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

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTIONS PRESENTED

1. Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement.

2. Whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed "contributed to" death by "mixed drug intoxication," but was not the independent cause of death of a person.

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INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular relevance here, NACDL has filed amicus briefs in a number of cases in which it has urged that the rule of lenity be

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

applied to limit the lower federal courts' expansive interpretation of broadly worded federal criminal statutes.

SUMMARY OF ARGUMENT

1. This Court has not had occasion to interpret the causal element of a federal *criminal* statute. But it has often construed the causal elements of *civil* statutes. It uniformly interprets such elements to require both actual (or "but-for") cause and proximate (or "legal") cause, unless the language and structure of the statute shows an unambiguous contrary intent. Reading statutes to require proximate cause is necessary, the Court has found, to avoid "extreme results," given the potentially unlimited scope of "but-for" causation. *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996).

2. The presumption of proximate cause that this Court affords civil statutes applies even more powerfully to criminal statutes. As a leading treatise puts it, where a criminal offense requires proof of "a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003). Nothing in the text, structure, or history of the statute at issue here--21 U.S.C. § 841(b)(1)(C)--supports a deviation from this basic principle of criminal law.

3. Even if doubt remained about the scope of the "results from" element of § 841(b)(1)(C), the rule of lenity would require that the statute be read

to require proximate cause. This Court often invokes the rule of lenity--under which it requires "clear and definite" statutory language before it will choose the harsher of two plausible readings of a criminal statute, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)--to establish limits when prosecutors urge broad readings of ambiguous text. The rule of lenity requires that any doubts about the scope of § 841(b)(1)(C) be resolved in petitioner's favor.

ARGUMENT

This Court has recognized in the civil context that "proximate causation principles are generally thought to be a necessary limitation on liability." *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996). Requiring only "but-for" causation "would produce extreme results," because "'[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.'" *Id.* (quoting W. Prosser, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 264 (5th ed. 1984)).

An example based on the statute at issue here--21 U.S.C. § 841(b)(1)(C)--illustrates the danger of a "but-for" causation standard. Suppose A sells a small quantity of heroin to stranger B, a first-time user. B discovers that he enjoys the drug. He becomes an addict and buys ever-larger quantities from persons unconnected to A. Several years later he overdoses and dies.

It could be argued that A's sale of heroin to B was a "contributing cause" of B's death--that is, in the words of the instruction the Eighth Circuit approved here, "a factor that, although not the primary cause, played a part in the death." JA 241-42. If A had not sold B heroin, B would not have discovered that he enjoyed the drug, would not have become addicted, would not have overdosed, and would not have died. If a jury followed this reasoning to find that A's sale to B was a "contributing cause" of B's death, A would face a mandatory 20-year prison sentence and potential life in prison.

Few would maintain that Congress intended such an unjust outcome when it included the "death . . . results from" provision in § 841(b)(1)(C). Before a court could read the statute to permit such a draconian result, Congress would have to speak unambiguously. It did not do so in § 841(b)(1)(C). To the contrary, under ordinary rules of statutory interpretation--rules this Court applies to construe causal terms in *civil* statutes--the phrase "results from" includes both "but-for" cause and proximate cause. And because this is a *criminal* case, with a man's liberty at stake, any doubt about the meaning of the phrase must be resolved in petitioner's favor under the rule of lenity.

I. THIS COURT HAS REPEATEDLY INTERPRETED GENERAL CAUSAL TERMS IN CIVIL STATUTES TO REQUIRE BOTH ACTUAL CAUSE AND PROXIMATE CAUSE.

The Court has not had occasion to interpret the causal element of a federal *criminal* statute. But it has often construed the causal element of *civil* statutes--and its interpretation of those statutes leaves no doubt that § 841(b)(1)(C) must be construed to require both "but-for" cause and proximate cause.

In *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court interpreted § 4 of the Clayton Act, which provides that "any person who shall be injured in his business or property *by reason of anything forbidden in the antitrust laws* may sue therefor . . . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15 (emphasis added). The issue was whether the plaintiff Union had alleged a cognizable antitrust injury.

The Court acknowledged that "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." 459 U.S. at 529. But after reviewing the statute's history and interpretation by the lower courts, the Court found it "plain" that the question before it "cannot be answered simply by reference to the broad language of § 4. Instead, as was required

in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535. The Court drew an analogy between the antitrust standing question before it and "the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause.'" *Id.* It held that, despite the statute's broad language, the Union had not alleged a cognizable antitrust injury. *Id.* at 546.

In *Holmes v. SIPC*, 503 U.S. 258 (1992), the Court applied a similar analysis to the causal element of the civil RICO statute. That statute affords treble damages to "any person injured in his business or property *by reason of*" a RICO violation. 18 U.S.C. § 1964(c) (emphasis added). The Court recognized that "this language can, of course, be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." 503 U.S. at 265-66 (footnote omitted).

The Court declined to read the statute so broadly. Noting that the language did not "compel" the conclusion that the statute required only "but-for" cause, it observed that "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading." *Id.* at 266

(footnote omitted).[2] The Court found that § 1964(c) required proof of proximate cause, as well as "but-for" cause. It concluded that "because the alleged conspiracy to manipulate did not proximately cause the injury claimed, SIPC's allegations and the record before us fail to make out a right to sue petitioner under § 1964(c)." *Id.* at 276; *see also Hemi Group, LLC v. City of New York*, 559 U.S. 1, 17-18 (2010) (holding RICO plaintiff did not satisfy the *Holmes* proximate cause requirement); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-61 (2006) (same).

