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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

The Solicitor General acknowledges that the "death results" provision "plainly requires proof of causation," Br. Resp't 13, and does not dispute that the majority rule of criminal common law requires but for and proximate cause. Br. Resp't 18, 39. Nonetheless, the Solicitor General suggests that it is somehow consonant with 21 U.S.C. § 841(b)(1)(C)'s plain text to import a different, relaxed civil standard and impose a twenty-year mandatory minimum sentence upon "a showing that use of the controlled substance contributed to the victim's death." Br. Resp't 27. The Solicitor General's suggestion contradicts this Court's precedent and represents a significant departure from the common law that Congress has not authorized.

1. THE "DEATH RESULTS" PROVISION REQUIRES BUT FOR CAUSATION.

The Solicitor General claims that the contributing cause standard is "fully consistent with the 'death results' provision[] . . . ." Br. Resp't 17. But the Solicitor General's standard bears no relation to the statute, and its invitation to read-in a contributing cause standard is in direct conflict with this Court's precedent. Nowhere does the Solicitor General point to any express language in the text of the statute that provides the basis of its assertion that this Court should override the established meaning of "death results" language. In fact, the claim that Congress was targeting mixed-drug use with the "death results" provision is speculative at best. If Congress intended to address mixed-drug intoxication, it would have expressly written the statute to cover such scenarios.

The Solicitor General asserts that Congress intended a contributing cause standard because "[d]rug users often administer drugs in combination . . . ." Br.

Resp't 28; see also Br. Resp't 29 (referencing "the prevalence of mixed-drug overdoses"). Yet the causal language in 21 U.S.C. § 841(b)(1)(C) ("death or serious bodily injury results from *the* use of *such* substance") (emphasis added), plainly does not refer to or even imply mixed-drug use. Nor can the Solicitor General point to any legislative history or fact-finding related to such mixed-drug use. What evidence there is, including the language of this statute and the language of other statutes, points in the other direction.

The Solicitor General's invitation to read-in a contributing cause standard also directly contradicts the Court's opinion in *Meyer* v. *Holley*, 537 U.S. 280, 286 (2003), holding that: "[S]ilence, while permitting an inference that Congress intended to apply *ordinary* background . . . principles, cannot show that it intended to apply an unusual modification of those rules." Here, the "ordinary background principles" are not in controversy. When the death results language was added to the Controlled Substances Act ("CSA") in 1988, the 1985 Model Penal Code provided that "conduct 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). Since 1985, that "ordinary background principle" has remained true. Thus, even if it were accurate to say that Congress was "silent" on the proper causal standard (in spite of the paragraph above), the only allowable inference under *Meyer* is that the "but for" standard continues to govern.

When Congress intends to refer to mixed-drug use, it does so explicitly. For instance, Congress has acknowledged the dangers of "driving under the influence of alcohol, drugs, or the combination of alcohol and drugs." 23 U.S.C. § 405(d) (awarding grants to States implementing programs to reduce driving

under the influence). Congress has provided for the expedited approval of prescription drugs that, whether "alone or in combination with [one] or more other drugs," are meant to treat life-threatening diseases. 21 U.S.C. § 356(a)(1). Congress has explicitly sought to increase awareness of the "risks of combinations of drugs and biological products." 42 U.S.C. § 299b-1(b)(2). Finally, in amending the Controlled Substances Act in 2000, Congress acknowledged that narcotics are often dispensed in combination. See 21 U.S.C. § 823(g)(2)(A) (waiving registration requirements for practitioners dispensing "combinations" of scheduled drugs for detoxification purposes). By contrast, Congress made no such amendment to the "death results" provision. See *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

The Solicitor General also asserts that "[t]he 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." Br. Resp't 28. But that argument fails for the same reasons as the "mixed-drug use" assertion. Contributing cause language is missing from the statute, missing from the legislative history, missing from the ordinary background principles at the time of enactment, and sufficiently prevalent in other federal statutes to permit the Court to conclude that Congress did not simply forget to include it.

