No. 12-7515

In The
Supreme Court of the United States

MARCUS ANDREW BURRAGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF ALASKA, COLORADO, HAWAI'I, KANSAS, NEW MEXICO, SOUTH DAKOTA, TENNESSEE, WISCONSIN AND WYOMING IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amici address only the second of the two questions on which this Court granted review, namely:

> In cases like this one, where the defendant's conduct contributes to the causal mechanism underlying the victim's death but is potentially superfluous, does 21 U.S.C. § 841(b)(1)(C) require by way of factual causation that the defendant's conduct be "independently" sufficient to cause the victim's death?

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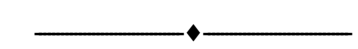
INTEREST OF AMICI CURIAE

Like the federal criminal code, state criminal codes include a variety of offenses that require the government to prove a causal relationship between an actor's conduct and a proscribed result. And like the federal criminal code, most state criminal codes include no general provision defining this required causal relationship. *See* Model Penal Code & Commentaries § 2.03 cmt. 5 (1985) ("In the majority of jurisdictions that have adopted or considered revised codes, no explicit provision on causation has been included. . . ."). Accordingly, in giving content to statutory causation requirements, state courts often draw on the same body of judge-made criminal law doctrine as do federal courts. *See*, *e.g.*, *State v. David*, 141 P.3d 646, 649-52 (Wash. App. 2006). As the states' chief law enforcement officers, the amici have a strong interest in fostering the development of just and workable criminal law doctrine on the subject of causation.



STATEMENT OF THE CASE

Petitioner Marcus Burrage sold heroin to Joseph Banka, who died of "mixed drug intoxication" shortly after injecting it. J.A. 100, 105-08, 157. Several different drugs (or their metabolites) were present in Banka's system when he died, including heroin, oxycodone, clonazepam, and alprazolam. J.A. 157, 193. Though all of these drugs but the heroin were

present only at therapeutic levels, all of them contributed – by depressing Banka's central nervous system – to the causal mechanism behind Banka's death. J.A. 153, 157, 193-95. As a result, neither the pathologist who performed the autopsy nor the toxicologist who tested Banka's blood could say that Banka would not have died "but for" his use of the heroin supplied by Burrage. J.A. 159, 208. Instead, they could say only that the heroin was a "contributing factor." J.A. 158, 199.

For his role in Banka's death, the government charged Burrage under 21 U.S.C. § 841(b)(1)(C), which imposes an enhanced sentence on a heroin dealer "if death or serious bodily injury results from the use of such substance." J.A. 41. At Burrage's trial (on this and another, separate charge), defense counsel proposed a jury instruction that would have required the government to prove, among other things, that the heroin supplied by Burrage was a but-for cause of Banka's death. J.A. 238. Specifically, the instruction would have required the government to prove that "except for [Burrage's conduct] the death would not have occurred." J.A. 238. The district court declined so to instruct the jury. J.A. 222. Instead, the court instructed the jury – in keeping with *United States v. Monnier*, 412 F.3d 859 (8th Cir. 2005) – that the government was required to prove that the heroin supplied by Burrage "was a contributing cause." J.A. 242. The jury convicted Burrage. J.A. 40.

On appeal, Burrage argued, among other things, that the district court had erred in its instructions to

the jury on the question of factual causation. J.A. 59. The Court of Appeals for the Eighth Circuit affirmed Burrage's conviction. The court of appeals concluded, first, that an event need merely be a "contributing cause" to satisfy the causation requirement in 21 U.S.C. § 841(b)(1)(C), and, second, that the testimonies of the pathologist and the toxicologist were sufficient to sustain the verdict. J.A. 60, 65-66.

SUMMARY OF ARGUMENT

Burrage's case is an instance of what courts and commentators call "causal overdetermination." *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989); Eric Funkhauser, *Three Varieties of Causal Overdetermination*, 83 Pac. Phil. Q. 335, 340 (2002). The evidence at Burrage's trial left no doubt either about the causal mechanism behind Banka's death or about whether the heroin supplied by Burrage had contributed to this causal mechanism. J.A. 153, 157, 193-95. At the same time, though, the evidence at trial suggested that the heroin's contribution to this causal mechanism – like every other individual contribution – might conceivably have been superfluous. J.A. 159, 208. The possible superfluity of each of the individual contributions to Banka's death makes this a case of causal overdetermination. *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1185 (9th Cir. 2000).

That Burrage's case is an instance of causal overdetermination bears on the second of the two questions before this Court, namely: What did 21 U.S.C. § 841(b)(1)(C) require in Burrage's case by way of factual (as distinct from legal or proximate) cause? On this question, the amici will make four points:

1. Though the "but-for" test is the correct test of factual causation in most criminal cases, cases of causal overdetermination require an alternative test. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(b) at 468-69 (2d ed. 2003). In cases like Burrage's, where each of the individual factors that contributes to the causal mechanism behind the proscribed result also is potentially superfluous, application of the but-for test would lead to the absurd conclusion that the result "may not have any 'cause' at all." *Price Waterhouse*, 490 U.S. at 241.

