No. 12-7515

In the Supreme Court of the United States

MARCUS ANDREW BURRAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Section 841(b)(1)(C) of Title 21 of the United States Code provides an increased sentencing range when "death * * * results from the use of [a controlled] substance" trafficked by a defendant. The questions presented are as follows:

1. Whether the defendant may be convicted under the "death results" provision when the use of the controlled substance was a "contributing cause" of the death, as the jury was instructed in petitioner's case.

2. Whether the defendant may be convicted under the "death results" provision without separately instructing the jury that it must decide whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense.

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OPINION BELOW

The opinion of the court of appeals (J.A. 52-70) is reported at 687 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2012. A petition for rehearing was denied on September 13, 2012 (J.A. 26). The petition for a writ of certiorari was filed on November 27, 2012, and was granted on April 29, 2013, limited to questions one and two presented by the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on one count of distributing heroin and one count of distributing heroin whose use resulted in death,

both in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). J.A. 40-41. The district court sentenced him to concurrent terms of 240 months of imprisonment on each count. J.A. 42. The court of appeals affirmed. J.A. 52-70.

1. A provision of the Controlled Substances Act (CSA), 21 U.S.C. 841(a)(1), makes it "unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 841(b) in turn prescribes "[p]enalties" for violations of Section 841(a)(1) based on the type and quantity of the controlled substance, other offense characteristics, and the offender's criminal history. As relevant here, Section 841(b)(1)(C) provides that, "[i]n the case of a controlled substance in schedule I or II" of the CSA, an offender "shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life." The latter provision is often referred to as the "death results" provision, as are materially identical provisions in 21 U.S.C. 841(b)(1)(A)-(B) and 960(b)(1)-(3) that provide the same sentencing ranges (but nominally pertain to larger quantities of Schedule I and II controlled substances, or to international drug trafficking).

Heroin is in Schedule I, the most restrictive under the CSA. 21 U.S.C. 812(c), Schedule I(b)(10). Like all Schedule I substances, heroin "has a high potential for abuse," it "has no currently accepted medical use in treatment in the United States," and "[t]here is a lack of accepted safety for [its] use * * * under medical supervision." 21 U.S.C. 812(b)(1). Schedule II substances, such as cocaine (see 21 U.S.C. 812(c), Schedule II(a)(4)),

are also subject to the "death results" provision. They likewise have a high potential for abuse that "may lead to severe psychological or physical dependence," though they have currently accepted medical uses. 21 U.S.C. 812(b)(2).[1] Congress enacted the original Schedules and delegated authority to the Attorney General to add and reschedule controlled substances. See 21 U.S.C. 811-812.

The "death results" provision was not part of Congress's original enactment of the CSA as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. In particular, Section 401 of the CSA, now codified at 21 U.S.C. 841, made it a crime to distribute a controlled substance, and established penalties based on the type and quantity of the controlled substance involved and the offender's criminal history, but it prescribed no enhanced penalties relating to death or serious bodily injury. That was so even though Congress had enacted the law partly out of concern that "hard narcotics and opiates" were "providing serious addiction or abuse problems" "approaching epidemic proportions" and that "a leading cause of death among teenagers * * * in many major metropolitan areas [was] overdosage of heroin." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 4, 6 (1970).

By 1986, Members of Congress believed "the drug problem in America" remained a "crisis and a plague" even after passage of the CSA and that stronger penalties were warranted for traffickers in controlled sub-

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[1] Schedule III controlled substances are also subject to an analogous "death results" provision, 21 U.S.C. 841(b)(1)(E)(i)-(ii), though its sentencing consequences are much less substantial than those of the Schedule I and II "death results" provisions. Schedule IV and V substances have no corresponding "death results" provision. See 21 U.S.C. 841(b)(2)-(3).

stances whose use resulted in death. 132 Cong. Rec. 26,453 (1986) (statement of Sen. Mattingly) (internal quotation marks omitted); see, *e.g.*, *ibid.* (noting the high-profile death of basketball star Len Bias from a drug overdose and the "national outcry" for efforts to prevent further drug-related deaths); *id.* at 27,161 (statement of Sen. DeConcini) (advocating "extremely stiff penalties" as a way to "send[] the clear message" that "we are no longer going to tolerate" "the insidious business of drug trafficking," especially where it results in "death or serious bodily harm"). Congress accordingly enacted the Anti-Drug Abuse Act of 1986, which established the "death results" provision. Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2. Although Congress has since amended Section 841(b)(1) numerous times, it has left the "death results" provision undisturbed.[2]

Today, overdoses of Schedule I and II substances—especially cocaine and opiates including heroin—remain a significant cause of death in the United States: According to the National Center for Injury Prevention and Control (one of the Centers for Disease Control and Prevention), from 1999 to 2010, at least 80,883 deaths in the United States resulted from overdoses involving illicit Schedule I or II controlled substances. The Center has also found that during that period, 125,895 deaths

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[2] See Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, § 2, 110 Stat. 3807; Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, Div. E, § 2, 112 Stat. 2681-759; Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. No. 106-172, § 3, 114 Stat. 9; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 3005, 116 Stat. 1805; Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. No. 110-425, § 3, 122 Stat. 4828; Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2, 4, 124 Stat. 2372.

resulted from overdoses involving prescription opioids (many of which, even if obtained through legitimate prescriptions, would be Schedule II controlled substances). In 2010, 3036 overdose deaths involved heroin, which translates to approximately 1 death for every 118 users dependent on heroin that year.[3]

2. Petitioner sold heroin on multiple occasions—as relevant here, on April 14, 2010, to Joshua Banka. Banka was "a long-time, multiple drug user," but he had only begun using heroin in September 2009, and he had not used it for about six months (*i.e.*, since October 2009). J.A. 54, 96-97, 107, 121.

On the morning of April 14, Banka and his wife, Tammy Noragon Banka (Noragon), visited a friend's house, where they smoked marijuana (a Schedule I controlled substance). J.A. 115, 127-128; 21 C.F.R. 1308.11(d)(23). Banka also stole from the house some oxycodone pills (a Schedule II controlled substance). J.A. 117-118; 21 C.F.R. 1308.12(b)(1)(xiii). He and Noragon then went home, and at about 10 a.m., Banka crushed, prepared ("cooked"), and injected the oxycodone. J.A. 118-120. At about 2 p.m., Noragon drove Banka from their home in Nevada, Iowa, to meet up with petitioner in the parking lot of a grocery store in Ames, Iowa. Petitioner and Banka had met for the first time

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[3] The findings as to heroin are published at Nat'l Safety Council, *Prescription Nation* 1 (citing 3036 overdose deaths involving heroin in 2010), http://www.nsc.org/safety_home/PrescriptionDrugOverdoses/Documents/RX-Overdose-Infographic-for-print.pdf (last visited Sept. 30, 2013); Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings* 83 (Sept. 2011) (reporting 359,000 users dependent on heroin). The remaining findings were communicated to this Office.

about a week earlier in a strip club and had since arranged for Banka to buy heroin. Per that arrangement, petitioner sold Banka one gram of heroin for $200. J.A. 98-104, 121.

The transaction took place in Banka and Noragon's car and lasted only a few minutes. Petitioner got out of the car, Noragon drove to a different parking lot about a block and a half away, and Banka immediately cooked and injected some of the heroin. He became groggy and fell asleep. Noragon waited "to make sure [Banka] was okay" and then drove him home, arriving between 4 and 5 p.m. With Noragon's help, Banka went to bed, awoke at around midnight, complained that he was in pain, and injected more heroin between midnight and 1 a.m. on April 15. Banka injected still more heroin at about 5 a.m., when Noragon went to sleep. J.A. 101-111.

Noragon awoke at about 10:30 a.m. on April 15 and found Banka's dead body seated on the toilet, slumped into the shower. She called 911. J.A. 111-112. Officers ultimately found several used and unused syringes in Banka and Noragon's bathroom and car, including a syringe that still contained some of the heroin that Banka had cooked. J.A. 82, 91-92; see Trial Tr. (Tr.) 210-211, 215. Officers also found 0.59 grams of heroin in powder form, along with tablets of alprazolam and clonazepam (benzodiazepines on CSA Schedule IV), baclofen, and oxycodone. Tr. 154-155, 207; 21 C.F.R. 1308.14(c)(1) and (10). Later, upon reviewing a photographic lineup, Noragon identified petitioner as the person who had sold Banka the heroin. Tr. 209-210.

3. A grand jury in the Southern District of Iowa charged petitioner in a superseding indictment with two counts: distributing heroin whose use resulted in death, based on the April 2010 sale to Banka; and distributing

heroin, based on an unrelated November 2009 sale to a confidential informant. Superseding Indictment 1-2. Petitioner pleaded not guilty, and the case proceeded to a jury trial. J.A. 8-12, 40.

a. At trial, during the government's case in chief, Noragon and local police officers testified to the facts described above. J.A. 75-135. Also, two medical experts testified about the circumstances of Banka's death. J.A. 136-209.

Dr. Eugene Schwilke, a forensic toxicologist, examined blood and urine samples taken from Banka's body. J.A. 188-191, 197; see J.A. 210-212 (toxicology report). His tests "detected multiple drugs, including morphine (a metabolite of heroin), 6-monacetylmorphine (a metabolite of heroin), codeine (a likely impurity in the heroin), 7-aminoclonazepam (a metabolite of clonazepam), alprazolam, marijuana metabolites, and oxycodone." J.A. 54 (footnote omitted); see J.A. 54 n.2 ("[A] metabolite is what a drug breaks down into in the body."); see also J.A. 191-193, 197-198.