Congress has granted the authority to seek injunctive relief against "any person causing or contributing to" dangerous water pollution. 33 U.S.C. § 1364(a) (enacted in 1972). Congress has differentiated between "the cause" and acts that might have "contributed to the cause" of marine casualties.

46 U.S.C. § 6301(1)–(3) (enacted in 1983). Congress has addressed the statute of limitations for state law claims where an injury or damage is "caused or contributed to by exposure to any hazardous substance." 42 U.S.C. § 9658(a)(1) (language added by amendment in 1986). Congress has limited responsibility to situations where an accident "was caused, or contributed to, by the negligence of an employee." 22 U.S.C. § 3774(6) (enacted in 1985). Congress has affirmatively preserved the rights of the United States against third parties who may have "caused or contributed to the discharge of oil or hazardous substance[s]." 33 U.S.C. § 1321(h) (enacted in 1972). Congress has required facilities to demonstrate that they will not "cause, or contribute to, air pollution" over prescribed levels. 42 U.S.C. § 7475(a)(3) (enacted in 1977). Congress has authorized mandatory reporting for those "causing or contributing to pollution." 33 U.S.C. § 1320(d) (enacted in 1972). These examples are just a handful of those instances where Congress has explicitly referred to potential contributing cause scenarios. See also App. A. Here, however, Congress made no attempt to incorporate contributing cause language in the "death results" provision.

2. THE SOLICITOR GENERAL'S ATTEMPTS TO CONTROVERT THE REQUIREMENT OF BUT FOR CAUSE IN THIS CASE ARE UNAVAILING.

Fears that contributing actors would be "absolved" altogether of criminal liability underlie the sources upon which the Solicitor General relies in arguing that a contributing cause standard is appropriate where no single "but for" cause can be identified. See Br. Resp't 26, 26 n.9. Even the Solicitor General's own brief in the referenced *Paroline* case argues that: "The traditional 'but-for' test is inappropriate in cases

like this one because it would *absolve* culpable defendants (like petitioner) and leave victims (like Amy) without restitution . . . ." Brief for the United States at 19, *Paroline* v. *United States*, No. 12-8561, 2013 WL 5425148, at *19 (S. Ct. Sept. 27, 2013) (emphasis added). But there can be no concern in this case that Mr. Burrage and other defendants like him might be "absolved." The only question here is whether Mr. Burrage may lawfully be sentenced to a twenty-year mandatory minimum sentence, not whether he will escape criminal liability and the imposition of sentence altogether.

The Solicitor General relies primarily on two hypotheticals where but for causation fails implying that criminal liability would never be established without a relaxed causation standard.[1] Br. Resp't 18–19. From these hypotheticals, the Solicitor General concludes that but for causation should not be applied in this case. The argument is misleading for two reasons. First, in posing the scenarios, Professor LaFave specifically cautions that each act is "alone sufficient to bring about the harmful result." LaFave, *supra* note 1, at 468. The so-called failure of but for causation only results from the fact that there was a second, sufficient concurrent act, not because the first act was insufficient by itself. Professor LaFave never rejects the but for test, instead providing a "more ac-

[1] In the criminal context: "*A* stabs *B*, inflicting a fatal wound; while at the same moment *X*, acting independently, shoots *B* in the head with a gun, also inflicting such a wound; and *B* dies from the combined effects." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(b), at 468 (2d ed. 2003). And in the civil context: "*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." Richard W. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735, 1775–76 (Dec. 1985). Both hypotheticals are addressed by Professor LaFave.

curately worded" cause-in-fact test to account for the logical twist. *Id.* Unlike the Solicitor General, Professor LaFave does not lower the threshold to establish causation-in-fact, but instead LaFave accounts for the hypotheticals where there are two sufficient causes in defining cause-in-fact. Second, the Solicitor General ignores the practical distinction between criminal and civil law; namely, that criminal defendants are exposed to liability for different roles (*e.g.*, as principals, co-conspirators, or aiders and abettors), and to varying degrees (*e.g.*, for aggravated versions of the crime, for lesser-included offenses, or for attempts). Thus, in the criminal context, neither hypothetical would result in a finding of no-liability at all, even without the addition of the substantial factor language: A and X would go to prison for attempted murder, while C and D would still go to prison for arson, presuming the fires were set intentionally.

