality opinion).[2]

There are particularly good reasons to apply the rule of lenity rigorously to statutes that, like 21 U.S.C. § 841(b)(1)(C), create aggravated offenses with mandatory minimum sentences. Those reasons come both from comparing the *costs* of error in favor of severity to the costs of error in favor of lenity and from the heightened *risk* of error in construing mandatory minimum provisions.

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[2] *See also Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("[T]he Court has made it clear that [the rule of lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (same).

A. The Rule of Lenity Helps Avoid the Costs of Overreading Mandatory Minimums

The costs of erroneously construing mandatory minimum sentencing provisions too broadly are especially high, and the costs of construing them too narrowly are especially low. These "interpretive asymmetries give the rule of lenity special force in the context of mandatory minimum provisions." *Dean v. United States*, 556 U.S. 568, 584-85 (2009) (Breyer, J., dissenting).

1. The most direct cost of reading a mandatory minimum too broadly is that individual defendants lose their liberty. Mandatory minimum provisions are, by design, severe. They often tie an additional prison sentence of years or (as here) decades to a single factual determination. Such provisions therefore speak to the core concern that has motivated courts to apply the rule of lenity for centuries: an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *in Benchmarks* 196, 209 (1967), *quoted in United States v. Bass*, 404 U.S. 336, 348 (1971); *see also Begay v. United States*, 553 U.S. 137, 154 (2008) (Scalia, J., concurring in the judgment) (advocating application of the rule of lenity to avoid "condemn[ing] a man to a minimum of 15 years in prison on the basis of . . . speculation").

Further, mandatory minimum provisions often are said to reflect (at least in theory) a moral judgment that particular conduct deserves harsher punishment. In our system of government, that type of judgment is reserved to the legislature. The rule of lenity ensures that criminal sentences actually reflect legislative judgment, rather than the views of

a court filling in the blanks. *See United States v. Granderson*, 511 U.S. 39, 69 (1994) (Kennedy, J., concurring in the judgment) ("'[b]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity,' and set the punishments therefor") (quoting *Bass*, 404 U.S. at 348); *see also R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and concurring in the judgment).[3]

Any criminal statute raises these concerns to some extent, but mandatory minimum provisions do so with particular urgency. Unlike other criminal laws, such provisions run counter to the principle that courts should "impose a sentence sufficient, but not greater than necessary," to accomplish the goals of criminal punishment, 18 U.S.C. § 3553(a), based on the facts of a particular case. A mandatory minimum is thus a congressional directive to ignore injustice in individual cases in light of a perceived need for greater deterrence or incapacitation across the board. Congress may choose to make that tradeoff (within constitutional bounds), but it is the duty of the courts to ensure that Congress has actually done so before imposing needlessly harsh punishments. *Cf. Busic v. United States*, 446 U.S. 398, 408-09 (1980) (refusing to interpret a sentencing enhancement based on the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible").

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[3] Justice Kennedy did not find it necessary to apply the rule of lenity to construe the mandatory minimum provision in *Granderson* but stated that he would have done so if the statute had not already been clear in the defendant's favor. *See* 511 U.S. at 69 (Kennedy, J., concurring in the judgment).

2. The adverse consequences of erroneously expanding mandatory sentencing beyond the limits of congressional intent do not affect individual defendants alone. Such errors strike at the foundations of the sentencing system by undermining "sentencing proportionality – a key element of sentencing fairness." *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment), *overruled by Alleyne v. United States*, 133 S. Ct. 2151 (2013). As the Sentencing Commission – quoted with approval by this Court – has explained: "'The "cliffs" that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.'" *Neal v. United States*, 516 U.S. 284, 291-92 (1996) (quoting United States Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* iii (Aug. 1991) ("*1991 Report*")).[4]

Further, the rule of lenity historically has been justified in part based on the "principle of legality" – the rule that conduct can be criminalized, and penalties authorized, only by legislative action, so "that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits." Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968); *see United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997). Mandatory minimum provisions raise that concern more than other criminal statutes, because they transfer sentencing

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[4] The Commission has further described "mandatory minimum [as] both structurally and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve." *1991 Report* 26.

discretion from the trial judge, "the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way," to "an assistant prosecutor not trained in the exercise of discretion." Anthony M. Kennedy, Address at the American Bar Association Annual Meeting at 5 (Aug. 9, 2003), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf.

