No. 12-8561

IN THE
Supreme Court of the United States

DOYLE RANDALL PAROLINE,
Petitioner,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF AFTER ARGUMENT

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SUPPLEMENTAL BRIEF FOR PETITIONER PAROLINE AFTER ARGUMENT

1. Amy and the Solicitor General argue that this Court's recent decision in *Burrage* v. *United States,* 134 S. Ct. 881 (2014), does not necessitate finding a but-for causation requirement in 18 U.S.C. § 2259. S.G. Letter, Feb. 19, 2014 ("The government agrees with Amy that the Court's decision in *Burrage* neither dictates the appropriate causation standard for restitution awards under 18 U.S.C. [§] 2259, nor speaks to whether the requisite causation standard has been satisfied here."). But *Burrage* addressed language very similar to the language at issue here. In *Burrage*, this Court interpreted the following language from 21 U.S.C. § 841(b)(1)(C): "death or serious bodily injury *results from* the use of such substance." *Burrage*, 134 S. Ct. at 885 (emphasis added). Here, the relevant language requires the same causal relationship between a defendant's conviction and mandatory restitution in three separate instances: 18 U.S.C. § 2259(c) defines "victim" as "the individual harmed *as a result of* a commission of a crime;" § 2259(b)(3)(F) requires losses be the proximate result of the offense; and § 2259(b)(2) explains courts should award restitution in accordance with 18 U.S.C. § 3664, which requires the prosecution to demonstrate "the amount of the loss sustained by a victim *as a result of* the offense . . . ." 18 U.S.C. § 3664(e) (emphasis added).

In *Burrage*, the Court relied on the "traditional background principles" that inform statutes using "results from" or similar language such as "because of," "based on," and "by reason of." *Burrage*, 134 S. Ct. at 889. These principles require a showing of but-for causation. Additionally, the Court noted that state

courts "interpret similarly worded criminal statutes in the same manner." *Id.* at 889 (noting that "results in," "because of," and "as a result of" have all required but-for causation in state courts). The phrase "as a result of" in §§ 2259(b)(3)(F), 2259(c) and 3664(e) should likewise require but-for causation.

2. The Court in *Burrage* rejected the "contributing factor" theory of causation, *Burrage*, 134 S. Ct. 890-91, just as the Court refused to include anything beyond the offense of conviction in calculating losses for restitution orders in *Hughey* v. *United States*, 495 U.S. 411, 420 (1990). Yet this is the same causation argument presented by both Amy and the Solicitor General here. The *Burrage* decision rests not upon any defined term peculiar to that statute, but upon the ordinary meaning of the words "results from." *Id.* at 887. The Court held "[w]here there is no textual or contextual indication to the contrary, courts regularly read phrases *like* 'results from' to require but-for causality." *Id.* at 888 (emphasis added). Specifically, the Court emphasized that "it is one of the traditional background principles 'against which Congress legislate[s],' . . . that a phrase such as 'results from' imposes a requirement of but-for causation." *Id.* at 889 (internal citation omitted) (quoting *Univ. Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2525 (2013)). Had Congress intended § 841(b)(1)(C) to only require contributing causation, it would have written the statute with language that did not "import[ ] but-for causality." *Burrage*, 134 S. Ct. at 891.[1]

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[1] In *Burrage*, the Court held that "the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury," and therefore the defendant is not liable under the enhancement provision "unless [the victim's use of the drug] is a but-for cause of the death or injury." 134 S. Ct. at 884. In the same way, the but-for cause test

In requiring but-for causation, the Court also expressly rejected the "less demanding" and "less well established" Prosser & Keaton conversion theory proposed by the Solicitor General. *Id.* at 890-91; see also S.G. Br. 22 (arguing for "'aggregate' causation" where "the defendants bear[] a like relationship to the harm" and "[e]ach seeks to escape liability for a reason that . . . would likewise protect each other defendant in the group . . . leaving the plaintiff without a remedy . . . ." (alterations original)).