In the civil context, where the courts are more concerned about restitution to the injured plaintiff, rather than imposing criminal penalties, the defendants could share liability using the substantial factor language. A and X would both civilly be liable for the value of B's life and C and D could be found equally liable for burning down P's house. The important difference is that B's estate would only recover the value of his life once and P would still only recover the value of his house once. A, X, C and D would not have to each pay for the full value individually.

3. THE COMMON LAW REQUIRES BUT FOR CAUSATION IN CRIMINAL CASES.

The Solicitor General does not dispute that the but for test is a "practical and reliable guide to causation . . . ." Br. Resp't 18. Rather, the Solicitor General makes the surprising claim that "[c]riminal law generally does not insist on but-for causation." *Id.* For

support, the Solicitor General relies upon causation scenarios that are both hypothetical and inapposite, as well as civil authorities that are unpersuasive here. At the end of the day, the Solicitor General is unable to overcome the "basic theory of causation . . . that the culpable act or omission must be a causa sine qua non (inevitable or necessary cause)." William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 401, at 210 (7th ed. 1967); see also 1 Francis Wharton, *Wharton's Criminal Law* § 26, at 146 (15th ed. 1993) ("Where the statute involves a specified result that is caused by conduct, it must be shown, as a minimal requirement, that the accused's conduct was an antecedent 'but for' which the result in question would not have occurred."). Despite the Solicitor General's assertion and citation of nine cases, but for cause has a stronghold in common law.

Courts have consistently applied a but for test when assessing causation-in-fact. The Solicitor General's assertion that but for cause is not required is simply not supported by the vast majority of common law precedent. See, *e.g.*, App. B. For example, the Michigan Supreme Court has stated: "In determining whether a defendant's conduct is a factual cause of the result, one must ask, 'but for' the defendant's conduct, would the result have occurred?" *People* v. *Schaefer*, 703 N.W.2d 774, 785 (Mich. 2005). Similarly, the Washington Supreme Court has indicated that "[c]ause in fact refers to the 'but for' consequences of an act . . . ." *State* v. *Dennison*, 801 P.2d 193, 201 (Wash. 1990) (en banc).

Moreover, in *Warner* v. *State*, the Ohio Supreme Court upheld a jury instruction on causation that: "It must also be shown . . . that the violation of law on his part was the circumstance but for which the collision resulting in the death . . . would not have oc-

curred." 135 N.E. 249, 251 (Ohio 1922). Similarly, in *State* v. *Scott*, the Supreme Court of Louisiana addressed the issue of cause-in-fact:

> The true point is, did the party die of the wounds inflicted by the accused? If he did, the facts that he had no surgeon, or an unskillful one, or a nurse whose ill appliances may have aggravated the original hurt, cannot mitigate the crime of the person whose malice caused the death.

12 La. Ann. 274, 275 (1857). In other words, but for the defendant's wound, the deceased would have lived. Similarly, in *State* v. *Des Champs*, the Supreme Court of South Carolina defined proximate cause as "'that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and *without which the result would not have occurred*.'" 120 S.E. 491, 493 (S.C. 1923) (emphasis added) (quoting 22 R.C.L. 110, § 2). These examples track Professor LaFave's contention that cause-in-fact is traditionally determined by asking if "but for the conduct the result would not have occurred." LaFave, *supra* note 1, § 6.4, at 464.[2]

The cases cited by the Solicitor General, in contrast, offer meager support. In *Cox* v. *State*, 808 S.W.2d 306 (Ark. 1991), the defendants were tried for joint criminal conduct. More importantly, *Cox* involved a statutory definition of causation unique to

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[2] The Solicitor General relies heavily on Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* (3d ed. 1982). Even Perkins & Boyce acknowledge that problems of actual causation are commonly examined under a but for test. *Supra*, at 772. Moreover, this Court has referenced Professor LaFave in 164 cases, whereas it has cited Perkins & Boyce in only 7 cases. (WestlawNext, https://a.next/westlaw.com/Search/Home.html (search U.S. Supreme Court Cases for "LaFave"; search U.S. Supreme Court Cases for "Perkin /s Boyce") (last visited Oct. 30, 2013)).