Dr. Schwilke noted that the morphine, a heroin metabolite, was the only substance in Banka's system "that was excessive and above the therapeutic range." J.A. 194. He added that, because Banka had not used heroin between October 2009 and April 2010, the amount of morphine found in Banka's system, if it had been the result of a "single heroin administration," "would be expected to be highly toxic." J.A. 195-196. Dr. Schwilke explained that a regular heroin user's tolerance to heroin "dissipates rather quickly" when the user ceases regular use, and that Banka's tolerance "certainly" would have done so during the six months when he was not using heroin. *Ibid.*; see *ibid.* (testimony that the 201 nanograms of morphine per milliliter of Banka's blood "rep-

resent[ed] a dose that would exceed what would be tolerable for a nontolerant individual"). Dr. Schwilke explained that, by contrast, the concentration of oxycodone in Banka's blood was "consistent with a relatively low dose," such as "a single 5 to 10 milligram dose, and [would be] very typical of a person who's just starting out on oxycodone pain therapy." J.A. 204.

Dr. Schwilke also pointed out that the heroin could have had "a synergistic or overenhanced effect" when combined with the other drugs in Banka's system, most of which, like heroin, cause "respiratory and/or central nervous system depression." J.A. 193-196. Finally, although Dr. Schwilke could not say whether Banka would have survived if he had not taken the heroin—or, for that matter, whether Banka would have survived if he had not taken the oxycodone—Dr. Schwilke concluded that the heroin "was a contributing factor" in Banka's death. J.A. 199, 208.

Dr. Jerri McLemore, an Iowa state medical examiner, conducted Banka's autopsy. J.A. 138-139. Based on her examination and the toxicology report, she "certified the cause of death as a mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." J.A. 157; see J.A. 174-175, 181 (Dr. McLemore's report). Like Dr. Schwilke, she explained that "morphine, the breakdown product of the heroin, was the only drug that was above the therapeutic range" and that it was "at a significantly high level." J.A. 157, 153. Although she could not say whether Banka would have survived if he had not taken the heroin, J.A. 159, Dr. McLemore concluded that Banka's death would have been "[v]ery less likely" without the heroin, J.A. 171. See *ibid.* ("[W]ith the amount of heroin in his system, the morphine that was so elevated

as opposed to his other [drugs], it is more likely that he would not have died [absent the heroin].”). Accordingly, she concluded that her findings were “consistent with th[e] drugs, including the heroin, as contributing to death.” J.A. 158. Dr. McLemore elaborated that, as she used the term, something that “contribut[es]” to a death is something “that aided in bringing about the death,” and therefore “there may be a number of contributing factors” in a death. J.A. 159. Here, she concluded that the heroin “[wa]s the cause of [Banka’s] death as a contributor,” as were the oxycodone, the benzodiazepines, and “possibly” the marijuana. J.A. 159-160.

At the close of the government’s evidence, petitioner moved under Federal Rule of Criminal Procedure 29 for a judgment of acquittal on both counts of the indictment. J.A. 214-216. As to the count charging him with distributing heroin whose use resulted in death, petitioner argued (*inter alia*) that the government was required to prove that the heroin petitioner sold to Banka was a “but for” cause of Banka’s death; he contended that the government’s evidence was insufficient under that standard because “[b]oth medical witnesses * * * testified that they can’t say that Mr. Banka wouldn’t have died but for the heroin.” J.A. 216. The district court summarily denied the motion. J.A. 217. Petitioner testified in his own defense and denied that he had sold any heroin to Banka. Tr. 363-369. He renewed his Rule 29 motion, which the court again denied. J.A. 220.

b. As to the count charging petitioner with distributing heroin whose use resulted in death, the government proposed instructions asking the jury to decide whether the government had proved that the heroin petitioner had sold to Banka was a “contributing cause” of Banka’s death. J.A. 234. Petitioner proposed instead

instructions asking the jury to decide whether the government had proved that "the use of the heroin was the proximate cause of [Banka's] death." J.A. 236; see J.A. 237. Petitioner proposed to define "proximate cause" as:

> a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.
>
> A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

J.A. 238.

The district court rejected petitioner's proposed instructions, because "proximate cause is not what the law is." J.A. 221-222. It instructed the jury that the government had to prove beyond a reasonable doubt that (1) petitioner intentionally distributed heroin; (2) at the time of the distribution, he knew that the substance was heroin; and (3) "[a] death resulted from the use of the heroin." J.A. 241. The court further instructed:

> For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by [petitioner] was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death.

J.A. 241-242. The court overruled petitioner's objection to the "contributing cause" portion of that instruction. J.A. 223-224.

The jury found petitioner guilty on both counts of the indictment. J.A. 8. Petitioner moved for a new trial, reiterating his instructional arguments. J.A. 247-252. The district court denied the motion. J.A. 29-34.

c. At sentencing, the district court calculated an advisory Sentencing Guidelines range of 360 months to life imprisonment. Sent. Tr. 14-15. The government sought a 360-month sentence. *Id.* at 11-13. While the court acknowledged that petitioner's conduct was among the "most serious" prosecuted in federal court (*id.* at 15), and that it resulted in "the untimely death of a very young person" (*ibid.*), it varied downward from the advisory range and imposed concurrent terms of 240 months of imprisonment on each count of conviction (*id.* at 16-18).

4. The court of appeals affirmed. J.A. 52-70. As relevant here, petitioner renewed his challenge to the jury instructions on the count charging him with distribution of heroin resulting in death. J.A. 57-60. He contended that the district court should have instructed the jury that, in order to find that Banka's death "result[ed]" from the heroin petitioner had sold him, the jury had to find that the use of the heroin was the proximate cause of the death. J.A. 57-58 & n.3. Relying on its prior decision in *United States* v. *McIntosh*, 236 F.3d 968 (8th Cir.), cert. denied, 532 U.S. 1022 (2001), the court of appeals rejected petitioner's claim. J.A. 58 (concluding that "a showing of 'proximate cause' is not required under [Section] 841(b)(1)"). The court noted that "[e]very circuit to address the issue agrees with *McIntosh* on this point." J.A. 58 n.4.

Petitioner also contended "that the district court erred by using 'contributing cause' language to define the statute's causation element." J.A. 59. The court of appeals rejected that argument as well, explaining that

the instruction was "consistent with this court's statement that [Section] 841(b)(1)'s 'results from' requirement is met by a 'contributing cause.'" *Ibid.* (quoting *United States* v. *Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), cert. denied, 546 U.S. 1116 (2006)). The court noted that in *Monnier*, it had "defined 'contributing cause' as '[a] factor that—though not the primary cause—plays a part in producing a result.'" *Ibid.* (quoting *Monnier*, 412 F.3d at 862, in turn quoting *Black's Law Dictionary* 212 (7th ed. 1999)). The court therefore held that the district court did not abuse its discretion in including substantially similar language in the instruction here. J.A. 60.

Relatedly, petitioner contended that the evidence was insufficient to show that Banka's death resulted from the heroin petitioner had sold him. J.A. 64-66. Petitioner relied on the evidence that Banka's death "'resulted from' a mixed drug intoxication, not the heroin," and that the government's medical experts "could not testify that Banka would not have died if he had not used the heroin." J.A. 65. The court concluded that the evidence was sufficient because "both doctors testified that the heroin was a 'contributing cause' of [Banka's] death, which satisfies the *Monnier* standard." *Ibid.* The court further pointed out that "the heroin metabolite [morphine] was the only drug present in levels above the therapeutic range" and that Dr. McLemore testified "that death without the heroin was 'very less likely.'" *Ibid.*[4]

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[4] The court of appeals rejected petitioner's other contentions (J.A. 60-64, 67-70), which either were not renewed in this Court or were not within the limited scope of this Court's grant of review (see 133 S. Ct. 2049 (2013)).

SUMMARY OF ARGUMENT

The "death results" provision establishes an enhanced sentencing range if death "results from the use of [the controlled] substance" trafficked by the defendant. 21 U.S.C. 841(b)(1)(C). That language plainly requires proof of causation. This case concerns the proper jury instructions on causation in a "death results" case where the victim died of an overdose of drugs that included heroin trafficked by the defendant. Causation in criminal law is generally analyzed under the headings of "cause in fact" and "proximate cause."

I. With respect to causation in fact, petitioner's jury was instructed that it could convict petitioner if it found that the heroin he trafficked was a "contributing cause" of Banka's death. That instruction was correct.

The concept of a "but for" cause—a condition in whose absence the result (such as death) would not have occurred—is often invoked in criminal law. But courts, commentators, and law reform commissions alike have long recognized that a but-for test is an unsound tool in certain circumstances, particularly when multiple forces coincide or combine to produce a given result. Alternative tests that rely on concepts such as a "substantial factor" or an "independently sufficient cause" are sometimes used instead of, or in tandem with, a but-for test. Yet they too can produce unsatisfactory or nonsensical results.

Instead, asking (as the jury was asked here) whether a particular act was a contributing cause of a given result is a sound and comprehensive test for causation in fact. Thus, judges grappling with issues of concurrent causation in criminal cases often address the question by asking whether the defendant's action "contributed" to the unlawful result. A "contributing cause" test makes par-

ticularly good sense under the "death results" provision because many drug-overdose deaths—such as Banka's death here—are paradigmatic cases of concurrent causation: drug users often use drugs in combination, and drugs in combination can be especially lethal. Accordingly, the instruction given to petitioner's jury accurately stated the law.

II. As for proximate cause, petitioner urges that the jury should have been separately instructed to decide whether Banka's death was a foreseeable result of petitioner's drug trafficking. Such an instruction was not warranted here, where a drug-overdose death was the only basis offered for conviction under the "death results" provision.

The text and structure of the CSA, as well as the context in which the "death results" provision was enacted, indicate that the primary concern of the "death results" provision is drug overdoses. Congress has embedded in the CSA its judgment that Schedule I and II substances are dangerous and prone to abuse—in other words, their use foreseeably risks death or injury to a user through their effect on the user's physiology. Accordingly, when a drug user's death by overdose is at issue, if the jury is properly instructed on causation in fact, no separate instruction on foreseeability is required. That is because proof of the circumstances themselves—*i.e.*, distribution of a designated dangerous drug, use of the drug, and the drug's contribution to the user's death by overdose—fully serves proximate cause's traditional function of limiting criminal responsibility to forms of injury about which Congress was concerned. Moreover, every court of appeals to consider the foreseeability question (invariably in the context of a drug overdose) has concluded the "death results" provision requires no separate instruc-

tion on foreseeability. Congress has acquiesced in that interpretation by leaving the "death results" provision undisturbed even as it has repeatedly amended 21 U.S.C. 841(b)(1).