Inconsistently exercised discretion means that in practice mandatory minimums fail to yield even *uniformity* in sentencing – the benefit that they are supposed to produce at the expense of individual justice and proportionality. The Sentencing Commission found in 2004 that "[r]esearch over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply." United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 89 (Nov. 2004) ("*Fifteen-Year Report*"), *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/index.cfm.[5] Earlier in the guidelines era,

> the Commission [had] reported that, among all offenders who engaged in conduct that qualified them for a mandatory minimum sentence, only

[5] The Commission found that there was "little empirical research exploring why enhanced penalties are sought in some cases and not in others," but noted that "[f]ield research has reported that defense counsel believe the existence of penalty enhancements that are applicable at the sole discretion of the government gives prosecutors tremendous bargaining power to encourage defendant cooperation and discourage zealous defense advocacy." *Fifteen-Year Report* 90.

> 74 percent were initially charged with a count carrying the highest mandatory penalty applicable to their conduct. Only sixty percent were ultimately convicted and sentenced at this penalty level or above.

See id. (citing *1991 Report* 56-58). Even after conviction, prosecutors have wide discretion to request "substantial assistance" departures from mandatory minimums. *See* 18 U.S.C. § 3553(e). In 2010, 25.8% of all offenders convicted of an offense carrying a mandatory minimum penalty were relieved of the penalty at least in part because of an exercise of this discretion.[6]

As a result, rigorous application of the rule of lenity to mandatory minimums promises to protect important rule-of-law values as well as the interests of individual defendants. Those values face a greater threat from mandatory minimums that have unclear boundaries and are uncertain in their application. Problems of overly discretionary and inconsistent application exist even for mandatory minimums that are "relatively straightforward." *Fifteen-Year Report* 89. Such problems are still worse where reasonable lawyers and judges disagree about the facts that may trigger a mandatory minimum sentence.

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[6] *See* United States Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 133 & fig. 7-8 (Oct. 2011) ("*2011 Report*"), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm. The 25.8% figure includes 18.5% who benefited from a substantial assistance motion alone and 7.3% who both benefited from such a motion and qualified for statutory "safety valve" relief.

3. By contrast, the costs of erroneously construing a mandatory minimum provision too narrowly are relatively low, both for individual cases and for the criminal justice system as a whole. In cases that fall outside the scope of a mandatory minimum, but that nevertheless feature aggravating circumstances similar to those that moved Congress to impose the minimum, a sentencing judge still has discretion (guided by § 3553(a) and by the sentencing guidelines) to impose a more severe sentence. As Justice Breyer explained in *Dean v. United States,* "an interpretive error on the side of leniency[] still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence . . . is not legislatively *required*." 556 U.S. at 584 (Breyer, J., dissenting).

Moreover, "an error that excludes (erroneously) a set of instances Congress meant to include . . . could lead the Sentencing Commission to focus on those cases . . . [and] make available to Congress a body of evidence and analysis that will help it reconsider the statute." *Id.* at 585. Those who bring actions under the criminal laws (the executive branch) have far greater access to those who create them (the legislative branch) than do those who defend against such actions (potential criminal defendants). In light of this practical reality, the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

B. The Risk of Courts Overreading Mandatory Minimums Is Particularly High

The risk of mistaking congressional intent also is unusually high in the case of mandatory minimum provisions, because they often do not originate from a

careful and considered drafting process. The process that led to passage of the Anti-Drug Abuse Act of 1986 – which created the "death . . . results from" provision of 21 U.S.C. § 841(b)(1)(C) – is a good example. The Act was hastily introduced in June 1986, shortly after the well-publicized overdose death of a popular athlete. *See infra* p. 30 & n.23. As the Sentencing Commission has explained, "the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically [led] Congress [to] bypass[] much of its usual deliberative legislative process. As a result, Congress held no committee hearings and produced no reports related to the 1986 Act." *2011 Report* 23-24 (footnote omitted).

The predictable result of addressing complex legal issues "on an emergency basis," 132 Cong. Rec. 26,436 (Sept. 26, 1986) (statement of Sen. Hawkins), was unclear language, even in critical provisions. In one example from the Act, Senator Levin pointed out that proposed language for a new capital sentencing provision left in doubt whether a particular fact was an element of the capital offense or whether its absence was a mere mitigating factor. *See id.* at 30,477 (Oct. 14, 1986) (statement of Sen. Levin) ("It simply goes to the point that that is what hearings are all about.").[7]

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[7] An example from another statute is the mandatory five-year sentence that Congress created in 2003 for knowing *receipt* of child pornography, while creating no mandatory minimum sentence for the "closely related offense" of possession. United States Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* 28 (Dec. 2012) (discussing the "sparse" legislative history available to explain this disparity and noting that "[n]o legislative findings, committee reports, or relevant floor statements by sponsors clearly reflect Con-

The Anti-Drug Abuse Act is, unfortunately, not the only criminal statute that imposes mandatory minimum sentences on the basis of language that could have used more consideration. Others recently considered by this Court include the "Delphic residual clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), which Justice Scalia has called a "drafting failure" that should be declared "void for vagueness," *Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting); and the "unclear" 30-year mandatory minimum for possessing a machinegun in furtherance of certain crimes, *United States v. O'Brien*, 130 S. Ct. 2169, 2176 (2010), to which this Court applied a five-factor test to determine whether it was meant as an offense element or as a sentencing factor. Even where Congress has spoken with relative clarity, its decisions in this area have been forcefully criticized as lacking forethought and deliberation.[8] A decision from this

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gress's reasons for the different penalties"), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/index.cfm.