Arkansas that expressly departs from the traditional notion of cause-in-fact—a departure not present in the "death results" provision. *Cox* is also a capital murder case. Intentional murder is much different than an unintentional death resulting from the distribution of heroin. Indeed, drug dealers have no incentive to kill their customers, unlike murderers whose crime is specifically aimed at ending the life of another.

The Solicitor General also cites *People* v. *Jennings*, 237 P.3d 474 (Cal. 2010), as rejecting but for causation. Br. Resp't 19. But *Jennings* involved a defendant charged as an aider and abettor. Thus, even assuming the defendant's co-conspirator's acts were the sole cause of death, the defendant was still guilty as an aider and abettor. Additionally, the Solicitor General's selective quotation of *People* v. *Bailey* is especially puzzling. Br. Resp't 20. The full quote from the opinion reads: "In assessing criminal liability for some harm, it is not necessary that the party convicted . . . be the sole cause of that harm, only that he be a contributory cause *that was a substantial factor in producing the harm*." 549 N.W.2d 325, 334 (Mich. 1996) (emphasis added). If this explanation of causation looks familiar it is because it tracks closely to the proposed jury instruction Mr. Burrage requested at trial, J.A. 238, and the standard advocated by Professor LaFave.

Lastly, the Solicitor General's reliance upon *Commonwealth* v. *Osachuk*, 681 N.E.2d 292, 294 (Mass. App. Ct. 1997), Br. Resp't 19, is misleading. Unlike the Solicitor General's approach, the court in *Osachuk* required proximate cause. 681 N.E.2d at 294. Moreover, the defendant in *Osachuk* argued that he did not cause the victim's death because the victim ingested and injected two of the three narcotics that

combined to cause death (the defendant injected the third). *Id.* What the Solicitor General failed to mention is that "the defendant provided [the deceased] with every drug that contributed to her death." *Id.* at 295.

In contrast to *Osachuk*, Mr. Burrage did not provide Banka with the oxycodone or marijuana or alprazolam or clonazepam that was abused during his drug binge. The only narcotic that Mr. Burrage is responsible for is the heroin. Under traditional principles of cause-in-fact, Mr. Burrage can only be said to have caused the death if "the result would not have happened in the absence of [his] conduct." LaFave, *supra* note 1, at 467. Yet neither the medical examiner nor the toxicologist could say whether Banka would have lived if he had not taken the heroin. J.A. 159–60, 208. Accordingly, as the Solicitor General concedes, Mr. Burrage cannot be held liable for Banka's death under the "but for" test. Br. Resp't 33.

The same holds true for Professor LaFave's substantial factor test. Where multiple concurrent acts operate together, as here, the test is whether each was alone *independently* sufficient to cause the result. See LaFave, *supra* note 1, at 468. Neither expert at trial could testify that the heroin was independently sufficient to cause Banka's death. J.A. 159–60, 202–03. Thus, Mr. Burrage cannot be held responsible for Banka's death under Professor LaFave's substantial factor test, either. To avoid this result, the Solicitor General now advocates a sharp divergence from the criminal common law's strict cause-in-fact requirements.

As the Solicitor General notes, Professor LaFave references state statutes that address concurrent-cause situations with contributory cause standards. Br. Resp't 20 (citing LaFave, *supra* note 1, at 468

n.14). But the enactment of statutes that expressly impose contributing cause liability only serves as proof that legislatures recognize the need to except a particular form of criminal liability from the common law tradition. If the common law on its own deviated from the traditional but for standard, there would be little need for express statutory language in the first place.[3]