As for petitioner's argument that a separate instruction on foreseeability is required because the "death results" provision contains a *mens rea* requirement, the premise is mistaken. No *mens rea* requirement attaches to the "death results" provision, just as no such requirement attaches to any of the other facts in 21 U.S.C. 841(b)(1). This Court has explained that although "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct," "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Dean* v. *United States*, 556 U.S. 568, 575 (2009). The "death results" provision falls in the latter category: under it, illegal-drug traffickers are punished for the deadly consequences suffered by users of the drugs they have trafficked. Accordingly, the district court in this case was correct to refuse petitioner's proposed jury instruction on foreseeability.

ARGUMENT

PETITIONER'S JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS OF THE "DEATH RESULTS" OFFENSE IN 21 U.S.C. 841(b)(1)(C)

The "death results" provision establishes an enhanced sentencing range if death "results from the use of [the controlled] substance" trafficked by the defendant. 21 U.S.C. 841(b)(1)(C). The word "result" "plainly suggests causation." *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 690 (2012). Although the ultimate statutory requirement is proof that "death * * * results," criminal law generally analyzes questions of "causation" under the rubric of both "cause in fact" and

"'legal' or 'proximate' cause." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003) (LaFave). This case presents questions about both of those aspects of the causation inquiry, where the government seeks to hold a defendant drug trafficker criminally responsible for a drug-overdose death that "results from the use of [the controlled] substance" that the defendant trafficked. 21 U.S.C. 841(b)(1)(C).

The first question is whether evidence that a controlled substance was a "contributing cause" of the user's death by drug overdose is sufficient to establish that "the use of [the controlled] substance" was a cause in fact of the user's death. Courts and commentators grappling with questions of causation in situations where many concurrent factors produce a result—as is often the case with a drug overdose—generally agree that "contributing cause" is an appropriate standard for establishing causation in fact.

The second question is whether a separate showing of proximate cause (in petitioner's preferred formulation, foreseeability) is required under the "death results" provision. As this Court has explained, the term "proximate cause" is just a "label" for 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). Petitioner is correct that in the criminal context generally, the proximate cause inquiry often entails asking whether "the result [of the defendant's conduct] was a foreseeable one." Pet. Br. 18; see *id.* at 18-21 & nn.10-11. But the structure of the CSA and the text of the "death results" provision signal that, once the jury finds that a user's drug-overdose death was caused in fact by use of a substance Congress has already concluded is foreseeably danger-

ous, no further finding of foreseeability is necessary. Accordingly, the district court's refusal to instruct the jury on foreseeability was sound.

I. As A Matter Of Causation In Fact, Death "Result[ed] From The Use" Of The Heroin Petitioner Distributed Because That Heroin Was A Contributing Cause Of The Victim's Death By Mixed-Drug Intoxication

Petitioner claims with respect to causation in fact that this Court "should reverse because the district court erred by submitting the contributing factor instruction." Pet. Br. 31; see *id.* at 16-18, 31-37. But in cases like this one, where the government presents evidence that a mixed-drug intoxication caused the victim's death (see J.A. 157, 174-175, 181), a "contributing cause" instruction is fully consistent with the "death results" provision's requirement of causation in fact.

A. Like many criminal laws, the "death results" provision does not require strict but-for causation

Petitioner asserts (Br. 12) that the phrase "'results from' * * * incorporates stringent 'but for' * * * standards of criminal law." Under that test, certain conduct is the cause in fact of a given result if "the result would not have happened in the absence of the conduct"; that is, "'but for' the antecedent conduct the result would not have occurred." LaFave § 6.4(b), at 467. As even the authorities petitioner relies on explain, however, criminal law does not insist on but-for causation in general. And particularly good reasons exist not to read such a limitation into the statute here, which is primarily concerned with drug overdoses. Rather, the appropriate test is one of contributing cause—the test on which petitioner's jury was instructed.

1. Criminal law generally does not insist on but-for causation

The keystone of petitioner's argument (and the content of the jury instruction he proposed) is that "[t]he common law has long required 'but for' causation as a minimum standard in criminal cases." Pet. Br. 16-17; see J.A. 238. That is incorrect. The but-for test is a practical and reliable guide to causation in many circumstances, but courts, commentators, and law reform commissions alike have long recognized that it is an unsound tool when multiple forces coincide or combine to produce a given result.

In a passage petitioner selectively quotes (Br. 14), Professor LaFave explains that for criminal liability to attach on the basis of "a specified result," "it must be determined that the defendant's conduct was the cause in fact of the result, which usually *(but not always)* means that but for the conduct the result would not have occurred." LaFave § 6.4, at 464 (emphasis added). Certainly, the but-for standard is in practice "almost always sufficient" for identifying and eliminating causes. *Id.* § 6.4(b), at 467.[5] But in "the unusual case—numerically in the minority, yet arising often enough to warrant considerable attention by the courts—" difficulty arises because applying the but-for test produces unsatisfactory or even nonsensical results. *Id.* § 6.4(a), at 467.

Professor LaFave gives an example: "*A* stabs *B*, inflicting a fatal wound; while at the same moment *X*, acting independently, shoots *B* in the head with a gun, also

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[5] For that reason, the government noted at the certiorari stage that the cause-in-fact inquiry in practice "is sometimes referred to as 'but-for causation.'" Br. in Opp. 16. Contrary to petitioner's claim (Br. 17), that observation does not reflect a concession "that at a minimum 'but for' causation is required" in this case.

inflicting such a wound; and *B* dies from the combined effects." LaFave § 6.4(b), at 468. Neither *A*'s conduct nor *X*'s is a but-for cause of *B*'s death. Or, suppose "*C* and *D* independently start separate fires, each of which would have been sufficient to destroy *P*'s house. The fires converge and together burn down the house. * * * Yet, application of the but-for test would result in a finding * * * that neither *C*'s nor *D*'s fire was a cause of the destruction of *P*'s house." Richard W. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735, 1775-1776 (1985) (*Causation*). From a penological perspective, it would be unsatisfactory to exonerate the killers and arsonists in those examples. And it would defy common sense to assert that *B*'s death and the destruction of *P*'s house had no cause. Cf. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) (plurality opinion) ("Events that are causally overdetermined * * * may not have any 'cause' at all [when the but-for test is used]. This cannot be so.").

In the face of such scenarios, courts have readily found criminal liability, often explicitly rejecting a but-for test because it would unaccountably exonerate obviously culpable defendants. For example, the California Supreme Court has explained that a "focus upon 'but for' causation * * * is misplaced" in a murder case in which the "defendant's acts * * * were a concurrent cause of the [victim's] death," because "it is no defense that the conduct of some other person contributed to the death." *People* v. *Jennings*, 237 P.3d 474, 496 (2010). Other States follow the same principle. See, *e.g.*, *Commonwealth* v. *Osachuk*, 681 N.E.2d 292, 294 (Mass. App. Ct.) ("When the conduct of two or more persons contributes concurrently to the death, the conduct of each is the proximate cause regardless of the extent to which each

contributes.") (citing *Commonwealth* v. *McLeod*, 477 N.E.2d 972, 985 n.21 (Mass.), cert. denied, 474 U.S. 919 (1985)), review denied, 691 N.E.2d 580 (Mass. 1997) (Table); *People* v. *Bailey*, 549 N.W.2d 325, 334 (Mich. 1996) ("In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause [and also satisfy any requirement of proximate causation]."); *Cox* v. *State*, 808 S.W.2d 306, 309 (Ark. 1991) ("[W]here there are concurrent causes of death, conduct which hastens or contributes to a person's death is a cause of death.") (discussing Ark. Code Ann. § 5-2-205 (West 1987)); *Holsemback* v. *State*, 443 So. 2d 1371, 1382 (Ala. Crim. App. 1983) (holding that co-defendants "could both be properly convicted of [the victim's] murder, even though they acted independently, if each inflicted an injury that caused, contributed to, or accelerated [the victim's] death"); see also LaFave § 6.4(b), at 468 n.14 (identifying States that address the "concurrent cause situation" by criminal statute).[6]

These approaches to causation are not recent innovations. For example, in *Wilson* v. *State*, 24 S.W. 409, 410 (Tex. Crim. App. 1893), the defendant "str[uck] [the victim] on the head with a large rock" at the same time as the defendant's brother, acting independently, "stab[bed] [the victim] with a knife, inflicting a mortal

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[6] Moreover, as one scholar has explained, courts recognizing criminal responsibility for homicide when the defendant deprives the victim of a chance of survival implicitly reject the but-for test. See Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 Iowa L. Rev. 59, 66-109 (2005) (*Loss of a Chance*). The same is true of the common law's assignment of criminal responsibility for aiding and abetting, which generally does not require that the accomplice's aid or encouragement have been a but-for cause of the principal's commission of the offense. See *id.* at 110-116.

wound." The court explained that even though the defendant was not responsible for the concededly mortal knife wound inflicted by his brother, "if the blow with the rock contributed materially to the death of [the victim], [the defendant] also would be responsible" for homicide. *Ibid.* Likewise, *People* v. *Lewis*, 57 P. 470, 473 (Cal. 1899), explained that if the defendant wounds the victim while the victim "is dying from a wound given by another, both may properly be said to have contributed to his death." Thus, more than a century ago, treatises concluded that "[t]wo persons acting independently may contribute to the death of another, so that each will be guilty of the homicide." Francis Wharton, *The Law of Homicide* § 44, at 54 (3d ed. 1907) (Wharton) (citing *Lewis*, *supra*); see Wm. L. Clark & Wm. L. Marshall, *A Treatise on the Law of Crimes* § 237(g)(1), at 323 (2d ed. 1905) ("[If a defendant's] act or omission is *a cause* of the death of another, he is not relieved from responsibility for the homicide by the fact that the unlawful act or omission of a third person also contributed to cause the death, or would itself have caused the death.").