2. The alternative test applicable in cases of causal overdetermination does not, as Burrage claims, require that the defendant's conduct be "independently" sufficient to cause the proscribed result. Pet. Br. 17-18, 29-34. Though commentators occasionally posit independently sufficient conduct in constructing illustrations of causal overdetermination, the tests formulated by these commentators – like the tests applied by the courts – are broad enough to encompass cases where "an actor's conduct requires other conduct to be sufficient to cause another's harm." Restatement (Third) of Torts § 27 cmt. f (2010).

3. What the criminal law requires instead is that the defendant's conduct contribute to, or complement, a causal mechanism that in the aggregate is a cause of the proscribed result. This contribution test finds strong support both (a) in criminal statutes that address the problem of causal overdetermination explicitly; and (b) in cases from jurisdictions where the legislature has, like Congress, left the question to the courts. *See*, *e.g.*, 17-A Me. Rev. Stat. § 33; *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010).

4. This Court should leave for future cases the question whether the law requires something else in addition to contribution. Some versions of the contribution test impose an additional requirement. For example, under some state statutes it is a condition of liability that the *other* concurrent causal factors were not "clearly sufficient" by themselves to cause the result. *See, e.g.,* 17-A Me. Rev. Stat. § 33. But Burrage has not addressed the question whether the contribution test requires this or any other added condition. And neither this nor any other added condition would have made a difference in Burrage's case.

ARGUMENT

I. The Criminal Law Does Not Require But-For Causation In Cases Of Causal Overdetermination.

"In the usual course," the question of factual causation hinges on whether "the harm would not

have occurred in the absence of – that is, but for – the defendant's conduct." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2525 (2013) (internal quotation marks omitted). Everyone agrees, however, that the defendant's conduct sometimes will count as a factual cause "even though [it is] not a but-for cause." LaFave, *supra*, § 6.4(b) at 468-69; *see also Price Waterhouse*, 490 U.S. at 241; Model Penal Code, *supra*, § 2.03 cmt. 2. More specifically, everyone agrees that the but-for test does not deliver the right answer in cases of so-called "causal overdetermination." *Price Waterhouse*, 490 U.S. at 241; *see also* Michael S. Moore, *Causation and Responsibility* 86 (2009).

To illustrate: Suppose that "two assailants without preconcert attack their victim with intent to kill, and death results because each has simultaneously struck a mortal blow." Model Penal Code, *supra*, § 2.03 cmt. 2. Because either of the two assaults would have brought about the death, neither really is necessary. Neither is a but-for cause, in other words. It would be absurd, however, to conclude that the victim's death in this case "may not have any 'cause' at all." *Price Waterhouse*, 490 U.S. at 241; *see also Boeing Co. v. Cascade Corp.*, 207 F.3d at 1185; Jonathan Schaffer, *Overdetermining Causes*, 114 Phil. Studies 23, 24 (2003). In cases like this, then, "there are good reasons both for saying that some given event was caused by some action and also that it would have happened without this action." H.L.A.

Hart & Tony Honoré, *Causation in the Law* 123 (2d ed. 1985).

The but-for test's inadequacy in cases of causal overdetermination is widely recognized. *See* LaFave, *supra*, § 6.4(b) at 468-69. Where causal overdetermination is concerned, the jurisdictions can be divided roughly into two groups. In the first group are jurisdictions where the legislature has adopted a criminal statute that addresses the question of causal overdetermination explicitly. *See* Ala. Code § 13A-2-5(a); Ark. Code § 5-2-205; 17-A Me. Rev. Stat. § 33; N.D. Cent. Code § 12.1-02-05; Tex. Penal Code § 6.04. In the second group are jurisdictions where the question of causal overdetermination has essentially been "left to judicial development." Model Penal Code, *supra*, § 2.03 cmt. 5 (describing the effect of an incompletely specified definition of causation); *see also State v. David*, 141 P.3d 646, 649-52 (Wash. App. 2006) (noting that the state legislature "has historically left to the judiciary the task of defining some criminal elements," including causation); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 372 (arguing that the effect of "incompletely specified criminal statutes" is a tacit delegation of lawmaking authority from the legislature to the courts).

Of the state criminal codes that address the problem of causal overdetermination explicitly, all adopt an alternative to the but-for test for cases "in which two or more factors 'cause' the result." *See Final Report of the National Commission on Reform*

of Criminal Laws § 305 cmt. at 32 (1971) (describing the provision from which the state statutes are derived). Specifically, these codes adopt a "modified 'but for' test," *id.*, under which the fact finder is permitted to combine the defendant's conduct with another causal factor before applying the but-for test. *See* Ala. Code § 13A-2-5(a); Ark. Code § 5-2-205; 17-A Me. Rev. Stat. § 33; N.D. Cent. Code § 12.1-02-05; Tex. Penal Code § 6.04. Maine's statute, for example, says that "causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone *or concurrently with another cause*, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient." 17-A Me. Rev. Stat. § 33 (emphasis added).