[8] *See*, *e.g.*, *Dorsey v. United States*, 132 S. Ct. 2321, 2328 (2012) (describing the "strong[] critici[sm]" from the "[Sentencing] Commission and others in the law enforcement community" over "two decades" that led Congress to change the 100 to 1 ratio between mandatory minimum sentences involving crack cocaine and powder cocaine); *Watson v. United States*, 552 U.S. 74, 84 (2007) (Ginsburg, J., concurring in the judgment) (characterizing the Court's interpretation of 18 U.S.C. § 924(c)(1), under which "trading a gun for drugs" triggers a five-year mandatory minimum but "trading drugs for a gun" does not, as making "scant sense"); *Chapman v. United States*, 500 U.S. 453, 468 (1991) (Stevens, J., dissenting) (persuasively, though unsuccessfully, contending that "[t]he consequences of the majority's construction of 21 U.S.C. § 841 are so bizarre that I cannot believe they were intended by Congress").

Court reaffirming that the rule of lenity should be applied rigorously to mandatory minimums thus not only would protect strong interests in individual liberty, but also would provide needed clarity in the many close cases that arise under these statutes.

II. THE RULE OF LENITY SUPPORTS THE CONSTRUCTION OF 21 U.S.C. § 841(b)(1)(C) URGED BY THE PETITIONER IN THIS CASE

Petitioner Burrage ably sets forth in his brief the reasons why the jury instructions in this case cannot be reconciled with the best construction of 21 U.S.C. § 841(b)(1)(C). FAMM fully supports those arguments and agrees that this Court can and should reverse the judgment of the Eighth Circuit in this case without resorting to the rule of lenity. Part II of this brief gives additional reasons that, at the very least, the "death . . . results from" language of § 841(b)(1)(C) cannot be read to foreclose Burrage's position that the government was required to prove traditional causation in both the but-for and the proximate sense. As a result, the rule of lenity requires that the statute be read to incorporate those well-established requirements of the common law. The jury's finding that Burrage's sale of one gram of heroin "played a part" in the death of Joshua Banka from a mixed-drug overdose does not meet those requirements and therefore does not support Burrage's conviction of an aggravated offense with a 20-year mandatory minimum sentence.

A. The Statute Is At Least Ambiguous as to Whether the Government Must Prove But-For Causation

By its terms, § 841(b)(1)(C) imposes a causation requirement. The 20-year minimum sentence at

issue here applies only if "death or serious bodily injury results from the use" of a controlled substance. As the Solicitor General agreed in opposing certiorari, this language requires the government to prove (at least) that the controlled substance "was a cause-in-fact of the death." Opp. 16. The district court's instruction to the jury – that it need only determine that the heroin "played a part" in Banka's death to find petitioner liable for the aggravated offense, JA 241-42 – did not describe cause-in-fact as it is known by the criminal law.

1. "Causation-in-fact" is the requirement, common to tort and criminal law, that an action be a "factual cause" of a result before the actor can be held liable for that result. It is widely understood to require "but-for" causation – which is to say that the result would not have occurred without the cause. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 265 (5th ed. 1984) ("Prosser & Keeton"). Indeed, the two terms are largely treated as synonymous.[9] As this Court explained at the close of the last Term, "[i]t is . . . textbook . . . law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013) (quoting Prosser & Keeton § 41, at 265). That "is the background against which

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[9] *See*, *e.g.*, Wayne R. LaFave, *Substantive Criminal Law* § 6.4(a), at 466 (2d ed. 2003) ("LaFave") ("the defendant's conduct must be the 'but-for' cause (sometimes called the 'cause in fact') of the forbidden result"); 1 Paul H. Robinson, *Criminal Law Defenses* § 88(b), at 456 (1984) ("[I]t must be shown that the defendant's conduct physically caused the required result in the sense that the result would not have come about 'but for' his conduct. This is sometimes referred to as the 'cause in fact' requirement.") (footnote omitted).