In the modern era, criminal law reform efforts have agreed that criminal liability should not invariably be gauged by a strict but-for test. Petitioner points out (Br. 17) that the Model Penal Code provides that "[c]onduct is the cause of a result when * * * it is an antecedent but for which the result in question would not have occurred." Model Penal Code § 2.03(1) (1985). But he fails to acknowledge the commentary to that section, which offers a variation of Professor LaFave's homicide-by-independent-assailants hypothetical, and emphasizes that "[a]ll who have considered the issue agree that each of the assailants should be liable, and it was the intent of the [drafters] to make them liable." *Id.* cmt. 2, at 259.

The commentary explains that in such "infrequent[]" cases, the criminal "result should be characterized as 'death from two mortal blows,'" such that "the victim's demise has as but-for causes each assailant's blow." *Ibid.* The Brown Commission's report on reform of federal criminal law proposed a "modified 'but for' test"; on its approach, the relevant question is whether the defendant's conduct was among a *combination* of factors that was a but-for cause of the result—not whether the defendant's conduct standing alone was a but-for cause. See *Final Report of the National Commission on Reform of Federal Criminal Laws* § 305 & cmt., at 31-32 (1971) (*Brown Commission Report*) ("Causation may be found where the result would not have occurred but for the conduct of the accused operating * * * concurrently with another cause[.]").[7]

2. "Contributing cause" is the appropriate test for causation in fact

As the discussion above suggests, the inadequacy of a but-for test has prompted efforts to adopt supplemental tests for atypical situations or formulate an all-encompassing test for causation in fact. See, *e.g.*, *Causation*, 73 Calif. L. Rev. at 1774-1813 (critiquing various

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[7] The Brown Commission proposal went on to add an exception from liability in cases in which "the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient." *Brown Commission Report* § 305, at 31. Some States have adopted that approach by statute. See, *e.g.*, Ark. Code Ann. § 5-2-205 (West 2013). That exception is, however, in the nature of a proximate cause requirement because it reflects a policy judgment that the defendant's conduct, though a cause in fact of the result, is too insubstantial to impose criminal responsibility. See Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 779-780 (3d ed. 1982) (Perkins & Boyce).

proposed tests). Of those efforts, a test of contributing cause is a particularly sound formulation with judicial support.

a. Petitioner and some courts and commentators have urged or adopted a "substantial factor" test for causation. See Pet. Br. 17 & n.9 (citing cases and LaFave § 6.4(b), at 468-469). Courts and commentators use the term "substantial factor" to mean a variety of different (and not always consistent) things, some of which do not even concern causation in fact. For example, as sometimes used in the criminal context, that test addresses "factors" (*i.e.*, causes in fact) that are judged too insubstantial to warrant the attachment of criminal responsibility; on that understanding, the "substantial factor" formulation embodies a legal judgment in the nature of proximate cause. See Perkins & Boyce 779-780; *Causation*, 73 Calif. L. Rev. at 1781-1784.

In petitioner's usage, however, the "substantial factor" test addresses causation in fact. But its precise content is unclear and has, indeed, shifted during this very case. At trial, J.A. 238, petitioner asked the court to instruct the jury that an act is a cause of death only if it "played a substantial part in bringing about the death * * * and except for the cause the death would not have occurred"—which would have required the jury to apply the but-for test. In the court of appeals, Pet. C.A. Br. 25-26, petitioner did not advocate any "substantial factor" test as such, and instead argued that "if [Banka] would have died even without using the heroin," then the heroin did not "'contribute[] to' the death beyond a reasonable doubt"—which again asked the court to adopt the but-for test. In this Court, Pet. Br. 18, petitioner describes the "substantial factor" test as requiring a showing that "the defendant's actions would have *inde-*

pendently caused the death"—a test that would rule out even many but-for causes (such as two wounds, each survivable on its own, but lethal in combination).

b. Petitioner's latest suggestion (Br. 18) is that causation in fact is established when the defendant's conduct would have been "independently sufficient" to bring about the unlawful result. Some commentators have similarly voiced such an approach, at least as an adjunct to a but-for test. See LaFave § 6.4(b) at 468 (criticizing the but-for test using a hypothetical involving "two causes, each alone sufficient to bring about the harmful result"); see also Model Penal Code § 2.03 cmt. 2, at 259 (asserting that the "only difficult case" arises "when the conduct of two actors is completely independent, and each actor's conduct would have been sufficient by itself to produce death"). But that approach unduly limits criminal responsibility in ways that no commentator has explicitly endorsed and that cannot be reconciled with sound policy.

The problems with an independently-sufficient test are most apparent when more than two bad actors are involved. For example, suppose that *A*, *B*, and *C* each independently puts one drop of poison in *V*'s coffee intending to kill *V*; that *V*'s strong constitution makes a full two drops of poison a lethal dose; and that *V* indeed dies from poisoning. Petitioner's approach would conclude that *V*'s death did not result from *A*'s conduct (nor from *B*'s, nor from *C*'s): No single drop of poison was a but-for cause of *V*'s death, because the other two drops would have been enough to kill *V*. And no actor's conduct was independently sufficient to cause *V*'s death, because two drops, not just one, were needed to kill him. "[I]n other words, [*V*'s death] may not have any 'cause'

at all. This cannot be so." *Price Waterhouse*, 490 U.S. at 241 (plurality opinion).[8]

c. Instead, asking whether a particular act was a contributing cause of a given result is a sound, accepted, and comprehensive test for causation in fact. That test naturally describes the hypotheticals above: The simultaneous wounds inflicted by the murder victim's assailants were both contributing causes of the victim's death. The arsonists' fires were both contributing causes of the house's destruction. And each drop of poison contributed to the victim's death.

For that reason, judges grappling with issues of concurrent causation in criminal cases often address the question by asking whether the defendant's action "contributed" to the unlawful result. See, *e.g.*, *State* v. *Christman*, 249 P.3d 680, 687 (Wash. Ct. App.) (under the causation in fact "test [that] is generally applied in multiple causation cases," "all parties whose actions contributed to the outcome are held liable"), review denied, 257 P.3d 666 (Wash. 2011) (Table); *Jennings*, 237 P.3d at 496 (approving criminal responsibility "[w]hen the conduct of two or more persons contributes concurrently" to the unlawful result) (citation and emphasis omitted); *Osachuk*, 681 N.E.2d at 294 (same); *Bailey*, 549 N.W.2d at 334 (describing the causation in fact inquiry as wheth-

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[8] Moreover, even in simpler cases, an independently-sufficient test is imprecise because "few if any acts are sufficient by themselves to produce any particular consequence." *Causation*, 73 Calif. L. Rev. at 1776. For example, in the concurrent-arson hypothetical (p. 19, *supra*), neither arsonist's conduct in setting a fire was independently sufficient to destroy the house; it was also necessary that combustible material exist near the house and that oxygen be present in the air. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 cmt. c (2010) (Restatement).

er the defendant was "a contributory cause"); *Cox*, 808 S.W.2d at 309 ("[C]onduct which * * * contributes to a person's death is a cause of death."); *Holsemback*, 443 So. 2d at 1382 ("[The two defendants] could both be properly convicted of [the victim's] murder, even though they acted independently, if each inflicted an injury that caused, contributed to, or accelerated [the victim's] death."); *Lewis*, 57 P. at 473 (identifying circumstances in which two independent assailants "may properly be said to have contributed to [the victim's] death").

Commentators on criminal law likewise have addressed the problem of concurrent causes in fact through the concept of contributing cause. Wharton § 44, at 54 ("Two persons acting independently may contribute to the death of another, so that each will be guilty of the homicide."); Perkins & Boyce 771 ("All antecedents which contribute to a given result are, as a matter of fact, the causes of that result."). And the government has recently explained how the concept of aggregate causation—which recognizes that a result is ultimately caused by the aggregation of all factors contributing to it—is a superior approach for addressing questions of causation in the criminal restitution context. U.S. Br. at 19-27, *Paroline* v. *United States*, cert. granted, No. 12-8561 (June 27, 2013).[9]

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[9] With considerable variation in phrasing, the essence of the contributing-cause approach has also gained acceptance among commentators on tort law. See, *e.g.*, Restatement § 27 cmt. f & illus. 3 ("Multiple sufficient causal sets") (offering a hypothetical in which three people negligently lean on a car, rolling it off a mountain; all three are causes in fact of the car's destruction, even if the force of any two would have been sufficient to propel the car); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1984) ("When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is

3. The "death results" provision in particular is satisfied by a showing that use of the controlled substance contributed to the victim's death

The "death results" provision establishes an enhanced sentencing range if death "results from the use of [the controlled] substance" trafficked by the defendant. The government therefore must prove that the use of the drug was a cause in fact of the victim's death. In applying that test, the text and context of the "death results" provision favor a contributing-cause test, particularly in cases involving a drug-overdose death.

a. The text of the "death results" provision does not limit its reach by specifying a particular test for causation in fact. Nor do definitions of "result" contain such a limitation. See, *e.g.*, *Webster's Third New Interna-*

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a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event."); see also *June* v. *Union Carbide Corp.*, 577 F.3d 1234, 1239-1244 (10th Cir. 2009). Few courts or commentators, however, have found it important to establish a formal logical test for identifying contributing causes in the criminal context. But see *Loss of a Chance*, 91 Iowa L. Rev. 59.