Courts have adopted roughly the same test in states where the legislature has, like Congress, left causation doctrine to judicial development. *See*, *e.g.*, *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010); *Commonwealth v. Osachuk*, 681 N.E.2d 292, 294 (Mass. App. 1997); *People v. Bailey*, 549 N.W.2d 325, 334-36 (Mich. 1996); *State v. Woods*, No. W2003-02762-CCA-R3-CD, 2005 WL 396382 (Tenn. Crim. App. 2005); *State v. Christman*, 249 P.3d 680, 687 (Wash. App. 2011). In California, for example, the state supreme court has recognized that the but-for test, if applied in cases of causal overdetermination, "would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result." *Jennings*,

237 P.3d at 496 (quoting W. Page Keeton et al., *Prosser and Keeton on Torts*, § 41 at 266 (5th ed. 1984)). Accordingly, the court has held, as have other courts, that a defendant's conduct will qualify as a factual cause of the harm if (1) the defendant's conduct "was operative at the moment of the [result] and acted with another cause to produce the [result]"; and (2) the conduct's causal role was not "insignificant or merely theoretical." *Id.*; *see also Commonwealth v. McLeod*, 477 N.E.2d 972, 985 n.21 (Mass. 1985).

Tort law, too, reflects widespread recognition of the but-for test's inadequacy in cases of causal overdetermination. The Restatement (Third) of Torts, for example, adopts an alternative test of causation for cases of "overdetermined harm." Restatement (Third) of Torts, *supra*, § 27 cmt. b. Under this test, a defendant's conduct, though not a but-for cause, still will qualify as a factual cause if the conduct, either by itself or in combination with the conduct of one or more other actors, would have been "sufficient" to cause the harm. *Id.* § 27 & cmt. f. Likewise, Prosser's treatise espouses an alternative to the but-for test that is satisfied where "the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them." W. Page Keeton et al., *Prosser and Keeton on Torts* § 41 at 268 (5th ed. 1984).

Burrage's is a criminal case, of course, not a tort case. But tort law nevertheless bears on the question

what 21 U.S.C. § 841(b)(1)(C) requires by way of factual causation in this case. Tort and criminal law sometimes differ in how they resolve the policy-driven question whether a particular factual cause *also* qualifies as a legal or proximate cause. LaFave, *supra*, § 6.4(c) at 471-72. But criminal law and tort do not appear to differ in how they resolve, in the first instance, the question whether a particular event qualifies as a factual cause. *See id.* § 6.4(c) at 471 n.32 ("As to causation-in-fact, the two situations [tort and criminal cases] are exactly alike. . . ."); *see also People v. Jennings*, 237 P.3d 474, 496 n.3 (Cal. 2010) ("It is well established that the principles of causation, as they apply to tort law, are equally applicable to criminal law."); *State v. Burton*, 370 S.W.3d 926, 931 n.3 (Mo. App. 2012) ("We note that actual causation, or causation in fact, is the same analytically in criminal law and tort law.").

In short, "[a]ll who have considered the issue agree," at least with respect to the basic question whether the requirement of factual causation sometimes is satisfied in cases of causal overdetermination. Model Penal Code, *supra*, § 2.03 cmt. 2. Everyone agrees, in other words, that the requirement of factual causation sometimes is satisfied in cases where, by virtue of the causal sufficiency of other actors' contributions, the defendant's contribution was or might have been unnecessary.

II. In Cases Of Causal Overdetermination, The Criminal Law Does Not Require That The Defendant's Conduct Be "Independently" Sufficient To Bring About The Result.

Burrage was wrong, then, when he proposed a jury instruction that would have required but-for causation. J.A. 238. But Burrage also is wrong when he asserts in his brief to this Court that the law requires, in cases of causal overdetermination, that the defendant's conduct be "independently" sufficient to bring about the harm. Pet. Br. 17-18, 29-34. Burrage cites not a single case that applies this requirement of "independent[ ]" sufficiency.[1] Nor does he cite a single statute that adopts this test. And, indeed, all of the law is against him. Neither tort nor criminal law imposes a requirement that an overdetermining cause be "independently" sufficient.[2]

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[1] *See* Pet. Br. 17-18 n.9. The closest Burrage comes to citing case-law precedent for his view is his passing reference to *State v. Montoya*, 61 P.3d 793 (N.M. 2002). Pet. Br. 17 n.8. In *Montoya*, unbeknown to Burrage, the court *did* suggest that a defendant's conduct, if not a but-for cause, must be "alone sufficient" to cause the harm. *Montoya*, 61 P.3d at 799. But, as explained in Section IV, *infra*, the court in *Montoya* upheld the defendant's murder conviction despite the fact that the defendant's kidnapping of the victim was neither necessary nor independently sufficient to bring about the victim's death.