Congress legislate[s]" in enacting any statute that creates civil or criminal liability, including § 841(b)(1); and, accordingly, common law but-for causation is "the default rule[]" that Congress "is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Id.*

Modern tort law recognizes a limited exception to this rule. In the "rare" case where "an injured party can prove the existence of multiple, *independently sufficient* factual causes," *id.* (emphasis added; internal quotation marks omitted) – so that all defendants would be absolved of tort liability if a strict "but-for" test were applied – a plaintiff may prevail by instead demonstrating that the defendant's conduct was a "substantial factor" in causing the harm. Prosser & Keeton § 41, at 267-68. Substantial-factor causation is a policy measure that responds to the problem of "overdetermin[ation]." *Nassar*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting).[10] Where multiple *sufficient* conditions for a result exist, none is a *necessary* condition. Thus, to avoid leaving an injured plaintiff without compensation, courts will treat one or more sufficient conditions as causes-in-fact.

Leading authorities support the application of the "substantial factor" test as an exception to traditional but-for causation only where multiple sufficient

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[10] The majority and the dissent in *Nassar* disagreed vehemently about whether the substantial-factor test should apply in cases of employment discrimination. But the dissent made clear its view that the substantial-factor test applies where "two forces create an injury each alone would be sufficient to cause." 133 S. Ct. at 2546 (Ginsburg, J., dissenting). Even in that civil, remedial context, no member of this Court suggested that the substantial-factor test should apply to alleged retaliation without proof that the discrimination was independently sufficient to give rise to adverse employment action.

conditions for a harm exist. The Second Restatement of Torts takes this view explicitly.[11] Prosser and Keeton similarly describe the multiple-sufficient-cause scenario as the "one type of situation in which [the but-for test] fails." Prosser & Keeton § 41, at 266. The highest courts of several states are in accord.[12]

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[11] Restatement (Second) of Torts § 432 (1965) ("(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent. (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."). The recently published Third Restatement takes a similar approach, *see* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 27 (2010), but appears to contemplate broader liability in at least some cases, *see id.* cmt. f. Whether or not this Court might find that broader approach persuasive in tort cases (though *Nassar* suggests otherwise), it has no place in criminal law. *See infra* pp. 19-21.

[12] *See*, *e.g.*, *Eversley v. State*, 748 So. 2d 963, 967 (Fla. 1999) ("Although deceiving at first glance, this is not a case where two causes, each alone sufficient to bring about the harmful result, operated together to cause the result. Therefore, the 'substantial factor' test does not apply."); *Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996) ("substantial factor" test does not substitute for but-for causation "*except* where two causes concur to bring about the event, and either one of them, operating alone, would have been sufficient to cause the identical result") (internal quotation marks omitted); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862-63 (Mo. 1993) (*en banc*) ("the 'but for' test for causation is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury"); *see also In re M.S.*, 896 P.2d 1365, 1385 (Cal. 1995) (Kennard, J., concurring) ("[C]onduct is deemed to be a 'cause in fact' of another's injury if either (1) the injury would not have occurred 'but for' the conduct, or (2) the conduct would have been sufficient to produce the injury in the absence of other independent forces operating concurrently.").

2. Even in the civil context, this Court has hesitated to incorporate "substantial factor" or "motivating factor" tests into federal law. For example, the Court has repeatedly rejected such innovative doctrines in cases where multiple factors (some permissible, some impermissible) combine to influence a decision subsequently challenged under anti-discrimination law. *See*, *e.g.*, *Nassar*, 133 S. Ct. at 2525; *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009) (reasoning that the ordinary meaning of the phrase "because of" connotes but-for causation); *Hartman v. Moore*, 547 U.S. 250, 260 (2006) ("If there is a finding that retaliation was not the but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind.").[13] Thus, even if § 841(b)(1)(C) were a tort statute, the government would face an uphill battle to show that the statute could impose liability without but-for causation.

In any event, § 841(b)(1)(C) is not a tort statute – it is a criminal one. That distinction is important because, "with crimes, . . . the consequences of a determination of guilt are more drastic," and it is therefore "arguable that a closer relationship between the result achieved and that intended or hazarded should be required." LaFave § 6.4(c), at 472.[14] Tort law, moreover, has a variety of features

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[13] *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) ("What we term 'but-for' cause is the least rigorous standard that is consistent with the approach to causation our precedents describe. . . . Any standard less than but-for . . . simply represents a decision to impose liability without causation.").

[14] State courts frequently acknowledge this point, most often in discussions of different tort and criminal standards for *prox-*

that mitigate the unfairness of asking a defendant to compensate the plaintiff for a result that would have occurred without the defendant's action. Those include mechanisms for allocating costs among multiple liable parties (contract); for shifting risk entirely (insurance); for avoiding duplicative judgments (joint and several liability); and for preventing recovery by a plaintiff who brings about his own injury (comparative fault). Petitioner has no comparable safeguards against an unjust result.