In one persuasive formulation that has influenced the debate among legal philosophers, the "test of causal contribution" concludes that a particular condition was a cause in fact of a consequence "if [the condition] was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence." *Causation*, 73 Calif. L. Rev. at 1790 (emphasis omitted). Thus, in the two-arsonists hypothetical, an individual arsonist's act of starting a fire was a necessary part of a larger set of conditions—the presence of combustible material, atmospheric oxygen, etc.—that together was sufficient to destroy the house. Cf. note 8, *supra*. And in the poisoning hypothetical, pp. 24-25, *supra*, any one drop of poison was a necessary part of a larger set of conditions—the presence of exactly one more drop of poison—that together was sufficient to kill the victim.

tional Dictionary 1937 (1986) (*Webster's Third*) (defining "result" as "to proceed, spring, or arise as a consequence, effect, or conclusion"). Nothing about such definitions suggests that a result can arise only from necessary (*i.e.*, but-for) causes, or can arise only from some independently sufficient cause. Most importantly, nothing about the definition of "result" rules out the commonsense idea that results may sometimes proceed from the contributions of many causes in the aggregate. See, *e.g.*, *Random House Dictionary of the English Language* 1642 (1987) (defining "result" as "to spring, arise, or proceed as a consequence of actions, circumstances, premises, etc."). The text of the statute is thus fully compatible with criminal law's acceptance of the concept of contributing cause.

b. The context in which the "death results" provision is applied—typically, death by drug overdose—gives particular reason to think Congress intended a contributing-cause test. Drug users often administer drugs in combination, as Banka did in this case (J.A. 54, 191-193, 197-198), in part because some drug combinations can have a "synergistic" effect, as Dr. Schwilke testified (J.A. 195). And the lethality of drugs in combination is well-studied and widely recognized.[10] Thus,

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[10] See, *e.g.*, Richard G. Jones, *Heroin's Hold on the Young*, N.Y. Times, Jan. 13, 2008, at LI14 ("[S]tatistics show that heroin used in combination with other drugs proves far more lethal than heroin alone."); Nina G. Shah et al., *Unintentional Drug Overdose Death Trends in New Mexico, USA, 1990-2005: Combinations of Heroin, Cocaine, Prescription Opioids and Alcohol*, 103 Addiction 126, 133 (2007) (finding combination drug deaths varied from 89% to 98% of the annual totals of overdose deaths); Phillip O. Coffin et al., *Opiates, Cocaine and Alcohol Combinations in Accidental Drug Overdose Deaths in New York City, 1990-98*, 98 Addiction 739, 739

many overdose deaths—like Banka's death here—involve more than one drug. According to findings communicated to this Office by the National Center for Injury Prevention and Control, at least 46% of overdose deaths in 2010 involved more than one class of drugs. As for heroin in particular, most overdose deaths involving heroin also involved at least one other drug, and 1 in 4 deaths involving heroin also involved at least *two* other drugs.

Given the prevalence of mixed-drug overdoses, it would be anomalous to conclude that the "death results" provision is unconcerned with such deaths when no single drug was a but-for or independently-sufficient cause of the death. Such overdoses are all-too-real instances of the poisoning hypothetical used above to illustrate the inadequacies of the but-for and independently-sufficient tests for causation in fact. Consider the case of a victim who dies from use of (for example) heroin, oxycodone, and morphine. If it takes any pair of drugs to make a lethal dose, then it follows that no drug was a but-for cause of the death, and no drug would have been independently sufficient to cause death. On those facts, petitioner would urge this Court to hold that no one may be held responsible for the victim's death. By contrast, a test of contributing cause appropriately recognizes that each drug contributed to the victim's death, and each was therefore a cause of the death.

At least one state appellate court has approved this approach under a state controlled-substances homicide law that closely parallels the federal "death results" provision, Wash. Rev. Code § 69.50.415(1) (2008). In *Christman* the victim died from an overdose of three

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(2003) ("Simultaneous use of multiple drugs has been shown to contribute substantially to overdose mortality.").

drugs—methadone (supplied by the defendant), methamphetamine, and alcohol. The medical examiner testified to his scientific opinion "that all three combined to cause death, and that each one * * * played a role. * * * So the alcohol hastened his death, the methamphetamine hastened his death, and the Methadone hastened his death. So each of them is a cause of death." *Christman*, 249 P.3d at 683. The state court rejected the defendant's claim that this evidence was insufficient to convict him of drug distribution "result[ing] in death," explaining (in part) that causation in fact was established as to "all parties whose actions contributed to the outcome." *Id.* at 687.

c. Petitioner urges that a contributing-cause test should be confined to civil cases because "the consequences of a determination of guilt," in comparison with civil liability, "are more drastic." Pet. Br. 34 (quoting LaFave § 6.4(c), at 472). Of course, Congress well knew that it was enacting "extremely stiff penalties" in the "death results" provision. 132 Cong. Rec. at 27,161 (statement of Sen. DeConcini). And the causation in fact inquiry does not fundamentally vary between the civil and criminal contexts. See, *e.g.*, *Christman*, 249 P.3d at 687 ("With respect to cause in fact, tort and criminal situations are exactly alike."); Joshua Dressler, *Understanding Criminal Law* § 14.01[B], at 160 (2d ed. 1995) ("The role of [factual] causality in the criminal law is the same as it is in the evaluation of any everyday event: to determine why something occurred.").

The causation questions here concern petitioner's criminal responsibility for harm resulting from his "antecedently * * * unlawful" drug trafficking. *Dean* v. *United States*, 556 U.S. 568, 576 (2009) (quoting 4 William Blackstone, *Commentaries on the Laws of England*

26-27 (1769) (Blackstone)). In that setting, there is every reason to conclude that Congress intended familiar, workable background rules of causation in fact to govern. Nothing suggests Congress required heightened causation showings that would exonerate drug traffickers of the predictable consequences that users suffer from their drugs often consumed in combination—especially, as in the case of heroin, drugs that lack accepted medical use and pose inherent dangers. See 21 U.S.C. 812(b)(1).

The reliance of petitioner and his amici on the rule of lenity (*e.g.*, Pet. Br. 32) is misplaced for similar reasons. As an initial matter, "[t]o invoke the rule, [this Court] must conclude that there is a grievous ambiguity or uncertainty in the statute." *Dean*, 556 U.S. at 577 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998)). But no ambiguity exists here—or in any of the statutes under which courts have described the causation in fact inquiry as contributing cause. See pp. 25-26, *supra*. Moreover, adopting a constrained test for causation in fact would not serve the rule of lenity's purpose of "ensur[ing] fair warning" to the defendant that his conduct is criminal. *Reynolds* v. *United States*, 132 S. Ct. 975, 982 (2012) (quoting *United States* v. *Lanier*, 520 U.S. 259, 266 (1997)). Any defendant subject to punishment under Section 841(b) has necessarily satisfied all prerequisites for criminal responsibility under Section 841(a), a sufficient assurance of fair warning. Cf. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 n.3 (1994).

B. Petitioner was properly convicted under the "death results" provision

1. Petitioner previously suggested (see Pet. 15-16) that the district court in this case could have avoided any claim of instructional error simply by instructing the

jury using the language of the "death results" provision "without embellishment" (J.A. 60). See *United States* v. *Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010) ("the statutory language" is "clear enough"); cf. *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2641 (2011) (approving a causation instruction that "use[d] the everyday words contained in [the statute] itself"). That is correct, but the district court had discretion to offer petitioner's jury additional guidance on the statutory standard. As explained above, the contributing-cause instruction given to petitioner's jury accurately stated the law.

The evidence at trial supported the instruction given: the government had shown (and petitioner does not dispute) that a "mixed drug intoxication"—that is, an overdose—was a but-for cause of Banka's death. J.A. 157, 174-175, 181. That mixture involved multiple drugs that all had a tendency (especially in combination) to depress Banka's respiratory and central nervous systems. J.A. 193-196. Applying medical and scientific expertise, and with the benefit of a full opportunity to examine Banka's body and fluids, Drs. Schwilke and McLemore could not identify any one drug as a but-for cause of Banka's death, nor did they identify any one drug as independently sufficient to cause Banka's death. See J.A. 159, 169-171, 208. That aligned the facts here with those in the poisoning hypothetical above. See pp. 24-25, 28-29, *supra*. Reinforcing that understanding, Drs. Schwilke and McLemore expressly testified that heroin was a contributing cause of Banka's death. J.A. 158-160, 199. Moreover, the experts' testimony established that the heroin's contribution was important: the heroin's metabolites were far above the therapeutic range, at a level "expected to be highly toxic" (J.A. 153, 157, 194-196); by contrast, Banka's blood chemistry suggested he had "not

[taken] an excessive dose" of oxycodone (J.A. 203-204, 208). Thus, Dr. McLemore concluded that Banka's death would have been "[v]ery less likely" had he not injected petitioner's heroin. J.A. 171.

2. If this Court were to reject the district court's contributing-cause instruction, the appropriate disposition of the case would depend on the standard the Court adopts. For example, if the Court were to conclude that the government was required to prove that Banka would not have died but for his heroin use, then the appropriate disposition—in light of petitioner's Rule 29 motion (J.A. 214-216, 220) and the absence of evidence that Banka would have lived but for his heroin use (J.A. 159, 169-171, 208)—would be to vacate petitioner's conviction on the charge of distribution resulting in death, and remand for entry of judgment on the lesser included offense of simple distribution of heroin. See, *e.g.*, *United States* v. *Plenty Arrows*, 946 F.2d 62, 66-67 (8th Cir. 1991). But this Court's adoption of some other test for causation in fact might require closer analysis of the record. The court of appeals would be best positioned to apply this Court's decision to the facts of this case in the first instance.

II. Once The Government Establishes That A Controlled Substance Was A Cause In Fact Of A Drug-Overdose Death, The "Death Results" Provision Does Not Require A Separate Jury Instruction On Foreseeability

Petitioner urges (Br. 18-29), under the heading of "proximate cause," that the "death results" provision requires a separate instruction and proof that the victim's death was a reasonably foreseeable result of the defendant's drug-trafficking offense. The court below held to the contrary, as has every other court of appeals to consider the question where a drug overdose is the

only basis offered for conviction under the "death results" provision. In those circumstances, the text of the "death results" provision, the structure of the CSA, and Congress's acquiescence in the courts of appeals' uniform interpretation of the "death results" provision all indicate that, when the jury is properly instructed on causation in fact, no separate instruction on foreseeability is required. Proof of the circumstances themselves—*i.e.*, distribution of a designated dangerous drug, use of the drug, and the drug's contribution to the user's death by overdose—fully serves the traditional function of proximate cause. The district court was therefore correct to refuse petitioner's proposed jury instruction, and the government's proof was sufficient to satisfy the statute under any reasonable test.