[2] Though amici will indulge, with Burrage, in using the term "independently" sufficient, even this term is problematic. An actor's conduct never really is "independently" sufficient to cause a result. What is *sufficient* to cause a result is "not a

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a. To begin with, intuitions about the but-for test's inadequacy are not confined to cases where the actor's conduct was sufficient by itself to cause the harm. Exactly the same intuitions arise in cases where "an actor's conduct requires other conduct to be sufficient to cause another's harm." Restatement (Third) of Torts, *supra*, § 27 cmt. f. The Restatement uses a hypothetical case to illustrate this point:

> Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul's car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the end of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul's car past the

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single condition, but a set of conditions." Hart & Honoré, *supra*, at 19. Though we might be tempted to say that a smoker's disposal of a cigarette butt was "independently" sufficient to cause a resulting forest fire, the fire actually depended causally on a number of other conditions as well, including the presence of oxygen in the air and combustible materials on the forest floor. *Id.*; *see also* John Stuart Mill, *System of Logic*, bk. III, ch. V, § 3, at 241 (8th ed. 1974). What Burrage appears to mean by "independently" sufficient is that the actor's conduct was sufficient in combination with background conditions – like the tinder on the forest floor – to bring about the harm. And so his proposed test hinges on an undefended, and perhaps indefensible, distinction between background and non-background conditions.

> curbstone, but the combined force of any two of them is sufficient.

Id. § 27 cmt. f, ill. 3. In this case, no less than in a case where two assailants independently inflict mortal wounds, it would be absurd to conclude that the harm "may not have any 'cause' at all." *Price Waterhouse*, 490 U.S. at 241. Our intuition, rather, is that "Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car." Restatement (Third) of Torts, *supra*, § 27 cmt. f.[3]

Tort and criminal law both are in keeping with this intuition. Under the Restatement test, for example, the question whether an actor's conduct qualifies

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[3] The absurdity of Burrage's position is even clearer in cases where the defendant himself performs several distinct acts, each of which contributes to the proscribed result but none of which is "independently" sufficient to bring about the result. Take, for example, *Commonwealth v. Osachuk*, 681 N.E.2d 292, 293-94 (Mass. App. 1997), where the victim's death from drug intoxication was attributable to the combined effects of three separate acts by the defendant: (1) his act of giving the victim methadone tablets; (2) his later act of giving the victim money to purchase cocaine and heroin; and (3) his still-later act of injecting the victim with additional cocaine. If the law were to require that an overdetermining cause be "independently" sufficient to bring about the harm, the court in *Osachuk* would have had to conclude, absurdly, that the defendant had not caused the victim's death. After all, in criminal law as in tort, the question of causation is resolved in relation to a particular act, not in relation to a series of acts. *See* Michael S. Moore, *Act and Crime* 35-36 (1993) (explaining that all the conditions of criminal liability, including causation, must be proved in relation to a specific "voluntary act").

as a factual cause does not hinge on whether the actor's conduct is sufficient by itself to bring about the harm. The question hinges, rather, on whether it is possible, by subtracting some "other act(s)," to construct a counterfactual universe in which the actor's conduct is a necessary element of a "sufficient causal set." Restatement (Third) of Torts, *supra*, § 27 & cmt. f. In the parked-car hypothetical, for example, the Restatement would permit the finder of fact to subtract counterfactually the conduct of *one* of the three actors, leaving a "sufficient causal set" consisting of (1) the defendant's contribution and (2) the contribution of one but not the other remaining actor. *Id.* cmt. f. Of this sufficient causal set, the defendant's conduct is a necessary element. So "Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car." *Id.*

The same thing is true under Prosser's test for cases of causal overdetermination. Keeton et al., *supra*, § 41 at 268. Prosser's test differs from the standard but-for test in that it poses the question of causal necessity not in relation to the defendant's conduct alone, but in relation to the "combined conduct" of two or more actors. *Id.* Under Prosser's test, each of the three actors in the parked-car hypothetical – Able, Baker, and Charlie – would count as a cause of the car's destruction, because their "combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them." *Id.* The fact that no single actor's conduct was independently

sufficient is beside the point. *Cf.* Jane Stapleton, *Unnecessary Causes*, 129 L. Q. Rev. 39, 60 (2013) ("There is no reason to think courts would take a different view in cases where the defendant's tortious contribution was not only unnecessary for the threshold to have been reached but was also insufficient for it to be reached. . . .").

The criminal law of the states reflects the same view. In states where the legislature has, like Congress, left the development of causation doctrine to the courts, the courts have not required the government to prove that defendant's acts were "themselves wholly sufficient" to cause the harm. *Commonwealth v. McLeod*, 477 N.E.2d 972, 985 (Mass. 1985). What they have required instead is roughly what Prosser requires, namely, proof that the defendant's conduct contributed to a causal mechanism that, in the aggregate, was a but-for cause of the harm. *See, e.g., People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010); *Commonwealth v. Osachuk*, 681 N.E.2d 292, 294 (Mass. App. 1997); *People v. Bailey*, 549 N.W.2d 325, 334-36 (Mich. 1996); *State v. Woods*, No. W2003-02762-CCA-R3-CD, 2005 WL 396382 (Tenn. Crim. App. 2005); *State v. Christman*, 249 P.3d 680, 687 (Wash. App. 2011). *See generally* Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 Iowa L. Rev. 59, 66-86 (2005).