There thus is ample support for a reading of § 841(b)(1)(C)'s 20-year mandatory minimum provision that would require the government to prove traditional but-for causation beyond a reasonable doubt: that is, but for the use of drugs sold by the defendant, a drug user who died would have lived. Alternately, this Court might conclude that, in cases with multiple independently sufficient causes for a drug overdose, proof that a particular drug was a "substantial factor" in death or injury would suffice. Both of those standards are well-established in the law as tests for causation and are reasonable interpretations of the term "results from." Any argument that Congress meant to impose a more permissive

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imate causation. *See*, *e.g.*, *Campbell v. State*, 444 A.2d 1034, 1041 (Md. 1982) ("[T]he tort liability concept of proximate cause has no proper place in prosecutions for criminal homicide. . . . Tort law is primarily concerned with who shall bear the burden of loss, while criminal law is concerned with the imposition of punishment."); *People v. Kibbe*, 321 N.E.2d 773, 776 (N.Y. 1974) (recognizing that criminal standard of proximate cause "is greater than that required to serve as a basis for tort liability"); *Commonwealth v. Root*, 170 A.2d 310, 312 (Pa. 1961) ("Legal theory which makes guilt or innocence of criminal homicide depend upon such accidental and fortuitous circumstances as are now embraced by modern tort law's encompassing concept of proximate cause is too harsh to be just.").

test, however, would be "based on no more than a guess as to what Congress intended," *Ladner*, 358 U.S. at 178, and therefore inconsistent with the rule of lenity.

3. The jury instruction given in this case, and approved by the court of appeals, was that the heroin Banka bought from Burrage needed only to be a "contributing cause" of Banka's death, which meant only that it must have "played a part" – however minor – in that death. *See* JA 59-60, 241-42. The court of appeals took this formulation from its earlier opinion in *United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), which in turn appears to have borrowed the "played a part" language from the definition of "contributing cause" in *Black's Law Dictionary*. *See id.* How the court of appeals derived the "contributing cause" standard from the actual statutory language – which requires a "death" that "results from" use of drugs – is wholly unclear from either *Burrage* or *Monnier*.

Nor was there any basis in precedent for the "played a part" instructions. Confronted in *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010), with apparently identical jury instructions – that the use of a drug "need not be the primary cause of death or serious bodily injury," but "must at least have played a part in the death or in the serious bodily injury," *id.* at 947 – Judge Posner remarked that "[n]o case ha[d] approved the language" of the instruction. *Id.* at 950. That was true in 2010, when *Hatfield* was decided, and it certainly was true 24 years earlier, when Congress enacted § 841(b)(1). So far as we can tell, then, the standard under which Burrage was convicted and sentenced does not have its origin in any of the traditional tools of statutory construction. The rule of lenity (and the closely related principle of

legality) should have prevented the court of appeals from inventing it.

4. In his opposition to the petition for certiorari, the Solicitor General defended the judgment of the court of appeals on broader grounds than the court itself gave. He argued that

> [t]he law has long understood how to address the conduct of multiple actors whose "combined conduct, viewed as a whole, is a but-for cause of the [harm]": When "application of the but-for rule to [each of the actors] individually would absolve all of them [of liability], the conduct of each is a cause in fact of the [harm]."

Opp. 16 (quoting Prosser & Keeton § 41, at 268) (alterations added in government's brief). Calling this formula something that courts have "long understood" is a considerable overstatement. The quotes in the above excerpt are from Prosser & Keeton § 41, at 268, which is the only authority the government cites for its argument. Those authors caution, however, that, as of the time they published the fifth edition of their casebook in 1984, "*no judicial opinion* ha[d] approved this formulation," though they believed the reported cases could be reconciled with it. *Id.* at 268 n.40 (emphasis added).[15] That was the state of the law in 1986, when Congress enacted the statutory language here.

In the intervening 29 years, it does not appear that Prosser and Keaton's formulation has been applied to determine liability in a single criminal case. In the

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[15] It is indeed unclear from the treatise whether Prosser and Keeton even meant their proposed formula to apply outside the multiple-sufficient-causes scenario, which they had earlier described as the "one type of situation" in which traditional but-for causation failed to work properly. *See supra* p. 18.

tort context, the Sixth and Tenth Circuits explicitly have rejected the standard in diversity cases, holding that there *cannot* be liability on a combined-conduct theory without proof that a particular defendant's conduct would independently have been sufficient to cause a plaintiff's harm. *See In re Bendectin Litig.*, 857 F.2d 290, 310-11 (6th Cir. 1988) (applying Ohio law: "plaintiffs . . . still have to prove 'but for' causation rather than some weaker . . . standard"); *Menne v. Celotex Corp.*, 861 F.2d 1453, 1459-61 & n.9 (10th Cir. 1988) (applying Nebraska law: refusing to apply the test on the ground that it was a deviation from the common law that Nebraska had not "adopted").[16]

The combined-conduct theory of causation has been considered in a handful of tort cases, but applied in few. It has gained a foothold primarily in the context of asbestos cases, where several state courts have found defendants liable where a plaintiff may have become ill as a result of exposure to the products of multiple manufacturers.[17] To the extent these cases

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[16] *See also Van Houten v. State*, No. 50657-9-I, 2003 WL 22766074, at *1-2 (Wash. Ct. App. Nov. 24, 2003) (unpublished) (judgment noted at 119 Wash. App. 1027) (rejecting a jury instruction based on the "combined cause" language from Prosser & Keeton because it was "not an accurate statement of the law" and "obliterate[d] the necessary link between negligence and causation").