A. The "death results" provision does not require a separate instruction on foreseeability in a drug-overdose case

Petitioner contends that this Court should read a foreseeability requirement into the "death results" provision because "the common law * * * requires the prosecution to prove * * * that the result [for which a defendant is held criminally responsible] was a foreseeable one." Pet. Br. 18. The Court should reject that invitation here because the text and structure of the statute indicate otherwise in a case involving a drug-overdose death.

1. As an initial matter, no reference to "foreseeability" or "proximate cause" appears in the text of the "death results" provision. That omission is not insignificant in the context of the CSA: Congress considered expressly addressing the foreseeability of a victim's death in another sentence-enhancing provision of the same 1986 law that enacted the "death results" provision, and Congress actually added such a provision elsewhere

in the CSA in 1988.[11] That history shows that the 1986 Congress that enacted the "death results" provision "underst[ood] how to place a reasonable foreseeability requirement into a sentencing enhancement provision," but did not do so in the "death results" provision. *United States* v. *Patterson*, 38 F.3d 139, 145 n.7 (4th Cir. 1994), cert. denied, 514 U.S. 1113 (1995).

Petitioner's textual focus on the meaning of "result" (Br. 13) also does not establish the need for a foreseeability instruction. Dictionary definitions of "result" say nothing about foreseeability. See, *e.g.*, *Webster's Third* 1937 (to "result" is "to proceed, spring, or arise as a consequence, effect, or conclusion"). The primary case of this Court on which petitioner relies (Br. 13) does not

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[11] In particular, as part of negotiations between the Senate and House over the bill amending the CSA that was eventually enacted as the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, the House adopted an amendment authorizing the death penalty for continuing criminal enterprise drug offenses that cause death. 132 Cong. Rec. at 32,728 (text of H. Con. Res. 415); see *id.* at 33,158. The House amendment identified, as a mitigating factor for the jury to consider in its penalty-phase deliberations, whether "[t]he defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense resulting in death * * * would cause, or would create a grave risk of causing, death to any person." *Id.* at 32,787 (Section 1995(k)(5)).

Although that amendment did not survive in the final 1986 legislation, Congress added a similar death-penalty provision to the CSA two years later in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4387 (amending 21 U.S.C. 848). Under that provision, the jury was to consider as a mitigating factor whether "[t]he defendant could not reasonably have foreseen that the defendant's conduct in the course of the * * * offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person." 21 U.S.C. 848(m)(4) (1988) (repealed 2006).

suggest otherwise. In *Brown* v. *Gardner*, 513 U.S. 115 (1994), this Court held that 38 U.S.C. 1151 (1988 & Supp. V 1993)—which then provided that the Department of Veterans Affairs (VA) would compensate for an injury occurring "as the result of hospitalization, medical or surgical treatment" provided under VA programs—did not require a showing of VA fault. 513 U.S. at 116-117; see *id.* at 117 (noting "the absence from the statutory language of so much as a word about fault on the part of the VA"). The government argued that "as a result of" in the statute "signifie[d] a proximate cause requirement that incorporates a fault test." *Id.* at 119. The Court rejected that argument, explaining that "result" "is naturally read simply to impose the requirement of a causal connection." *Ibid.* Only in the alternative did the *Gardner* Court observe that, "[a]ssuming" a requirement of proximate cause, that would still not support "requiring a demonstration of fault." *Ibid.* Contrary to petitioner's claim, the Court's "assum[ption]" for the sake of illustrating the insufficiency of the government's argument in *Gardner* is no authority for construing "result" here.[12]

2. Petitioner must instead draw his proposed foreseeability requirement from background principles of the common law. But the conclusion petitioner would draw from those principles—that an instruction on fore-

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[12] The only other case of this Court on which petitioner relies (Br. 15) for the meaning of "results," *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995), is unhelpful because the provisions at issue there did not even use the word "result." See *id.* at 690-691 (quoting pertinent statutes and regulations). And background assumptions about "ordinary requirements of proximate causation and foreseeability," *id.* at 696 n.9, are displaced in the present context by unique features of the CSA, see pp. 37-41, *infra*.

seeability is required in every criminal case—fails to account for the structure of the CSA and an unusual feature of the "death results" provision. Most statutes assigning criminal responsibility for a death speak generically about the link between offense conduct and the resulting death (thus potentially inviting presumed adoption of an implied foreseeability requirement). But the "death results" provision insists specifically that the death "result *from the use* of [the trafficked controlled] substance," 21 U.S.C. 841(b)(1)(C) (emphasis added). Thus, the provision is concerned not with drug *trafficking* deaths generally, but with deaths associated with drug *use* specifically—primarily, overdoses. In a prototype drug-overdose case, because Congress has already made a judgment about the dangers of overdoses of scheduled controlled substances, the statutory "death * * * results" element is satisfied when the jury finds that a drug-overdose death was in fact caused by use of the controlled substance trafficked by the defendant.

a. The "death results" provision is nearly unique among the scores of federal criminal laws specifying increased punishment when a death results. The vast majority of such statutes generically provide that the death must result from "the offense" or a "violation" of the statute,[13] or from "the acts committed" or "conduct prohibited" or "crime prohibited,"[14] or they simply make implicit reference to the offense conduct as the cause of

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[13] 8 U.S.C. 1324(a)(1)(B)(iv); 18 U.S.C. 43(b)(1), 175c(c)(3), 249(a)(1)(B)(i), (a)(2)(A)(ii)(I), 670(b)(2)(C), 1347(a), 1366(d), 1581(a), 1583(b)(1), 1584(a), 1589(d), 1590(a), 1992(a), (b), 2237(b)(2)(B)(i), 2332g(c)(3), 2332h(c)(3); 42 U.S.C. 2272(b).

[14] 18 U.S.C. 34, 37(a), 241, 242, 245(b), 247(d)(1), 844(d), (i), 1716(j)(3), 2280(a)(1), 2281(a)(1), 2291(d), 2332b(c)(1)(A), 2340A(a); 42 U.S.C. 3631; cf. 18 U.S.C. 2251(e).

the death.[15] Very few statutes outside the CSA state an explicit test for deciding whether offense conduct and a "result[ing]" death are sufficiently linked to justify criminal responsibility for the death.[16]

b. Because of its atypical approach, the "death results" provision's compass differs substantially from that of a hypothetical statute assigning criminal responsibility for any death foreseeably resulting from a drug-trafficking offense. In important respects, the "death results" provision assigns criminal responsibility more narrowly. For example, a deadly explosion at an illegal drug lab, or a killing during a disagreement over a drug deal, may well be a foreseeable result of a drug-trafficking offense under 21 U.S.C. 841(a). But those are no basis for a conviction under the "death results" provision because such deaths do not "result[] from the use" of the trafficked substance. In other respects, the "death results" provision may assign criminal responsibility more broadly. For example, a *particular* heroin user's death may not be a foreseeable result of a distant opium-poppy farmer's heroin manufacturing. But the "death results" provision clearly assigns criminal responsibility for the death to the drug manufacturer in that case.

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[15] 10 U.S.C. 881(b), 950t(2), (7), (8), (9), (11)(A), (12), (13)(A), (14), (17), (23), (24), (29); 18 U.S.C. 38(b)(3), 248(b), 351(b), (d), 1038(a)(1)(C), (a)(2)(C), 1091(b)(1), 1201(a), 1203(a), 1365(a)(2), 1751(b), (d), 1864(b)(1), 1952(a)(B), 1958(a), 2113(e), 2115(a), 2118(a), (b), 2119(3), 2261(b)(1), 2262(b)(1), 2332a(a), (b), 2339A(a), 2339B(a)(1), 2441(a), 2442(b); 42 U.S.C. 2284(a), (b); 49 U.S.C. 46502(a)(2)(B), (b)(1)(B); cf. 18 U.S.C. 924(c)(5)(B).

[16] Only two appear to exist: 18 U.S.C. 38(b)(3) (relating to fraud involving aircraft or space vehicle parts) and 49 U.S.C. 5124(a) (relating to violations of hazardous materials laws, regulations, and orders).

Those boundaries that Congress drew demonstrate that the primary concern of the "death results" provision, conceived as a response to a wave of drug overdoses (see pp. 3-4, *supra*), is indeed drug overdoses. And the provision particularly assigns criminal responsibility to the people who trafficked in the controlled substances at issue. In a case about an overdose, those limitations fully serve the traditional function of proximate cause. As petitioner recognizes (Br. 14, 20, 31), the common law proximate cause requirement of foreseeability ensures that "any variation between" the defendant's offense "and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." LaFave § 6.4, at 464. Thus, when the matter is left unstated by Congress, courts typically "look to * * * the relationship of the [resulting] injury * * * with those forms of injury about which Congress was likely to have been concerned in making [the] defendant's conduct unlawful." *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 478 (1982). Here, drug-overdose deaths are the very "form[] of injury about which Congress was likely to have been concerned," *ibid.*

Stated otherwise, Congress elected to treat drug-overdose deaths caused in fact by controlled substances as per se foreseeable to the criminals who traffic those dangerous substances. That approach is empirically well supported. It is foreseeable that a drug user who obtains a controlled substance will use it. See, *e.g.*, *United States* v. *Martinez*, 588 F.3d 301, 321 (6th Cir. 2009) ("[A]n intervening act" of drug use does not break the chain of proximate causation because it "may be said to be a response to the prior actions of the defendant when it involves reaction to the conditions created by the defendant.") (quoting LaFave § 6.4(f)(3), at 482), cert. denied,

131 S. Ct. 538 (2010). It is also foreseeable that a drug user will overdose; Schedule I and II controlled substances are controlled precisely because they are poisonous and prone to abuse, and their lethality—particularly in combination with other drugs—is well-known. See pp. 2-3, 28-29 & note 10, *supra*.