4. PROXIMATE CAUSE AND FORESEEABILITY ARE REQUIRED.

The Solicitor General is incorrect that the text of 21 U.S.C. § 841(b)(1)(C) does not require proximate cause, which in criminal law means foreseeability. Congress legislates against the background principles of the common law, which include foreseeability as a prerequisite to imposing criminal liability. See Br. Pet'r 18–22. To determine that Congress intended to deviate from the established meaning of the "results

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[3] Ultimately, the Solicitor General tries to wrongly import a civil standard into criminal law. But even assuming civil standards apply, the text of the "death results" provision still requires but for cause. In *Gross*, this Court rejected a similar contributing cause standard in favor of the traditional but for test. Like the Solicitor General, the petitioner in *Gross* argued that the ADEA's "because of" language encompassed mixed-motive scenarios. 557 U.S. at 173–77. Again, in *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, this Court rejected the same contributing cause approach as applied to Title VII's "because" language. In support, this Court affirmed that "[i]t is . . . textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" 133 S. Ct. 2517, 2525 (2013) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)). Likewise, in the civil RICO context, this Court also recently affirmed that the statutory language "by reason of" requires both "but for" and proximate cause. *See Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 9 (2010) (quoting *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

in" language, there must be convincing evidence in the text itself. No such evidence is present, and the normal common law rule of proximate cause applies. See *Meyer*, 537 U.S. at 286; see also *Holmes*, 503 U.S. at 287 (Scalia, J., concurring) (calling "judicial inference of a proximate-cause requirement" a "background practice against which Congress legislates."). The "death results" provision does not include an express alteration to the applicable background rule, so the presumption in favor of foreseeability remains intact.

The legislative history upon which the Solicitor General relies (see Br. Resp't 34–35, 35 n.11) is tangential to the "death results" provision at issue in this case. The Solicitor General cites two amendments to different provisions of the CSA, one of which was never passed, and both of which have no effect today. Br. Resp't 35 n.11. In particular, the Solicitor General points to a failed House amendment to the bill that eventually became the Anti-Drug Abuse Act of 1986, and a provision in the Anti-Drug Abuse Act of 1988, which was repealed in 2006. Br. Resp't 35 n.11. Both provisions involved foreseeability as a mitigating factor when a defendant faced the death penalty. The failed amendment to a different provision of the CSA cannot provide the evidence necessary to change the meaning of the "death results" provision. If an amendment is not adopted, it does not inform the meaning of the text. See *Kimbrough* v. *United States*, 552 U.S. 85, 106 (2007) ("Ordinarily, we resist reading congressional intent into congressional inaction."). Both provisions cited by the Solicitor General are temporally and topically disconnected from the "death results" provision at issue here, and do not inform congressional intent.

5. DEATH FROM DRUG OVERDOSE IS NOT PER SE FORESEEABLE.

The Solicitor General also claims: "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." Br. Resp't 39. This proposition is not supported by the data or the text of the statute. Even if "the lethality of drugs in combination is well-studied and widely recognized," (Br. Resp't 28) the Solicitor General cannot support that proposition with congressional findings or the text of the statute. Similarly, the Solicitor General's narrative about the history of and motivations for the CSA (see Br. Resp't 3–5) amounts only to speculation as to its application to a foreseeability requirement.

Research on illegal drug use and drug overdose deaths does not indicate that a drug overdose resulting in death is per se foreseeable to individuals who sell drugs. Although it may be "foreseeable that a drug user who obtains a controlled substance will use it," Br. Resp't 39, it does not follow that death from a drug overdose is sufficiently prevalent that it is per se foreseeable. The articles upon which the Solicitor General relies (see Br. Resp't 28–29 n.10) deal with combination drug deaths; they do not speak to the foreseeability of overdose death in general from the perspective of the individual seller participating in an individual transaction involving a single drug. Similarly, the information conveyed exclusively to the Solicitor General by the National Center for Injury Prevention and Control does not address the likelihood that an individual drug user is someone who uses or plans to use drugs in combination.

The appropriate foreseeability analysis focuses on the likelihood that an individual drug user will over-

dose on the particular drugs sold. The numbers provided by the Solicitor General[4] indicate that less than one percent of those addicted to heroin, not even including casual users, overdose. Br. Resp't 5 n.3. Neither the text of the "death results" provision nor the likelihood that an individual drug user will die from a drug overdose indicate that Congress elected to treat drug overdose death as per se foreseeable.

