No. 12-8561

In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

vs.

AMY UNKNOWN and UNITED STATES,

Respondents.

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

RESPONDENT AMY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF AFTER ARGUMENT

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RESPONDENT AMY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Respondent Amy hereby moves the Court, pursuant to Rule 25.6, for leave to file the accompanying supplemental brief after argument. The purpose of this brief is to discuss this Court's decision in *Burrage v. United States*, No. 12-7515, which was decided January 27, 2014 – five days after Amy argued her case to the Court. *Burrage* analyzes "contributing cause" in the context of determining criminal liability. It appears that petitioner Paroline believes that *Burrage* requires a ruling in his favor.[1]

Amy respectfully submits that a short, supplemental brief from her will assist in the proper resolution of this case. While Amy did not have the benefit of having read the *Burrage* decision before oral argument, it appears that the Court may have asked a number of questions based on the decision. *See, e.g.,* Oral Argument Tr. 15 (discussing "modern tort law" and the "Keeton" treatise); *id.* at 41 (discussing whether petitioner "contributed" to the harm). Now

[1] On January 28, 2014, counsel for petitioner Paroline sent a letter to this Court advising that he believed "that the Court's opinion in *Burrage* should apply to the arguments made on behalf of Mr. Paroline . . . regarding the statutory interpretation of 18 U.S.C 2259. . . ." Letter from Stanley G. Schneider to Hon. Scott S. Harris (Jan. 29, 2014). Counsel for Paroline also indicated that "[i]f the Court might benefit from further briefing as to the specific application of *Burrage* to this case, we stand ready to submit a brief. . . ." *Id.*

that the *Burrage* opinion has been released, contrary to the suggestion of Paroline's counsel, it does not support the arguments made by Paroline in his earlier submissions to the Court. Instead, properly understood, contributing cause analysis from tort law supports Amy's position. To clarify this point, Amy respectfully requests leave to file a short, supplemental brief. Amy has advised the Government and petitioner that she is filing this motion and that she would have no objection to briefs regarding *Burrage* from them.

Accordingly, this Court should grant respondent Amy leave to file the accompanying supplemental brief.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

SUPPLEMENTAL BRIEF FOR RESPONDENT AMY AFTER ARGUMENT

As the Court is aware, respondent Amy has argued that in mandating restitution for child pornography possession crimes, Congress adopted a contributing cause approach – i.e., where a defendant criminally contributes to a victim's losses he becomes responsible to pay for the "full amount" of those losses. *See* 18 U.S.C. § 2259(b)(1) (court must direct each convicted child pornography possessor to pay "the full amount of the victim's losses").

Shortly after oral argument in this case, this Court issued an opinion discussing contributing cause in the context of determining criminal liability. In *Burrage v. United States*, No. 12-7515 (Jan. 27, 2014), this Court reviewed a statute imposing a twenty-year mandatory minimum sentence when a "death . . . results from the use" of an illegally-distributed controlled substance. 21 U.S.C. § 841(b)(1)(C). In *Burrage*, the Government argued that if the distribution of a controlled substance was a contributing cause to a death, that fact triggered the mandatory minimum. In rejecting the Government's argument, this Court noted that a handful of states had adopted such a rule for drug overdose deaths, but that the American Law Institute (ALI) had declined to include this approach in its Model Penal Code. *Burrage*, slip op. at 11 (citing ALI, 39th Annual Meeting Proceedings 135-41 (1962)). The Court then went on to construe § 841(b)(1)(C) against this backdrop and concluded that the "death . . . results from" language

in the statute limited liability to drug distributions that were an "independently sufficient cause" (i.e., a but-for cause) of the victim's death. Slip op. at 14-15.

Moving away from statutes imposing criminal punishment to settings involving tort compensation, however, the contributing cause basis for liability is widely recognized. Indeed, the American Law Institute itself has identified contributing cause as a general principle of tort law sufficiently well-established to be included in its restatement. Under American tort law, "[w]hen an actor's tortious conduct is not a factual cause of harm under the standard in § 26 [i.e., independently sufficient or but-for causation] only because one or more other causal sets exist that are also sufficient to cause the harm at the same time, the actor's tortious conduct is a factual cause of the harm." ALI, *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 27 cmt. f, at 381 (hereinafter cited as *Restatement*). This approach recognizes that for purposes of tort law it is never possible to identify a single "cause" for an event; a fire burning down a house, for example, is caused not only by a match but also fuel to burn, lack of a downpour, and a fire department being too far away to immediately respond. *See Restatement* § 27 cmt. f, Reporters' Note at 391 (collecting authorities discussing this point). In determining tort compensation, the proper question is whether the defendant's act is part of a "causal set" producing harm.