Congress's rejection of a case-specific foreseeability inquiry for overdoses was eminently sensible. Petitioner does not say what evidence he would offer at trial to dispute the obvious dangers of heroin and persuade the jury that a drug-overdose death was unforeseeable to him as a drug trafficker. Presumably, he would argue that his drug distribution was somehow not dangerous, or Banka was by all appearances a responsible heroin user. Cf. Pet. Br. 30-31. But having categorically concluded otherwise, Congress understandably did not wish trials in "death results" cases to become jury referenda on the defendant drug dealer's plea that he had a practice of tutoring his clientele on the fine points of "safe" use of illegal drugs, or that he only dispensed "safe" doses of heroin. "In short, Congress recognized that the risk is inherent in the product and thus it provided that persons who distribute it do so at their peril." *United States* v. *Robinson*, 167 F.3d 824, 831 (3d Cir.), cert. denied, 528 U.S. 846 (1999).

c. In practice, the government will typically present evidence that the defendant trafficked in a controlled substance and that the victim's use of the substance was a cause in fact of the victim's death by overdose. If the jury finds those facts (as all agree it must to convict), no legal basis exists for the jury to conclude that the victim's death was nonetheless unforeseeable. To be sure, a district court might well need to instruct the jury on foreseeability if the government's theory is (or the evi-

dence could suggest) that the controlled substance was a cause in fact of the victim's death, but not by overdose. See pp. 48-51, *infra* (addressing petitioner's non-overdose hypotheticals). But in the mine-run drug-overdose death case, instructions like the ones here (J.A. 241-242) adequately explicate the statutory element of "death * * * results" by telling the jury to decide whether a controlled substance was trafficked, and whether that substance was a cause in fact of the drug-overdose death of the person who used that controlled substance. No additional instruction on foreseeability is required. See *United States* v. *Park*, 421 U.S. 658, 675 (1975) (recognizing a district court's "discretion" to craft instructions that "viewed as a whole and in the context of the trial [are] not misleading and contain[] an adequate statement of the law to guide the jury's determination").

B. Petitioner's argument that a separate instruction on foreseeability is required because the "death results" provision contains a *mens rea* requirement is unsound

Petitioner contends (Br. 22-29) that the "death results" provision must require a separate instruction on foreseeability because, in his view, the government must prove that the defendant had a *mens rea* of at least recklessness with respect to the victim's death. The premise of that argument is incorrect; no *mens rea* requirement exists in the "death results" provision.[17]

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[17] Petitioner does not appear to raise a freestanding claim of error concerning the lack of a jury instruction on his mental state with respect to Banka's death. Such a claim would be forfeited three times over. Petitioner requested no such instruction, nor raised that claim of error in either court below. See Br. in Opp. 9. Nor did he "set out [such a question] in the petition [for a writ of certiorari]" or make an "argument [in the petition] amplifying the reasons relied on" for such a claim. Sup. Ct. R. 14.1(a), (h).

1. As an initial matter, petitioner identifies no decision from any court holding that the government is required to prove the defendant's mental state with respect to *any* of the facts in the "penalties" provision of 21 U.S.C. 841(b)(1), much less a case addressing the "death results" provision. And the courts of appeals have uniformly held that no *mens rea* requirement attaches to the issues of drug type and quantity—the penalty-related facts in Section 841(b)(1) at issue in most drug trafficking cases.[18] Nothing justifies treating the "death results" provision in Section 841(b)(1) differently.

2. Of this Court's decisions, the best reference point for deciding whether the "death results" provision contains a *mens rea* requirement is *Dean*. That case addressed whether, under 18 U.S.C. 924(c)(1)(A)(iii), the "extra punishment Congress imposed for the discharge

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[18] See, *e.g.*, *United States* v. *Collazo-Aponte*, 281 F.3d 320, 325-326 (1st Cir.) (quantity), cert. denied, 537 U.S. 869 (2002); *United States* v. *King*, 345 F.3d 149, 152-153 (2d Cir. 2003) (per curiam) (type and quantity), cert. denied, 540 U.S. 1167 (2004); *United States* v. *Barbosa*, 271 F.3d 438, 457-459 (3d Cir. 2001) (type), cert. denied, 537 U.S. 1049 (2002); *United States* v. *Brower*, 336 F.3d 274, 276-277 (4th Cir.) (type), cert. denied, 540 U.S. 936 (2003); *United States* v. *Gamez-Gonzalez*, 319 F.3d 695, 699-700 (5th Cir.) (type and quantity), cert. denied, 538 U.S. 1068 (2003); *United States* v. *Villarce*, 323 F.3d 435, 438-439 (6th Cir. 2003) (quantity); *United States* v. *Carrera*, 259 F.3d 818, 830 (7th Cir. 2001) (type and quantity); *United States* v. *Sheppard*, 219 F.3d 766, 768 n.2, 769 (8th Cir. 2000) (type), cert. denied, 531 U.S. 1200 (2001); *United States* v. *Carranza*, 289 F.3d 634, 643-644 (9th Cir.) (type and quantity), cert. denied, 537 U.S. 1037 (2002); *United States* v. *Briseno*, 163 Fed. Appx. 658, 665-666 (10th Cir.) (type), cert. denied, 547 U.S. 1157 (2006); *United States* v. *Garcia-Frias*, 239 Fed. Appx. 575, 577 (11th Cir. 2007) (per curiam) (type and quantity); *United States* v. *Branham*, 515 F.3d 1268, 1275-1276 (D.C. Cir. 2008) (type).

of a gun"—over and above the punishment for possessing the gun "'during and in relation to'" certain crimes—"applies when the gun goes off accidentally," that is, when the defendant lacks a heightened mental state with respect to the discharge. *Dean*, 556 U.S. at 570-571 (quoting 18 U.S.C. 924(c)(1)(A)).

Dean found no *mens rea* requirement, pointing to the absence of textual support and emphasizing that this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." 556 U.S. at 572 (quoting *Bates* v. *United States*, 522 U.S. 23, 29 (1997)). This Court pointed out that the nearest textual reference to *mens rea* was located in the statute's umbrella paragraph and did not carry "all the way down" into the discharge provision located in a "separate subsection[]." *Id.* at 573.

Dean also underscored that the discharge provision is framed in the passive voice. 556 U.S. at 572-573; see 18 U.S.C. 924(c)(1)(A)(iii) (prescribing enhanced punishment "if the firearm is discharged"). "The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean*, 556 U.S. at 572; see *ibid.* ("It is whether something happened—not how or why it happened—that matters."). Finally, this Court emphasized that, although "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct," "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Id.* at 575. As Blackstone explained:

> "[I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing anything *unlawful*, and a consequence ensues which he did not

> foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehavior."

Id. at 575-576 (brackets in original) (quoting Blackstone 26-27).

Each of those observations in *Dean* applies equally to the "death results" provision:

- Like the provision *Dean* addressed, the "death results" provision has no textual reference to *mens rea*. Section 841(a) describes the primary offense conduct and requires a showing that the defendant "knowingly or intentionally" trafficked in a controlled substance. By contrast, Congress segregated certain facts bearing on the appropriate punishment into Section 841(b)(1), which makes no reference to *mens rea*. The difference signals that Congress intended not to require a showing of *mens rea* with respect to the matters in Section 841(b)(1). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). There is no basis to carry the *mens rea* requirement in Section 841(a) "all the way down" into the "death results" provision located in a "separate subsection[]." *Dean*, 556 U.S. at 573.[19]

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[19] *Dean* thus shows why petitioner's reliance (Br. 23) on *Flores-Figueroa* v. *United States*, 556 U.S. 646 (2009), is misplaced. That case considered the reach of the modifier "knowingly" in the federal aggravated identity theft statute, which penalizes "[w]hoever, during and in relation to [certain specified felonies], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). This Court held that the government must prove that a Section 1028A(a)(1) defendant knew that the means of identification at

- Like the provision *Dean* addressed, the "death results" provision is phrased in the passive voice. See, *e.g.*, *United States* v. *Houston*, 406 F.3d 1121, 1124 (9th Cir.), cert. denied, 546 U.S. 914 (2005).

- Just as the *Dean* defendant's criminal culpability for the underlying firearm offense made it unproblematic to hold him responsible for an unintended discharge, so too here it would have been "no excuse" at common law that a drug trafficker "did not [subjectively] foresee or intend * * * the death of a man" as "a consequence" of his "antecedently * * * unlawful" trafficking. *Dean*, 556 U.S. at 576 (quoting Blackstone 26-27); see *X-Citement Video*, 513 U.S. at 73 n.3 ("Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful.").

3. Petitioner resists these striking parallels to *Dean*, asserting that *Dean* is limited to sentencing factors (Br. 24) or peculiar to the discharge provision at issue (Br. 24-25). But the common law principles animating *Dean* also

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issue "belonged to another person." *Flores-Figueroa*, 556 U.S. at 657.

Flores-Figueroa found, "[a]s a matter of ordinary English grammar," that it was "natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime," 556 U.S. at 650, because the entire provision was a single sentence of only two dozen words. But here, the "death results" provision is not in the same sentence as the phrase "knowingly or intentionally"; nor are they even the same subsection of the statute; indeed, more than 1000 words intervene between the two.

support the felony-murder rule, under which a defendant is held criminally responsible for deaths—even unintentional deaths—that result from the defendant's commission of a particularly dangerous intentional felony. See *Dean*, 556 U.S. at 575 (discussing the felony-murder rule). Felony-murder is not a sentencing factor; it has always been a criminal homicide,[20] and is so by statute in many States today.[21] "[F]elony-murder does contain an element of intent"—the intent to commit the predicate felony—but "not the intent to kill." *State* v. *Burkhart*, 103 P.3d 1037, 1047 (Mont. 2004). The same is true here: to be held criminally responsible under the "death results" provision of the CSA, the defendant must intend to traffic a controlled substance, but need not intend the death that results from its use.