The Solicitor General's claim that Congress rejected a case-specific foreseeability inquiry (Br. Resp't 40) is mere speculation because Congress did not state that it meant to do so. Importantly, Congress did not cite to any statistics in 21 U.S.C. § 841(b). "[A] 'general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all." *United States* v. *Monzel*, 641 F.3d 528, 537 n.8 (D.C. Cir. 2011). When a twenty-year mandatory minimum sentence hangs in the balance, making assumptions about congressional intent is particularly reckless. Neither the text of the "death results" provision, nor the uncited studies about the likelihood that an individual drug user will die from a drug overdose, indicate that Congress elected to eliminate a proximate causation requirement and treat drug overdose death as per se foreseeable.

6. CONTRIBUTING CAUSE IS UNACCEPTABLE IN CRIMINAL LAW.

The Solicitor General retreats to a position that a but for, or independently sufficient, test is "imprecise." Br. Resp't 25 n.8. According to the Solicitor General, "'few if any acts are sufficient by themselves to produce any particular consequence.'" *Id.* (citing

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[4] The numbers provided by the Solicitor General come in part from non-public sources that were not provided to Mr. Burrage, therefore Mr. Burrage has no way of verifying their validity.

Wright, *supra* note 1, at 1776). The Solicitor General explains that there are many other factors involved in any incident, such as "combustible material exist[ing] near the house and that oxygen be present in the air" in an arson hypothetical. *Id.*

That myriad causal agents exist in any scenario only serves to show why there is no place for a contributing cause standard in criminal cases. Nor is it accurate to say that a "but for" test is any more or less imprecise than other causal standards. A contributing cause standard is only more "precise" because it is tautological. Any person's actions might be deemed a contributing cause, whether non-culpable or culpable. Once the prosecution establishes that a person's actions had some role to play in the ultimate event, the contributing cause standard is satisfied in each and every case. [5]

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[5] The Solicitor General's contributing cause standard violates the spirit of *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013). In *Alleyne*, this Court held that only a jury could decide if a defendant's conduct met the requirements for a mandatory minimum sentence. 133 S. Ct. at 2163–64. The Solicitor General's proposed causal standard sets such a low bar that it would effectively take the decision about which defendants are culpable out of the hands of the jury. 21 U.S.C. § 841(a)(1) makes it unlawful to knowingly distribute a controlled substance. When that controlled substance is heroin, then § 841(b)(1)(C) sets a punishment of "not more than 20 years." Where, however, "death or serious bodily injury results from the use of such substance" the penalty is a mandatory minimum of twenty years with a maximum of life. *Id.* The Solicitor General's contributing cause standard is such a low bar that whenever there is a death, then the mandatory minimum will attach because the test is tautological: if a defendant distributed a drug and the recipient of the drug died, then the defendant contributed to the death. Such a test robs the jury of its function, as recognized by *Alleyne*, of deciding which defendants are culpable of causing a death and therefore deserving of the mandatory minimum sentence.

This underscores the reason why there is no place for a contributing cause standard in criminal law. The Amici suggest that this Court should draw a line between where the defendant's conduct made a "positive incremental contribution to a causal mechanism that, in the aggregate, is a but-for cause of the proscribed result" and should leave undecided the question of "whether factual causation requires something else in addition to contribution." Br. of Amici Curiae States 20, 27. But here they are one and the same. The contributing-cause standard proposed by the Solicitor General and urged by the Amici States cannot be what Congress intended in imposing a heightened sentence. The "death results" provision requires something more exacting before imposing a mandatory minimum of twenty years to life for a result not wholly or even substantially caused by the defendant's conduct. It requires that death or serious bodily injury "results from" the drug use.