The *Restatement* notes that well-established tort precedent (pre-dating Congress' 1994 enactment of

§ 2259) underlies the contributing cause approach. The *Restatement* explains that, for example, "[s]ince the first asbestos case in which a plaintiff was successful, courts have allowed plaintiffs to recover from all defendants to whose asbestos products the plaintiff was exposed." *Restatement* § 27 cmt. g, Reporters' Note at 392 (citing*, e.g., Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076, 1094 (5th Cir. 1973); *Ingram v. ACandS, Inc.,* 977 F.2d 1332, 1340 (9th Cir. 1992); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 Iowa L. Rev. 1001, 1073 & n.384 (1988) (collecting authorities)).

While numerous toxic tort cases illustrate the contributing cause approach, the *Restatement* identifies much deeper roots: "Nuisance cases were the pre-toxic-substances equivalent of asbestos and other such cases, and courts resolved them similarly." *Restatement* § 27 cmt. g, Reporters' Note at 393 (citing *Bollinger v. Am. Asphalt Roof Corp.*, 19 S.W.2d 544, 552 (Mo. Ct. App. 1929) ("If there was enough of smoke and fumes definitely found to have come from defendant's plant to cause perceptible injury to plaintiffs, then the fact that another person or persons also joined in causing the injury would be no defense; and it was not necessary for the jury to find how much smoke and fumes came from each place.")); *see also Phillips Petroleum Co. v. Hardee*, 189 F.2d 205, 212 (5th Cir. 1951) ("'According to the great weight of authority where the concurrent or successive acts or

omissions of two or more persons, although acting independently of each other,[1] are in combination, the direct or proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tortfeasor. . . .'" (*quoting American Jurisprudence*)); *Northrup v. Eakes*, 178 P. 266, 268 (Okla. 1918) (where "separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it"); *cf. The "Atlas"*, 93 U.S. 302, 315 (1876) ("Nothing is more clear than the right of a plaintiff, having suffered . . . a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss."). In other words, traditionally in American tort law, an "independent-sufficiency requirement is not followed by the courts. . . . [Instead], courts have allowed the plaintiff to recover from each defendant who contributed to the . . . injury, even though none of the

[1] In this case, Amy has also alleged concerted action and unity of purpose by the de facto joint criminal enterprise that produces, distributes, and possesses child pornography. *See* Amy Br. 9-13, 55-56. This allegation is a separate, well-recognized basis for joint and several liability.

defendants' individual contributions were either necessary or sufficient by itself for the occurrence of the injury." Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1792 (1985) (discussing various cases).

In this case, Amy is seeking recovery for a single "injury," e.g., her psychological counseling costs of $512,681. J.A. 104. Those counseling costs do not increase or decrease with the addition or subtraction of an additional criminal from the estimated 70,000 men (Amy Br. 65) who have collected images of her childhood rape. In other words, the $512,681 in psychological counseling costs is "indivisible" because the evidence fails to provide "a reasonable basis for the factfinder to determine . . . the amount of [those costs] separately caused" by any particular child pornography possessor or distributor. *Restatement (Third) of Torts: Apportionment of Liability* § 26. Against that backdrop, it is not surprising that Congress followed the standard tort principle of contributing cause by directing that each convicted child pornography criminal who contributes to a victim's psychological counseling costs must pay for the "full amount" of those costs. 18 U.S.C. § 2259(b)(3)(a).

The fact that the American Law Institute declined to recognize a contributing cause approach in the Model Penal Code while including one in its *Restatement of Torts* reflects the longstanding principle that criminal punishment focuses on the culpability of defendants while tort law focuses on the need to compensate victims. *See* ALI, 39th Annual

Meeting Proceedings, *supra*, at 136-37 (discussing differences between criminal and tort law with regard to contributing cause). A simple example is a polluter who negligently dumps waste into a Superfund site may have committed no crime but can be liable for millions of dollars in cleanup costs. J.A. 347. Thus, *Burrage*'s conclusion that contributing cause analysis is only occasionally used to establish liability for a crime does not refute that it is regularly used to establish responsibility to pay tort compensation. And it appears to be common ground in this case that compensatory tort law principles are the relevant background principles against which Congress legislated when providing restitution for crime victims; both petitioner and the Government cite, for example, the *Restatement (Third) of Torts* as providing the applicable analogies for construing § 2259. *See* Pet. Br. 44, 50; Gov't Reply Br. 10, 12, 13, 15, 19, 20. *See United States v. Kearney*, 672 F.3d 81, 96 n.12 (1st Cir. 2012) ("while 18 U.S.C. § 2259 is a criminal restitution statute, it functions much like a tort statute . . . and thus tort doctrine informs our thinking with respect to the statute" (internal quotation omitted)).

To be sure, but-for causation is also a background principle that is a factor in many tort law cases. In *Burrage*, this Court quoted discussion from the Prosser tort treatise about the limited need for an alternative, "substantial factor" test where the but-for test does not work well:

> But the authors of that treatise acknowledge that, even in the tort context, "[e]xcept in the

> classes of cases indicated" (an apparent reference to the situation where each of two causes is independently effective) "no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it." *Id.*, at 268.