[17] *See*, *e.g.*, *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858-60 (Iowa 1994) (permitting proof of proximate cause based on "a reasonable inference of exposure to a defendant's asbestos-containing product, coupled with expert testimony regarding asbestos fiber drift and the cumulative effects of exposure to asbestos") (internal quotation marks omitted); *ACandS, Inc. v. Asner*, 686 A.2d 250, 259-60 (Md. 1996) (discussing problems of proof in a multiple-manufacturer asbestos case).

do not require proof that a particular manufacturer's product independently could have caused a plaintiff's injury, they are best explained as attempts "to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis," *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003), and do not support loosened causation requirements in criminal law.[18]

A theory of causation that would permit the government to imprison Burrage for 20 years on the ground that his conduct was one of "multiple factors [that] caused Banka's death," Opp. 17 – without proving that Burrage's unlawful conduct was either a necessary *or* a sufficient condition for Banka's death

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[18] Two circuit courts recently have applied a combined-conduct standard of causation in cases involving statutory awards of restitution for child pornography. *See United States v. Hargrove*, 714 F.3d 371, 373-75 (6th Cir. 2013); *United States v. Kearney*, 672 F.3d 81, 98 (1st Cir. 2012), *cert. dismissed*, 133 S. Ct. 1521 (2013). Those courts were motivated by a desire to comply with "the congressional purpose," manifested in 18 U.S.C. § 2259, "of ensuring full compensation of losses for the victims of child pornography distribution and possession." *Kearney,* 672 F.3d at 99; *accord Hargrove*, 714 F.3d at 375. Thus, although *Kearney* and *Hargrove* were criminal cases, their adoption of a relaxed tort-law standard for causality was grounded in the same underlying purpose of compensation as the tort cases from which that standard derived. They represent, moreover, the minority view. *See*, *e.g.*, *United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir.) ("Monzel's possession of Amy's image . . . was not 'sufficient in itself' to produce all of [her injuries], nor was it 'essential' to all of them. . . . Monzel's possession of a single image of Amy was neither a necessary nor a sufficient cause of all of her losses."), *cert. denied*, 132 S. Ct. 756 (2011); *accord United States v. Aumais*, 656 F.3d 147, 154-55 (2d Cir. 2011); *United States v. Kennedy*, 643 F.3d 1251, 1264 (9th Cir. 2011). The Court recently granted certiorari to resolve this split. *See Paroline v. United States*, No. 12-8561 (cert. granted June 27, 2013).

– would be an unprecedented innovation in the criminal law. There is no reason for this Court to assume that Congress had such a theory in mind when it enacted § 841. In these circumstances, the rule of lenity forecloses the government's argument that "causation in part" is enough.

B. The Statute Is At Least Ambiguous as to Whether the Government Must Prove Proximate Causation

Section 841(b)(1)(C) also is at least ambiguous concerning whether the government must prove that the drug distributed by a defendant was the proximate cause of a death. There is no dispute that the jury here was not asked for such a finding.

1. The court of appeals – along with the other circuit courts that have sided with the government on this issue – determined that § 841(b)(1)(C) did not necessitate a finding of proximate cause because its requirement that "death . . . result[] from the use" did not explicitly demand one. That rule overlooks the point that "statutory drafting occurs against a backdrop not merely of structural conventions of varying significance, but of traditional treatment of certain categories of important facts." *Jones v. United States*, 526 U.S. 227, 234 (1999); *see also Sherwood Bros., Inc. 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"). That rule applies here because, under the common law, proximate causation is a fundamental requirement for *all* crimes.

Proximate cause is "causation substantial enough and close enough to the harm to be recognized by law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704

(2004). It is a term used "to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) – "shorthand" for the concept that "not all factual causes contributing to an injury should be legally cognizable causes," because, "'[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond,'" *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642 (2011) (plurality opinion) (quoting Prosser & Keeton § 41, at 264).