The Court's decision in *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011), provides an instructive contrast to these cases. In *CSX Transportation*, the Court held that the phrase "resulting in whole or in part from the [railroad's] negligence" in the Federal Employers' Liability Act did not incorporate a traditional proximate cause requirement. *Id.* at 2634. Much like the "contributing cause" instruction at issue here, the instruction the Court approved in *CSX Transportation* permitted liability if the defendant's negligence "played a part--no matter how small--in bringing about the injury." *Id.* at 2636 (quoting instruction). The Court based this interpretation on

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[2] This textual analysis in *Holmes* and similar cases refutes the conclusion of some courts of appeals that the "results from" language unambiguously excludes a proximate cause requirement. *See, e.g., United States v. Houston*, 406 F.3d 1121, 1124 (9th Cir. 2005); *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001). The key language in § 841(b)(1)(C) does not unambiguously exclude proximate cause any more than the language of the Clayton Act and RICO that the Court construed in *Associated General Contractors* and *Holmes*.

"FELA's language on causation," which is "as broad as could be framed," and the statute's "humanitarian and remedial goals." *Id.* (quotations and brackets omitted).

Against this interpretation, CSX argued that proximate cause "is a concept fundamental to actions sounding in negligence" and that the "any part" instruction "opens the door to unlimited liability . . . inviting juries to impose liability on the basis of 'but for' causation." *Id.* at 2641.[3] The Court found these concerns overstated, because under FELA foreseeability--a touchstone of proximate cause--is an aspect of the *negligence* element. In addition, the statute limits the universe of potentially compensable injuries to "those sustained by employees, during employment," thus "weed[ing] out the injuries most likely to bear only a tenuous relationship to railroad negligence." *Id.* at 2643-44.

A comparison with FELA confirms that § 841(b)(1)(C) must be interpreted to include proximate cause. First, the key statutory phrase--"results from"--lacks the expansive "in whole or in part" language that Congress included in FELA. Second, absent a proximate cause requirement, § 841(b)(1)(C) does not require that the death be foreseeable to the defendant--unlike FELA, which incorporates foreseeability through the negligence

[3] In dissent, Chief Justice Roberts, joined by Justices Scalia, Kennedy, and Alito, would have interpreted FELA to require a showing of proximate cause. *CSX Transportation*, 131 S. Ct. at 2644-51. Under the dissent's analysis, proximate cause would even more clearly be required under § 841(b)(1)(C).

element. Third, nothing in § 841(b)(1)(C) limits the universe of potential victims and thus "weeds out the [deaths] most likely to bear only a tenuous relationship" to use of drugs sold by the defendant. Finally, as discussed in the next part, § 841(b)(1)(C) is a criminal statute that must be strictly construed, not a compensatory, "humanitarian" statute designed to make injured railroad workers whole.

II. THE RULE OF LENITY REQUIRES DOUBTS ABOUT THE MEANING OF "RESULTS FROM" TO BE RESOLVED IN THE DEFENDANT'S FAVOR.

The previous discussion shows that, in the context of civil statutes, this Court reads causal elements to require proximate cause unless--as in *CSX Transportation*--the language and structure of the statute show an unambiguous contrary intent.

That interpretive approach--in effect, a presumption of proximate cause--applies even more clearly to criminal statutes. As a leading treatise puts it, where a criminal offense requires proof of "a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003); *see, e.g., United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011) (proximate cause is "a bedrock rule of both tort and criminal law") (footnote omitted), *cert. denied*, 132 S. Ct. 756 (2011); *United States v. Pineda-Doval*, 614 F.3d 1019, 1026 (9th Cir. 2010) (it is a "basic tenet of criminal law" that "when a criminal statute requires

that the defendant's conduct has resulted in injury, the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury") (quotation omitted). Nothing in the text, structure, or history of § 841(b)(1)(C) supports a deviation from this basic principle of criminal law.[4]

Under these principles, the "results from" phrase in § 841(b)(1)(C) includes both "but-for" cause and proximate cause. But even if doubt remained on this point, the rule of lenity would require that it be resolved in petitioner's favor. This Court often invokes the rule of lenity--under which it requires "clear and definite" statutory language before it will choose the harsher of two plausible readings of a criminal statute, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)--to establish limits when prosecutors urge broad readings of ambiguous text. Under the rule of lenity,

> the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. . . . This venerable rule not only vindicates

[4] *Pineda-Doval* notes that the courts of appeals have created a "drug-trafficking" exception to the requirement of proximate cause. *See* 614 F.3d at 1027. There is no principled basis for such an exception to the usual proximate cause rule in criminal cases, and neither *Pineda-Doval* nor any other case offers one. Those cases purport to rely on the "plain language" of § 841(b)(1)(C), but they do not explain how virtually identical language can be read to *require* proximate cause in most statutes (such as the alien smuggling statute in *Pineda-Doval*) and unambiguously *exclude* it in § 841(b)(1)(C).

> the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion).

The rule of lenity "is founded on two policies that have long been part of our tradition," *United States v. Bass*, 404 U.S. 336, 348 (1971): that the law should provide fair warning of the line between criminal and noncriminal conduct, and that "legislatures and not courts should define criminal activity," which rests on "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (quotation omitted); *see, e.g., United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute.").

Here, the most that can be said for the court of appeals' view is that "[a] literal reading of [the phrase "results from"] is broad enough to encompass every [death] that can be attributed directly or indirectly to the consequences of" a defendant's drug

sales. *Associated General Contractors*, 459 U.S. at 529. But the Court did not find such a "literal reading" persuasive even in the context of the civil statutes in *Associated General Contractors* and *Holmes*, where the rule of lenity did not apply. In this criminal case, where "the tie must go to the defendant," *Santos*, 553 U.S. at 514, an interpretation that permits liability to rest solely on "but-for" cause must even more clearly be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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