Much the same rule is applied in states where the legislature has addressed the causal-overdetermination problem by statute. *See* Ala. Code § 13A-2-5(a); Ark. Code § 5-2-205; 17-A Me. Rev. Stat. § 33; N.D. Cent.

Code § 12.1-02-05; Tex. Penal Code § 6.04. Arkansas's statute, for example, provides:

> Causation may be found when the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless:
>
> (1) the concurrent cause was clearly sufficient to produce the result; and
>
> (2) the conduct of the defendant was clearly insufficient to produce the result.

Ark. Code § 5-2-205. This statute, like the others, does not require that the defendant's conduct be sufficient by itself to cause the harm. It requires, first, that the defendant's conduct contribute to a causal mechanism that is a but-for cause. And it requires, second, that the defendant's contribution *might* potentially have made a difference to the outcome.[4]

Congress, of course, has not adopted this or any other statutory language on the question of causal overdetermination. But these state statutes are nevertheless telling. Each of the statutes was modeled closely on Section 305 of the Brown Commission's 1971 draft federal criminal code. *See Final Report of the National Commission on Reform of Criminal Laws*, *supra*, § 305. Section 305 – on the

[4] This second statutory component is analyzed in greater detail in Section IV, *infra*.

"causal relationship between conduct and results" – was one of several code provisions addressed to "basic conditions of liability" and designed to "make the treatment and understanding of these issues clear and uniform." *Id.* § 301 cmt. at 27. Thus, the section does not appear to have been intended to work a change in existing law on the subject. Rather, it appears to have been intended merely to make existing law "clear and uniform." *Id.* At bottom, the state statutes modeled on the Brown Commission report are just another reflection, albeit indirect, of the substantive background principles at work in the judge-made criminal law.

b. In support of his sufficient-by-itself test, Burrage does not cite statutes or cases. Instead, Burrage seizes on the fact that commentators, in constructing illustrations of causal overdetermination, sometimes posit conduct – both by the defendant and by the other actor – that is sufficient by itself to cause the harm. *See* Keeton et al., *supra*, § 41 at 266; LaFave, *supra*, § 6.4 at 468. But Burrage misinterprets these commentators. Though they do posit conduct "sufficient by itself" in constructing illustrations of causal overdetermination, they do not require conduct sufficient by itself when, finally, they formulate the rule applied in cases of causal

overdetermination. *See* Keeton et al., *supra*, § 41 at 266, 268; LaFave, *supra*, § 6.4 at 468.[5]

Take Professor LaFave, for example. Professor LaFave's illustration of causal overdetermination posits two simultaneous assaults, each of which "inflict[s] a fatal wound." LaFave, *supra*, § 6.4. at 468. When he formulates the rule applied in cases of causal overdetermination, however, Professor LaFave does not impose a sufficiency requirement. According to Professor LaFave, the question in these cases is simply: "Was the defendant's conduct a substantial factor in bringing about the forbidden result?" *Id.* at 479.

The phrase "substantial factor" does not, of course, mean "sufficient by itself to bring about the

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[5] Burrage's argument misreads the reason why commentators posit conduct sufficient by itself in constructing illustrations of causal overdetermination. Illustrations like LaFave's are designed to show that cases arise where (1) the defendant's conduct fails to satisfy the but-for test; but (2) his conduct nevertheless seems intuitively to qualify as a cause. LaFave, *supra*, § 6.4 at 468. The sufficient-by-itself stipulation bears on the first, not the second, feature of these cases. In other words, in causal-overdetermination scenarios involving two actors, what makes each actor's conduct unnecessary – what makes it less than a but-for cause – is the fact that the conduct of the *other* actor would have been "sufficient by itself" to produce the same result. Keeton et al., *supra*, § 41 at 268. There is no reason to suppose, then, that the sufficient-by-itself stipulation bears on the second feature of these illustrations. There is no reason to suppose, in other words, that the sufficient-by-itself stipulation is what drives the critical intuition that the defendant's conduct ought to qualify as a factual cause.

result." Rather, a "substantial factor" simply is "an important or significant contributor" to the proscribed result, *Black's Law Dictionary* 1442-43 (7th ed. 1999), as distinguished from an "infinitesimal" or "theoretical" contributor. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 781 (3d ed. 1982); *see also People v. Caldwell*, 681 P.2d 274, 280 (Cal. 1984); *People v. Wells*, 355 N.W.2d 105, 107 (Mich. 1984) (Levin, J., dissenting). Professors Perkins and Boyce explain this point in their criminal law treatise:

> If a man bleeds to death from two wounds inflicted by different persons, acting quite independently, "both may properly be said to have contributed to his death." If at the moment of death both injuries were substantially contributing thereto, the "law does not measure the effects of the several injuries in order to determine which is the more serious and which contributed in greater measure to bring about the death," but imputes the loss of life to both. But suppose one wound severed the jugular vein whereas the other barely broke the skin on the hand, and as the life blood gushed from the victim's neck, one drop oozed from the bruise on his finger. . . . [T]he law will apply the *substantial factor* test and for juridical purposes the death will be imputed only to the severe injury in such an extreme case as this.