Burrage, *supra*, slip op. at 11 (quoting W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 267 (5th ed. 1984) (hereinafter *Prosser*)).

As this passage in *Burrage* specifically recognized, in saying "no case has been found" where the but-for causation test failed, the treatise's authors were significantly setting aside two "classes of cases indicated." Slip op. at 11. One of these two classes involved cases where "a similar, but not identical result would have followed without the defendant's act." *Prosser*, *supra*, at 267. The paragraph *Burrage* quoted from the treatise thus excluded cases like the ones discussed earlier in this brief from the *Restatement* and, importantly, like the one at issue here: presumably a "similar result" would have happened to Amy if 69,999 criminals had viewed her rape instead of 70,000. Thus the question presented here must be decided with regard to some formulation apart from the "but-for" test and the "substantial factor" test. Indeed, the treatise specifically mentioned a hypothetical case that bears similarities to this case. *See Prosser*, *supra*, § 41 at 267 n.25 (noting that the but-for test fails to explain standard tort law in a case where "five persons independently beat a sixth, who dies from the effect of all of the beatings, and would

have died from any three"). This hypothetical is an example of what the *Restatement* describes as "multiple sufficient causal sets," and under recognized tort principles each of the five attackers would be liable for all the damage they collectively caused. *Restatement* § 27 cmt. f, at 381 ("That there are common elements in each of the sufficient causal sets does not prevent each of the sets from being a factual cause").

The second class of cases the treatise excluded from its discussion was "where one defendant has made a clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire." *Prosser*, *supra*, § 41 at 267-68. In such a situation, one match might be regarded as a trivial cause of fire damage. The *Restatement* recognizes that a trivial cause can be excluded from tort liability. *Restatement* § 36. The *Restatement*, however, specifically notes that this triviality limitation "is not applicable if the trivial contributing cause is necessary for the outcome . . . ," *id.* cmt. b, at 599, with a cross-reference back to the contributing cause cases that involve constructing a sufficient causal set. *Id.* Put another way, if all causes would be regarded as trivial causes, then none of them can be regarded as a trivial cause. Of course, in this case petitioner's crime is a part of a causal set which produced Amy's psychological harm. Amy Br. 43. Thus, this case is not like tossing a match into an already raging fire. Instead, the proper hypothetical is thousands of arsonists all collectively tossing matches into a forest to start a fire or, alternatively,

sequentially tossing matches to keep a fire burning. Rather than allowing all of the wrongdoers to escape liability through an exercise in blame shifting and finger pointing, standard tort principles hold all of them liable.

In any event, Congress itself answered what is considered trivial in the context of child pornography restitution. Section 2259 mandates imposition of a restitution award for the "full amount" of Amy's losses in every case of a criminal conviction for child pornography possession. 18 U.S.C. § 2259(b)(4). By operation of law, a serious felony like the one committed by petitioner is not trivial.

Finally, the tort principles discussed in *Burrage* involve the rules applicable to negligent tortfeasors. This was entirely proper in the context of a drug overdose statute imposing criminal liability for a resulting death on the basis of negligence or even strict liability. *See Burrage*, Pet. Reply Br. at 11-13 (arguing that the statute requires that death be foreseeable); *Burrage*, Gov't Br. at 46-48 (collecting numerous Court of Appeals decisions holding that foreseeability is not required under the statute).

But here, the restitution statute under which Amy seeks recovery applies only to intentional tortfeasors – i.e., those who act with scienter to cause harm. At issue is the "full amount" language found in three statutes – 18 U.S.C. §§ 2248 and 2264, as well

as § 2259[2] – covering extremely serious felony crimes which all permit a conviction only where the defendant has acted intentionally or knowingly. The tort authorities uniformly agree that "[t]here is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong. More liberal rules are applied as to the consequences for which the defendant will be held liable . . . and the type of damage for which recovery is to be permitted, as well as the measure of compensation." *Prosser*, *supra*, § 8, at 37; *accord Restatement* § 33 ("[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which the actor would be liable if only acting negligently") (collecting authorities). It thus is entirely consistent with conventional tort principles to find that felons acting with scienter under §§ 2248, 2259, and 2264 are broadly required to pay restitution – to the extent that they are financially able to do so[3] – for all the losses to which their crimes contributed.

[2] The requirement for restitution for the "full amount" of various losses was first proposed in §§ 2248 and 2264 – statutes covering federal sexual assault and federal domestic violence. *See* Amicus Br. for Bipartisan Group of U.S. Senators at 7-9. Of course, these types of crimes are quintessential intentional "torts." Later, the language of § 2259 was copied from these proposed statutes. *Id.*

[3] In imposing a restitution order, a district court is required to set up a payment schedule based on the defendant's ability to pay, thus shielding a defendant from disproportionate financial impact. J.A. 399.

CONCLUSION

The decision of the Fifth Circuit should be affirmed in all respects.

Respectfully submitted,

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