The Solicitor General would have this Court depart from traditional principles of criminal law and impose a contributing causal standard with no mens rea component. As Professor LaFave highlights, when a crime requires no mens rea, then there is traditionally a strict but for and proximate cause requirement. LaFave, *supra* note 1, § 6.4(j), at 501. The Model Penal Code adopted this but for and proximate cause standard for strict liability crimes. Model Penal Code § 2.03(4) (1985). Here, the Solicitor General is advocating for a departure from this longstanding consensus by pairing a relaxed causal standard with no requirement of mens rea. This Court should reject such a relaxed criminal liability standard when a twenty-year mandatory minimum to life sentence is at issue.

CONCLUSION

For the foregoing reasons, the Court should overturn Mr. Burrage's conviction and remand the case for judgment of acquittal or a new trial.

Respectfully submitted,

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APPENDIX A

19 U.S.C. § 2272(c)(1) (defining "contributed importantly" to mean "a cause which is important but not necessarily more important than any other cause.") (enacted in 1975).

19 U.S.C. § 2435(b)(3) (requiring consultations whenever commercial imports "cause or threaten to cause, or significantly contribute to, market disruption . . . .") (enacted in 1975).

15 U.S.C. § 2603(e)(1)(A)(viii) (giving priority to substances known "to cause or contribute to" cancer or other conditions) (enacted in 1976).

30 U.S.C. § 814(e)(1) (requiring notice be given to operator of mine with health violations that could "significantly and substantially contribute[] to the cause and effect of coal or other mine health or safety hazards . . . .") (enacted in 1977).

42 U.S.C. § 7491(a)(3)(B) (calling for the creation of modeling techniques to determine how much manmade air pollution will "cause or contribute to" visibility impairment) (enacted in 1977).

42 U.S.C. § 7616(b)(3)(A) (authority to withhold grants where the construction of a new sewage treatment plant would "cause or contribute to . . . an increase in emissions . . . .") (enacted in 1977).

42 U.S.C. § 9601(20)(B) (transporter of hazardous substances "shall not be considered to have caused or contributed to any release . . . which resulted solely from circumstances or conditions beyond his control.") (enacted in 1980).

42 U.S.C. § 300i(a) (granting authority to order the provision of supplies by those who "caused or contributed to" water contamination) (language added by amendment in 1986).

19 U.S.C. § 2436(e)(2)(B)(ii) (defining "significant cause" as "a cause which contributes significantly to the material injury . . . but need not be equal to or greater than any other cause.") (language added by amendment in 1988).

42 U.S.C. § 300D-13(a)(7)(B) (distinguishing between "the cause of the injury and any factors contributing to the injury . . . .") (enacted in 1990).

10 U.S.C. § 2254(c)(1)–(2) (distinguishing between evidence sufficient to determine "the cause or causes" and factors that "substantially contributed to" military aircraft accidents) (enacted in 1992).

21 U.S.C. § 360i(a)(1)(A) (requiring manufacturers to report instances where their devices "may have caused or contributed to a death or serious injury . . . .") (language added by amendment in 1992).

19 U.S.C. § 3391(d)(2)(A) (suggesting consultations to determine whether higher peanut imports are a "substantial cause of, or contribute importantly to, serious injury . . . to the domestic peanut industry . . . .") (enacted in 1993).

49 U.S.C. § 20901(a) (allowing railroad employees who "cause[d]" an accident to explain "any factors [that] contributed to the accident . . . .") (enacted in 1994).

15 U.S.C. § 6605(b)(1)(A) (proportioning liability to the defendant's percentage of the total fault of all persons who "caused or contributed to" the total loss) (enacted in 1999).

20 U.S.C. § 1408(a)(4)(A) (terminating the waiver of statutory requirements where the waiver "has contributed to or caused" other problems) (enacted in 2004).

42 U.S.C. § 7385s-3(a)(1)(B) (determining survivor compensation where exposure to toxic substance "was a significant factor in aggravating, contributing to, or causing the death . . . .") (enacted in 2004).

21 U.S.C. § 379aa-1(g) (submission of safety report is not an admission that dietary supplement "caused or contributed to" adverse health condition) (enacted in 2006).