C. Congress has long acquiesced in lower courts' uniform understanding that the "death results" provision does not require instruction on foreseeability in a case involving a drug-overdose death

1. Since at least 1994, the courts of appeals to consider the issue in drug-overdose cases have uniformly held that "the plain language" of the "death results" provision

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[20] See, *e.g.*, Michael Dalton, *The Countrey Justice* 308 (1655) ("But if a man be doing of an unlawful act, though without any evill intent, and he happeneth by chance to kill a man, this is Felony, *viz.* Man-slaughter at the least, if not Murder."); Edward Coke, *The Third Part of the Institutes of the Laws of England* 57 (Hein Co. 1986) (1644) ("[W]hen a man doth an act" which "tendeth to a man's death," "[i]f the act be unlawful it is murder * * * for he had an ill intent, though that intent extended not to death.").

[21] See, *e.g.*, La. Rev. Stat. Ann. § 14:30.1(A)(2) (Supp. 2013); Mont. Code Ann. §§ 45-5-102(1)(b), -2-103(2) (2011); Tenn. Code Ann. § 39-13-202(a)(2) and (b) (West 2013); Va. Code Ann. § 18.2-33 (2009).

"does not require" the government to prove that "death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event." *Patterson*, 38 F.3d at 145.[22] In that time, Congress has amended Section 841(b)(1) six times (see note 2, *supra*), but it has never sought to alter those courts' uniform understanding that the "death results" provision does not require an instruction on foreseeability in a case involving a drug overdose.

2. That telling history parallels the history behind this Court's decision in *McBride*, which addressed the role of proximate cause in a provision of the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* Under FELA, "railroads [are] liable for employees' injuries or deaths 'resulting in whole or in part from [carrier] negligence.'" *McBride*, 131 S. Ct. at 2634 (quoting 45 U.S.C. 51) (second set of brackets in original). The Court held that the statute "does not incorporate 'proximate cause' standards developed in nonstatutory common-law tort actions." *Id.* at 2634. Rather, the Court reaffirmed that "the test" Congress adopted to serve the function of proximate cause is whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.*

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[22] See, *e.g.*, *United States* v. *Webb*, 655 F.3d 1238, 1254-1255 (11th Cir. 2011) (per curiam), cert. denied, 132 S. Ct. 1131 (2012); *Houston*, 406 F.3d at 1124-1125; *United States* v. *Soler*, 275 F.3d 146, 152-153 (1st Cir.), cert. denied, 535 U.S. 1071 (2002); *United States* v. *McIntosh*, 236 F.3d 968, 971-974 (8th Cir.), cert. denied, 532 U.S. 1022 (2001); *Robinson*, 167 F.3d at 830-832; see also *Hatfield*, 591 F.3d at 949 (dicta); *United States* v. *Rebmann*, 226 F.3d 521, 525 (6th Cir. 2000) (describing the "death results" provision as "a strict liability statute"), overruled on other grounds by *United States* v. *Leachman*, 309 F.3d 377, 385 n.9 (6th Cir. 2002), cert. denied, 538 U.S. 969 (2003).

at 2636 (quoting *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957)).

McBride is relevant in two respects. First, it reflects this Court's recognition that Congress sometimes replaces default principles of proximate causation with special rules adapted to the circumstances at hand. See *McBride*, 131 S. Ct. at 2641 (explaining that the Court's decision in *Rogers* does not "eliminate[] the *concept* of proximate cause" but rather "describes the test for proximate causation applicable in FELA suits"). Congress has done so in the "death results" provision by recognizing that a drug trafficker can reasonably foresee the drug-overdose deaths of which his drugs are a cause in fact. Second, *McBride* emphasized that, in light of this Court's 1957 decision in *Rogers*, the courts of appeals had uniformly rejected a default proximate cause standard in FELA cases. 131 S. Ct. at 2640. The Court found it significant that "Congress has had more than 50 years in which it could have corrected" that approach "if it disagreed with it, and has not chosen to do so." *Id.* at 2641 (internal quotation marks and alterations omitted). So too here, Congress has acquiesced in the uniform judicial interpretation of the "death results" provision.

D. The "death results" provision would require a jury instruction on foreseeability in some cases, but an ordinary drug-overdose case does not implicate that requirement

Petitioner relies on elaborate hypotheticals (Br. 21) to suggest that a foreseeability requirement is necessary to avoid an enhanced sentence for deaths that are causally remote from the user's drug use. The Seventh Circuit in *Hatfield* likewise expressed concern about applying the "death results" provision in a hypothetical case in which "a defendant sells an illegal drug to a person who, not

wanting to be seen ingesting it, takes it into his bathroom, and while he is there the bathroom ceiling collapses and kills him." 591 F.3d at 948.

Those hypotheticals do not suggest any instructional error here. The courts of appeals have long interpreted the "death results" provision not to require proof of foreseeability in connection with drug-overdose deaths (see note 22, *supra*), yet petitioner cites *not one actual case* in which that has led to an untoward result. The government has likewise identified no conviction on facts even arguably comparable to petitioner's imagined horribles.[23] In the face of similar invented scenarios, this Court in *Dean* and *McBride* refused to adopt extra-textual requirements of *mens rea* and proximate cause. *Dean*, 556 U.S. at 574 (declining to "contort[] and stretch[] the statutory language to imply an intent requirement" based on "[f]anciful hypotheticals"); *McBride*, 131 S. Ct. at 2641 ("[A] half century's experience * * * gives us little cause for concern: [the defendant's] briefs did not identify even *one* trial in which the instruction generated an absurd or untoward [outcome].").

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[23] The government has identified only one conviction under the "death results" provision in which the victim's immediate cause of death was not an overdose (*i.e.*, the internal physiological effects of the controlled substance), but instead something external. The defendant in *United States* v. *Roman*, No. 09-cr-77 (C.D. Cal.), pleaded guilty to, *inter alia*, distributing Schedule I hallucinogenic mushrooms to a 17-year-old girl who ingested them, suffered severe hallucinations, and ran naked onto a freeway where she was struck and killed by a motorist. See U.S. Atty's Off., *Ventura County Man Sentenced to 15 Years in Federal Prison for Selling "Magic Mushrooms" to Teenagers, One of Whom Was Killed After Running onto Freeway* (Aug. 3, 2009), http://www.justice.gov/usao/cac/Pressroom/pr2009/092.html.

"Fanciful hypotheticals," *Dean*, 556 U.S. at 574, are better addressed (if at all) in more measured fashion. Petitioner is surely correct that a prosecution under the causal theories of death in his hypotheticals would require jury instructions different from the ones given at his trial. Explicating the statutory "death * * * results" element for the jury in such a case might lead a court to include an instruction about foreseeability, or one about intervening and superseding causes, or any of a number of proximate cause concepts. Significantly, though, such instructions would be appropriate not because the "death results" provision inflexibly commands them in every case, but instead because they would have a foundation in the theory of the prosecution and the evidence at trial. Cf. *United States* v. *Swallow*, 109 F.3d 656, 659 (10th Cir. 1997) ("An instruction as to intervening cause is not proper absent evidence to sustain it."); *Vallery* v. *State*, 46 P.3d 66, 78 (Nev. 2002) ("[The defendant] proffered instructions on intervening, superseding acts. * * * Given [the evidence at trial], the facts do not support an instruction on intervening, superseding acts.").

The structure of the CSA supports the distinction between "death results" cases prosecuted on an overdose theory and those prosecuted on another theory. As explained above, by placing a controlled substance on Schedule I or II, Congress (or the Attorney General) has made a determination that the substance is dangerous and prone to abuse—in other words, its use foreseeably risks death or injury to the user through its effect on the user's physiology. See pp. 2-3, *supra*. By contrast, scenarios involving deaths from drug-impaired behavior (Pet. Br. 21) or furtive drug use (*Hatfield*, 591 F.3d at 948) do not similarly implicate the foundational policy

judgments of the CSA. The different judgments Congress embedded in the CSA can most sensibly be reflected by different instructions adapted to different fact patterns prosecuted under that law. It is enough to say here that Congress's judgment with respect to drug-overdose deaths like Banka's was that no separate jury instruction on foreseeability was necessary.

E. If adopted, petitioner's foreseeability argument would at most entitle him to a new trial, not an acquittal

Petitioner contends that "[t]he record in this case affirmatively establishes * * * that Mr. Banka's death was *not* a foreseeable consequence of his partial use of the heroin [petitioner] sold him" (Pet. Br. 29) and that his conviction therefore "must be overturned" (*id.* at 31). Petitioner is incorrect to the extent he suggests that he would be entitled to a judgment of acquittal on the "death results" charge if this Court concludes the jury should have been instructed to decide whether Banka's death was foreseeable. Rather, petitioner would be entitled only to a new trial at which the jury would be instructed on foreseeability, for two independent reasons.

First, petitioner did not preserve a sufficiency-of-the-evidence claim as to foreseeability. When he moved in the district court for a judgment of acquittal under Rule 29, he did not assert that the government had failed to prove proximate cause or reasonable foreseeability. J.A. 214-216, 220. Rather, petitioner preserved his foreseeability claim only by objecting to the jury instructions. J.A. 221-222, 236-238. The remedy for such an instructional error is a new trial. See, *e.g.*, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 465 (1978).

Second, even if petitioner had preserved a sufficiency claim as to the foreseeability of Banka's death, it would fail. The jury could infer from petitioner's heroin sales

that he was familiar with the drug's properties and risks. And the jury had evidence that the particular amount of heroin petitioner distributed to Banka (1 gram, J.A. 101-104) was more than enough to cause death, given that Banka had used well less than half of it (leaving at least 0.59 grams, Tr. 154), yet that fraction of petitioner's sale had alone produced a morphine level in Banka's blood that "would be expected to be highly toxic" and "represent[ed] a dose that would exceed what would be tolerable for a nontolerant individual" (J.A. 195-196).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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