Perkins & Boyce, *supra*, at 779 (footnotes omitted); *see also Christman*, 249 P.3d at 687 ("Under the

substantial factor test, all parties whose actions contributed to the outcome are liable.").

In summary, Burrage's proposed sufficient-by-itself requirement is without support in the criminal law.

III. In Cases Of Causal Overdetermination, The Criminal Law Requires The Government To Prove That The Defendant's Conduct Contributed To A Causal Mechanism That Was A Cause Of The Proscribed Result.

The criminal law does not, then, require "but for" causation in cases of causal overdetermination. Nor does it require proof that the defendant's conduct was sufficient by itself to cause the proscribed result. What it requires, primarily if not exclusively,[6] is that the defendant's conduct make a positive incremental contribution to a causal mechanism that, in the aggregate, is a but-for cause of the proscribed result.

Courts have applied this contribution requirement, for example, in cases where "a man bleeds to death from two wounds inflicted by different persons, acting quite independently." Perkins & Boyce, *supra*, at 781. In the seminal case, *People v. Lewis*, 57 P. 470 (Cal. 1899), the victim bled to death from two

[6] The question whether the criminal law requires something else, in addition to contribution, is addressed in Section IV, *infra*.

wounds: a gunshot wound inflicted by defendant Lewis and a "ghastly" knife wound inflicted independently by the defendant's son. *Id.* at 471. In concluding that the gunshot wound inflicted by the defendant was a cause of death, the California Supreme Court said that the critical question was whether "the wound inflicted by the defendant did contribute to the event." *Id.* at 473. The critical question, in other words, was whether the wound inflicted by the defendant had made a positive contribution to a causal mechanism – blood loss – that in the aggregate was a but-for cause of death. It had, according to the court: "Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event." *Id.*

In other settings too, courts have imposed criminal liability after concluding that the defendant's conduct "contributed" to the causal mechanism behind the victim's death. Take, for example, *State v. Woods*, No. W2003-02762-CCA-R3-CD, 2005 WL 396382 (Tenn. Crim. App. 2005), where the blunt-force injuries inflicted by the defendant contributed, along with injuries inflicted by others, to the victim's death from blunt-force trauma. Under these circumstances, said the appellate court, the government was required to show only that "'but for' the acts of all, death would not have occurred." *Id.* at **4-5; *see also People v. Bailey*, 549 N.W.2d 325, 334-36 (Mich. 1996).

Likewise, in cases where the defendant supplied one of several substances that contributed to the

victim's death from intoxication, the courts have required the government to show only that the defendant's conduct "contributed to the outcome." *State v. Christman*, 249 P.3d 680, 687-88 (Wash. App. 2011); *see also People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010) (applying contribution test where defendant's physical abuse of the victim contributed, by weakening him, to his death from "combined drug toxicity"); *Commonwealth v. Osachuk*, 681 N.E.2d 292, 294 (Mass. App. 1997) (applying contribution test where drugs supplied by the defendant on each of three different occasions contributed to the victim's death from combined "cocaine, heroin, and methadone intoxication").

Cases where courts explicitly have applied this "contribution" test are just the tip of an iceberg, however. In a large number of other criminal cases, courts have reached identical results by asking, instead, whether a homicide defendant's conduct deprived the victim of a "chance" of surviving some other causal factor – usually an illness or injury. Johnson, *supra*, 91 Iowa L. Rev. at 61 n.3 (listing cases); *see also Grayer v. State*, 647 S.E.2d 264, 268 (Ga. 2007) (upholding defendant's conviction for murder after concluding that but for the defendant's failure to seek medical care for the infant victim, "the baby might have survived"); *People v. Hoerer*, 872 N.E.2d 572, 574, 579 (Ill. App. 2007) (upholding defendant's conviction for involuntary manslaughter after concluding that but for the defendant's efforts to prevent his friends from summoning assistance for

the victim, the victim "might have survived" the methadone overdose that killed her); *State v. Shane*, No. A06-1581, 2008 WL 660543 at *3 (Minn. App. 2008) (upholding defendant's conviction for second-degree murder after concluding that the defendant's failure to seek prompt medical assistance for her infant daughter had deprived the daughter of "between a two and ten percent chance of survival").

Consider, for example, *State v. Montoya*, 61 P.3d 793 (N.M. 2002), where Adam Montoya was charged with murder for his role in the death of Ty Lowery. Lowery died from a gunshot wound, but Montoya himself did not shoot Lowery, nor was he implicated in the shooting as an accomplice. Rather, shortly after the shooting, he kidnapped the injured Lowery and drove him to a nearby river, where he left him to die. At Montoya's trial, the state's pathologist could not testify that Montoya's actions were a but-for cause of Lowery's death. He acknowledged that "he thought it was still more than likely that the victim would have died even if he would have been taken to the hospital." *Id.* at 796. But the pathologist testified "there was 'some chance' that immediate medical attention could have prevented the victim's death." *Id.* In upholding Montoya's conviction, the court said it was enough that Montoya had deprived Lowery of this chance of survival: "This evidence permits a finding that the victim was not put on an unalterable course of death once he had been shot. Immediate medical intervention could possibly have saved his life." *Id.*