So understood, proximate cause is a fundamental requirement of criminal statutes. *See* LaFave § 6.4, at 464 ("[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."). Proximate cause is so enshrined in the structure of criminal law that it often is treated not as an element of any particular offense, but as a "bedrock rule . . . that a defendant is only liable for harms he proximately caused." *Monzel*, 641 F.3d at 535 (collecting sources from both tort and criminal law).[19]

For this reason, courts frequently presume that criminal statutes require proof of proximate cause, even in the absence of statutory language confirming the requirement. *See*, *e.g.*, *id.* at 536 (holding that proximate cause applies in the "absence of contrary

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[19] *Accord Aumais*, 656 F.3d at 153; *see also United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986) ("A basic tenet of criminal law is that the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury.").

direction" from Congress) (internal quotation marks omitted); *United States v. Main*, 113 F.3d 1046, 1050 (9th Cir. 1997) (finding it irrelevant that the statute prohibiting involuntary manslaughter "does not expressly mention proximate cause" because that concept is "implicit in the common understanding of the crime"). Respected commentators also have strongly defended the rule that proximate cause is and should be an element even of so-called "strict liability" offenses such as felony murder.[20]

2. As the court of appeals and the Solicitor General have noted, there is circuit authority that concludes that § 841(b)(1)(C)'s "death . . . results from" provision does not incorporate proximate cause as an element of the offense. *See* JA 58 & n.4; *see also* Opp. 12 (collecting cases). That authority is strikingly unpersuasive. Each case that has reached this conclusion relies on nothing more than the "plain language" of § 841(b)(1)(C) and the decisions of other courts of appeals on the same issue.[21] Equally

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[20] *See*, *e.g.*, Model Penal Code § 2.03 explanatory note, p. 26 (1985) (describing proximate causation, in the context of "strict liability offenses," as "a minimal protection against the limitless extrapolation of liability without fault"); LaFave § 6.4(h), at 494-95 ("It has sometimes been claimed, perhaps because the felony-murder and misdemeanor-manslaughter rules border on strict liability, that the only ca[us]al relationship which must be established in such cases is cause-in-fact, which ordinarily only requires proof that but for the defendant's acts (here the felony or misdemeanor) the harm would not have occurred. . . . This is not so.").

[21] *See*, *e.g.*, *United States v. De La Cruz*, 514 F.3d 121, 137 (1st Cir. 2008) (relying on "the language of the statute" and decisions of other courts); *United States v. Robinson*, 167 F.3d 824, 830-31 (3d Cir. 1999) (similar); *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994) ("plain language" alone); *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001) ("plain

striking is another fact: Except for the Eighth Circuit itself, each of the circuits to adopt an interpretation of § 841(b)(1)(C) that excludes proximate cause – purportedly based on its "plain language" – has interpreted similar language in at least one other statute to incorporate a proximate-cause requirement.[22]

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language" and other decisions); *United States v. Houston*, 406 F.3d 1121, 1124 (9th Cir. 2005) (similar); *United States v. Webb*, 655 F.3d 1238, 1250-54 (11th Cir. 2011) (per curiam) (similar), *cert. denied*, 132 S. Ct. 1131 (2012).

[22] *See*, *e.g.*, *United States v. Marler*, 756 F.2d 206, 216 (1st Cir. 1985) ("common law meaning" dictates that "if death results" means that defendant may be held liable for deaths "proximately caused by his criminal conduct" – those that are "foreseeable and naturally result") (internal quotation marks omitted); *United States v. Yeaman*, 194 F.3d 442, 457 (3d Cir. 1999) (plain meaning of "harm that resulted" requires showing of causation akin to "reasonabl[e] foreseeab[ility]"); *United States v. Harris*, 701 F.2d 1095, 1101 (4th Cir. 1983) ("if death results" requires finding that "death ensued as a proximate result" of the defendant's actions); *United States v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1979) (same as *Marler*); *Spinney*, 795 F.2d at 1415-16 (9th Cir.) (construing "misdemeanor resulting in death" to require "pro[of] that the defendant's conduct was the legal or proximate cause of the resulting injury"); *United States v. Woodlee*, 136 F.3d 1399, 1405-06 (10th Cir. 1998) ("if bodily injury results" requires showing that "injury was a foreseeable result" of the defendant's conduct); *United States v. Williams*, 51 F.3d 1004, 1012 (11th Cir. 1995) ("[i]f death resulted" element satisfied where defendant "put into motion" a chain of events that contained an "inevitable tragic result") (internal quotation marks omitted). The Second, Sixth, and Seventh Circuits, which have not addressed whether § 841(b)(1)(C) requires proximate cause, also have concluded that similar language in other statutes does incorporate such a requirement. *See United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976) ("We find the principle of proximate cause embodied in [18 U.S.C.] § 241 through the phrase 'if death results.'"); *United States v. Martinez*, 588 F.3d 301, 317-19 (6th Cir. 2009)

3. This Court's recent decision in *CSX Transportation, Inc. v. McBride* is the exception that proves the rule. There, this Court held that the Federal Employers' Liability Act ("FELA"), which makes railroads liable for injuries to their employees "'resulting in whole or in part'" from the railroad's negligence, does not incorporate common law proximate causation. 131 S. Ct. at 2634 (quoting 45 U.S.C. § 51). Instead, FELA permits liability for negligence that "played any part . . . in . . . causing [an] injury." *Id.* at 2641 (internal quotation marks omitted; alterations in original).