21 U.S.C. § 350f(m) (submission of safety report is not an admission that the food "caused or contributed to a death, serious injury, or serious illness.") (enacted in 2007).

42 U.S.C. § 17283(b)(2)(B) (requiring consideration of whether a scheduled refinery outage will affect gas prices by "causing or contributing to" a supply shortage) (enacted in 2007).

21 U.S.C. § 387i(a)(1) (requiring tobacco manufacturers to report knowledge that its products "caused or contributed to" adverse result) (enacted in 2009).

51 U.S.C. § 40114 (creating programs to develop preventative technologies "aimed at causal, contributory, or circumstantial factors of aviation accidents.") (enacted in 2010).

51 U.S.C. § 70703(2)(3) (distinguishing between "the cause" and "all contributing factors to the cause" of space flight accidents) (enacted in 2010).

42 U.S.C. § 300mm-22(a)(1)(A)(i) (defining "WTC-related health condition" to mean an illness or condition for which exposure "is substantially likely to be a significant factor in aggravating, contributing to, or causing the illness or health condition . . . .") (enacted in 2011).

APPENDIX B

Witherspoon v. *State*, 33 So. 3d 625, 627–28 (Ala. Crim. App. 2009) (citing "but for" language for criminal liability from Ala. Code § 13A-2-5 (1975)).

State v. *Marty*, 801 P.2d 468, 471 (Ariz. Ct. App. 1990) ("In Arizona, both 'but for' causation and proximate cause must be established in a criminal case."), *aff'd sub nom. Marty* v. *Daniels*, 978 F.2d 715 (9th Cir. 1992).

People v. *Stamp*, 2 Cal. App. 3d 203, 209 (1969) (applying "but for" test).

Eversley v. *State*, 748 So. 2d 963, 966–67 (Fla. 1999) (applying "the traditional 'but for' test . . . .").

Velazquez v. *State*, 561 So. 2d 347, 350 (Fla. Dist. Ct. App. 1990) ("Courts . . . have uniformly followed the traditional 'but for' test in determining whether the defendant's conduct was a cause-in-fact of a prohibited consequence in result-type offenses . . . .").

People v. *Hudson*, 856 N.E.2d 1078, 1083 (Ill. 2006) (holding that Illinois requires proximate cause in felony murder cases, which is composed of "two distinct requirements: cause in fact and legal cause.").

State v. *Marti*, 290 N.W.2d 570, 585 (Iowa 1980) (cause-in-fact expressed in "but for" terms).

Robertson v. *Commonwealth*, 82 S.W.3d 832, 836 (Ky. 2002) (finding "but for" causation).

State v. *Phillips*, 514 So. 2d 743, 745–46 (La. Ct. App. 1987) (adopting the "but for" test).

State v. *Crocker*, 431 A.2d 1323, 1325 (Me. 1981) (upholding a "but for" standard of causation in criminal cases).

People v. *Feezel*, 783 N.W.2d 67, 74 (Mich. 2010) (holding that the term "cause" requires both factual or "but for" cause and proximate cause).

State v. *William*, 435 N.W.2d 174, 177 (Neb. 1989) (requiring "but for" and proximate cause for felony murder).

State v. *Marshall*, 34 A.3d 540, 544 (N.H. 2011) (adopting "but for" and proximate cause as the standard for drug-related crimes resulting in death).

State v. *Montoya*, 61 P.3d 793 (N.M. 2002) (requiring "but for" causation).

State v. *Bingaman*, 655 N.W.2d 51, 56 (N.D. 2002) (adopting a "but for" standard).

State v. *Lovelace*, 738 N.E.2d 418, 425 (Ohio Ct. App. 1999) (cause-in-fact is determined by the "but for" test).

Commonwealth v. *Rementer*, 598 A.2d 1300, 1305 (Pa. Super. Ct. 1991) (factual cause determined by "but for" test).

Robbins v. *State*, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986) (en banc) (requiring "but for" causal connection).

State v. *Hallett*, 619 P.2d 335, 338–39 (Utah 1980) ("but for" test is "uniformly recognized" aspect of causation).