Decisions like *Montoya* obviously cannot be explained by the but-for test. In these cases, the government's evidence at best shows that, but for the defendant's wrongdoing, the victim *might* have survived the injury or illness that killed him. The evidence does not show that he *would* have survived, and so it does not satisfy the but-for test. The evidence in these cases does satisfy the contribution test, however. In *Montoya*, for example, the defendant's kidnapping of the victim complemented the victim's gunshot wound by depriving the victim of medical care that would have stopped the bleeding. *Montoya*, 61 P.3d at 796; *see also* Johnson, *supra*, 91 Iowa L. Rev. at 78. Because the kidnapping of the victim made a positive contribution to the causal mechanism that brought about the victim's death – namely, blood loss – it counts as a cause under the contribution test, quite apart from whether the victim might have died anyway.

Admittedly, the courts in these lost-chance cases have not consciously formulated an alternative to the but-for test. Johnson, *supra*, 91 Iowa L. Rev. at 64. On the contrary, in many of these cases the courts appear to have assumed that they were applying the but-for test as they had always done. *See, e.g., Armstrong v. State*, 502 P.2d 440, 446 n.2 (Alaska 1972); *Montoya*, 61 P.3d at 799-800; *Commonwealth v. Barnhart*, 497 A.2d 616, 626 (Pa. Super. Ct. 1985). Still, these cases matter. That courts scattered around the country have arrived independently at the same rough formula for resolving questions of causal overdetermination

bespeaks the strength of the intuitions underlying that formula. Those intuitions, in turn, bear on the interpretation of criminal statutes in jurisdictions where the legislature has left the development of causation doctrine to the courts. As Hart and Honoré said: "[I]t is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned." Hart & Honoré, *supra*, at 1.

Burrage is wrong, moreover, when he implies that the contribution test would lead somehow to a "limitless extrapolation of liability." Pet. Br. 36. Under the contribution test, the fact finder is permitted to "combine" the defendant's conduct with another causal factor only if the two are complementary – only if both *contribute* to the same causal mechanism, in other words. *See* 3 *Oxford English Dictionary* 848 (2d ed. 1989) (defining "contribute" as "[t]o give or pay jointly with others; to furnish to a common fund or charge"). In *Lewis*, for example, the victim's two wounds – the gunshot wound inflicted by Lewis and the knife wound inflicted by Lewis's son – both contributed to the same causal "fund." They complemented one another. *See* Stapleton, *supra*, 129 L. Q. Rev. at 47 (arguing that liability may be assigned on the basis of the "combined" conduct's causal role if the result depends causally on "a threshold amount of some element" and the defendant's conduct makes "a positive contribution to the total amount of that element present").

By contrast, the finder of fact would not be permitted to "combine" two or more acts that lacked

this complementary or contributory relationship. To illustrate: Suppose that each of two would-be assassins independently fires a single bullet at an unknowing victim, and that one of the two bullets – no one knows whose – strikes the victim. *See* Johnson, *supra*, 91 Iowa L. Rev. at 77-78. In this hypothetical, no one would argue that the conduct of the two shooters could be "combined" or aggregated, for neither shooter contributed to the likelihood that the other's bullet would strike the victim. Neither shooter *complemented* the danger posed by the other. *Id.*; *see also* Stapleton, *supra*, 129 L. Q. Rev. at 40.

Finally, then, the district court did not err in using the word "contribute" in its instructions to the jury. Pet. Br. 33-34; J.A. 242. The word "contribute" captures better than any other the critical idea at work in the overdetermination cases. *See* Stapleton, *supra*, 129 L. Q. Rev. at 45. It captures, first, the idea at work in cases like *Lewis*, where the courts explicitly have required a showing that the defendant's actions "contributed" to the causal mechanism behind the harm. *Lewis*, 57 P. at 473. But it also captures the essential idea at work in the lost-chance homicide cases, where courts have required a showing that the defendant's conduct, by contributing to the operation of some other causal factor, deprived the victim of a chance of surviving it. *See* Johnson, *supra*, 91 Iowa L. Rev. at 77-78, 106 (identifying complementary relationship between defendant's conduct and other causal factor as critical element of lost-chance liability).

IV. This Court Should Leave For Future Cases The Question Whether The Criminal Law Requires Something Else In Addition To Contribution.

This Court should leave for future cases the question whether factual causation requires something else in addition to contribution. As explained below, some versions of the contribution test impose a secondary requirement designed to foreclose liability where the defendant's conduct makes only a trifling or insubstantial contribution to the result.[7] But Burrage has not invoked any of these requirements; instead, he has staked everything on his claim that an overdetermining cause must be sufficient in itself to cause the harm. Pet. Br. 17-18, 29-35. Moreover, none of these secondary requirements would have made a difference in the outcome of Burrage's trial.