McBride rejected the contention that FELA incorporated common law proximate cause for three reasons: (1) because FELA's unusual "resulting in whole or in part" language indicated Congress's intent to depart from common law standards, *see id.* at 2636; (2) because Congress had intended to permit broad recoveries for employees engaged in the "exceptionally hazardous" railroad business in the early twentieth century, *id.*; and (3) because this Court's earlier decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), was entitled to *stare decisis* effect, *see* 131 S. Ct. at 2640-41. No similar concerns are present here. If anything, it would be odd to give the unadorned term "results" of § 841(b)(1)(C) the same meaning as the unusual phrase "resulting in whole or in part."

4. Finally, to the extent that it is relevant, the legislative history of § 841(b)(1)(C) contains no

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("[P]roximate cause is the appropriate standard to apply in determining whether a health care fraud violation 'results in death.'"); *United States v. Walls*, 80 F.3d 238, 241 (7th Cir. 1996) ("resulting in death" under Sentencing Guidelines § 2K2.1(c) requires a finding that death was a "foreseeable" result).

indication whatsoever that Congress meant to depart from the general rule that proximate cause is an element of any crime that involves bringing about a prohibited result. Instead, that history shows that Congress was uniquely occupied with cases that presented no particular problems of proximate cause: overdose deaths of popular athletes from use of a single drug.[23] Accordingly, here the text is not only

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[23] *See*, *e.g.*, 132 Cong. Rec. 22,991 (Sept. 11, 1986) ("The tragic death of Maryland basketball star Len Bias underscored the reality of drug use on our college campuses.") (statement of Rep. Waxman); *id.* at 26,728 (Sept. 27, 1986) ("[I]t took the tragic and unnecessary deaths of two promising young athletes to finally inspire this Nation to act on the drug problem.") (statement of Sen. Bingaman); *id.* at 26,731 ("S. 2787 also imposes prison terms of 20 years to life for drug trafficking where, as in the Len Bias case, death results.") (statement of Sen. D'Amato); *id.* at 26,823 ("[t]he American people are tired of hearing about athletes dead from overdoses") (statement of Sen. Hollings); *id.* at 27,173 (Sept. 30, 1986) ("Due to the recent death of several well-known Americans, including Len Bias, drug abuse has come to the forefront of public concern.") (statement of Sen. Bradley); *id.* ("Recent events have highlighted the scope and seriousness of the drug problem and dramatized the need for swift and forceful action. Athletes like Len Bias and Don Rogers have lost their lives in the growing epidemic of cocaine abuse.") (statement of Sen. Kennedy); *id.* at 27,177 ("The deaths of several well-known athletes have convinced everyone that the consequences of illicit drug use can be fatal or disabling.") (statement of Sen. Dodd); *id.* at 27,183 ("And this summer, the people of Boston grieved as a star player who had just signed with the Boston Celtics, Len Bias, lost his life to an overdose of cocaine. So we all know that there is a serious problem with drug addiction in our society.") (statement of Sen. Kerry); *id.* at 29,610 (Oct. 8, 1986) ("The death of Len Bias, a promising young athlete at the University of Maryland, focused our attention on drug abuse among athletes.") (statement of Rep. Florio); *id.* at 29,624 ("The deaths of prominent athletes due to drug use . . . have all raised this issue to the national spotlight.") (statement of Rep. Daub); *id.* at 32,722 (Oct. 17, 1986) ("Unfortunately,

the best, but also the only evidence of Congress's intent with regard to proximate cause. Because the text is silent on that question, the default presumption is dispositive.

In sum, even before taking the rule of lenity into account, this case can be resolved by the "fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones*, 526 U.S. at 234. At best, the government's contrary theory is open to serious doubt, and in a criminal case "doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 348. This Court should follow the rule of lenity and reject the government's argument that petitioner should spend 20 years in prison when Congress has "not clearly prescribed" that punishment. *Santos*, 553 U.S. at 514 (plurality opinion).

CONCLUSION

The court of appeals' judgment should be reversed.

I guess, it took the very widely publicized death of basketball star, Len Bias, and football star, Don Rogers, to bring the issue to where it is now, that is, the No. 1 domestic concern of the American people.") (statement of Rep. Oxley).

Respectfully submitted,

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