In cases of causal overdetermination, again, the criminal law requires that the defendant's conduct contribute to a causal mechanism that, in the aggregate, is a but-for cause of the harm. But most courts and commentators appear to require something more as well. Though these additional, secondary

[7] These secondary requirements traditionally have been treated as an aspect of factual causation, rather than of proximate or legal causation. *See* LaFave, *supra*, § 6.4(b) (treating "substantial factor" requirement as an aspect of "cause in fact"); Keeton et al., *supra*, § 41 (same); Restatement (Third) of Torts, *supra*, § 27 & cmt. f (treating limitations on the construction of "sufficient causal sets" as a facet of "factual cause").

requirements take a number of different forms, most can be described loosely as "difference-making" requirements. The question posed by these requirements is not, of course, whether the defendant's contribution *actually* made a difference. To require proof that the defendant's contribution actually made a difference would be to require proof of but-for causation. The question posed by these secondary requirements is, instead, essentially whether the defendant's contribution "might have made a difference." Sanford H. Kadish, *Blame and Punishment: Essays in the Criminal Law* 164 (1987) (describing the causation test applied to contributions by accomplices).

Under the Brown Commission test, for example, and under the state statutes derived from it, a defendant's contribution will not qualify as a cause if "the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient." *Final Report of the National Commission on Reform of Criminal Laws*, *supra,* § 305; *see also* Ala. Code § 13A-2-5(a); Ark. Code § 5-2-205; 17-A Me. Rev. Stat. § 33; N.D. Cent. Code § 12.1-02-05; Tex. Penal Code § 6.04. Under this test, a defendant's contribution will qualify as a cause if it satisfies either of two difference-making tests. First, it will qualify as a cause if it might *actually* have made a difference – if the other causal factors at work were not "clearly sufficient" to cause the result. Alternatively, it will qualify as a cause if, in the absence of the other causal factors, it might still have caused the

result – if it was not "clearly insufficient" to cause the result.

The first of these two difference-making tests corresponds, as it happens, to what the courts require by way of difference-making in the lost-chance homicide cases. Again, the lost-chance cases require proof that the defendant's conduct contributed to, or complemented, the causal mechanism behind the victim's death. *See* Johnson, *supra*, 91 Iowa L. Rev. at 77-78, 106. But they also require proof that "the victim *might* have survived but for the defendant's conduct." *See id.* at 104; *see also, e.g., Armstrong*, 502 P.2d at 444 (relying on evidence that "in the absence of any one of the factors in this case, the victim might have survived"). To require proof that the victim might have survived but for the defendant's conduct is to require proof, as the Brown Commission's first test does, that the other causal factors at work in the case were not "clearly sufficient" by themselves to cause the death. *See Final Report of the National Commission on Reform of Criminal Laws*, *supra,* § 305.

Not all courts, though, have required proof that the defendant's contribution "might" have made a difference. Some have required only proof that the defendant's contribution was "substantial" rather than trifling. *See* LaFave, *supra*, § 6.4(b) at 469. In California, for example, the courts require the government, first, to prove that the defendant's conduct *contributed* to the result – that the conduct "was operative at the moment of the [result] and acted with another cause to produce the [result]." *Jennings*,

237 P.3d at 496 (quoting Cal. Jury Instr. 3.41). But they also require the government to prove that the defendant's contribution was a "substantial factor." *Id.* As the phrase "substantial factor" implies, this version of the difference-making requirement disqualifies as causes those contributions that are "insignificant or merely theoretical." *Id.*; *see also* Perkins & Boyce, *supra*, at 781; *Wells*, 355 N.W.2d at 107 (Levin, J., dissenting).[8]

This Court need not decide in this case whether to adopt one or another (or none) of these difference-making requirements. For starters, Burrage has not raised or briefed this question. In the district court and in his petition for certiorari, Burrage appears to have taken the position that the criminal law invariably requires but-for causation. J.A. 238; Pet. for Cert. 15-16. And in his brief to this Court, Burrage's only argument on the subject of factual cause is that an overdetermining cause must be "independently" sufficient in order to count as a cause. Pet. Br. 18, 31. Because Burrage has neither raised nor briefed the difficult question whether the criminal law imposes one or another of these difference-making

[8] The Restatement (Third) of Torts takes yet another approach to the question of difference-making. It limits the kinds of counterfactual manipulation that are permitted to the finder of fact in constructing a "sufficient causal set" of which the defendant's contribution is a necessary element. *See* Restatement (Third) of Torts, *supra*, § 27 & cmt. f.

requirements, this Court should leave the question for another case.

Further, none of these difference-making requirements would have changed the outcome of Burrage's trial. The evidence at Burrage's trial showed that heroin was the only drug in Banka's blood that was present (or present in the form of metabolites) at greater than therapeutic levels. J.A. 157, 194. The evidence also showed that morphine, a heroin metabolite, was present in Banka's blood at about two-and-a-half times the highest therapeutic level. J.A. 153. This evidence leaves no doubt as to whether the heroin supplied by Burrage was a substantial – as opposed to a trifling or insubstantial – factor in Banka's death from mixed-drug intoxication. And it leaves no doubt as to whether the heroin deprived Banka of a chance of surviving the other drugs. *See Neder v. United States*, 527 U.S. 1, 18 (1999) (holding that an instructional error pertaining to the elements of an offense is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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