Amy attempts to counter the broadly applicable principles announced in *Burrage* with an invitation to judicial policymaking. She warns that any standard other than contributing cause will let "all of the wrongdoers . . . escape liability . . . ." Resp't Supp. Br. 8-9. The Solicitor General made the same argument in *Burrage*. See Br. for United States at 24, *Burrage*, 134 S. Ct. 881 (No. 12-7515). But *all* wrongdoers here would not escape liability as Amy argues. All defendants convicted of child pornography would face criminal liability. More importantly, the majority of individuals convicted for possession of child pornography—and sentenced under § 2G2.2—also engaged in knowing receipt and/or distribution conduct. U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* 146-48 (2012) ("53.1 percent (878) of the 1,654 child pornography offenders sentenced [in Fiscal Year 2010] under §2G2.2 were convicted of possession [of child pornography]. . . . [And] the vast majority of all offenders sentenced under §2G2.2 (1,613, or 97.5%) actually engaged in knowing receipt and/or distribution con-

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was not met here. *See* Presentence Investigation Report ¶ 14, *United States* v. *Paroline*, No. 6:08-cr-61 (E.D. Tex. June 10, 2009). This determination in the PSR was confirmed by the District Court's finding of no proximate causation.

duct."). The fact that §§ 2259(b)(3)(F), 2259(c), and 3664(e) require but-for cause for possession does not prevent victims from receiving restitution from the *vast* number of individuals who actually engage in distribution.

Whether these policy arguments are sound, however, does not matter. The Court emphasized once again in *Burrage*, as it did in *Hughey*, that the role of the Court "is to apply the statute as it is written—even if . . . some other approach might 'accord with good policy.'" *Burrage*, 134 S. Ct. at 892 (internal quotation marks and alterations omitted) (quoting *Comm'r* v. *Lundy*, 516 U.S. 235, 252 (1996)); see also *Hughey*, 495 U.S. at 422 ("[L]ongstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy . . . ."). "[I]t frustrates rather than effectuates legislative intent . . . to assume that whatever furthers the statute's primary objective must be the law." *Dolan* v. *United States*, 560 U.S. 605, 625 (2010) (Roberts, C.J., dissenting) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987) (per curiam)). Even assuming, as the Solicitor General posits, that policy points in a different direction, *Burrage* demonstrates that courts must interpret §§ 2259(c)'s and 3664(e)'s "results from" language according to its plain meaning and not according to the parties', or even the Court's assessment of what constitutes good policy.

3. Amy argues that *Burrage*'s reasoning should not apply in this case because *Burrage* interpreted a statute that imposed criminal liability, while the Mandatory Victims Restitution Act (MVRA) should be interpreted like a tort statute. See Resp't Supp. Br. 2 ("the contributing cause basis for liability is widely recognized" in statutes "involving tort com-

pensation"). This contention is misguided for at least three reasons.

First, Amy overlooks that the MVRA is a criminal, not tort, statute. As the Solicitor General recently recognized, the MVRA incorporates traditional purposes of both criminal and tort law: in addition to victim compensation, "Congress also mandated restitution for certain crimes under the MVRA 'to mete out appropriate criminal punishment for' the offense conduct." Br. for United States, *Robers* v. *United States*, No. 12-9012, 2014 WL 251996, at *40 (U.S. Jan. 21, 2014) (quoting *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005)). Furthermore, "restitution under the MVRA is *punishment* because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes . . . ." *United States* v. *Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998), *cert. denied*, 525 U.S. 975 (1998) (emphasis added). Although the MVRA arguably encompasses *some* tort law principles—namely, compensation for victims—viewing it exclusively as a tort statute ignores much of its purpose, as the Solicitor General argued in *Robers*. The MVRA's multiple purposes do not support a reading that ignores an important "background principle" of *both* criminal and tort statutes: that phrases like "results in" imply a but-for causation requirement.

Second, even if the Court understands the MVRA as a civil statute, the assertion that but-for causation is limited to statutes imposing criminal liability fails to account for large swaths of *Burrage*. Indeed, the Court cited but-for causation requirements in similarly worded tort statutes, *Univ. Tex. Sw. Med. Ctr.* v. *Nassar*, and *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). *Burrage*, 134 S. Ct. at 888-89. In *Nassar*, the Court held that Title VII's antiretaliation provision, which contains the language ("results from"),

"require[s] proof that the desire to retaliate was the *but-for cause* of the challenged employment action." *Nassar*, 133 S. Ct. at 2528 (emphasis added). *Gross* similarly held that the Age Discrimination in Employment Act, another tort statute (using the language "by reason of"), requires that a plaintiff's age be a "'*but-for' cause* of the employer's adverse decision." *Gross*, 557 U.S. at 176 (emphasis added). As the *Burrage* decision shows, the but-for causation requirement is inherent in phrases like "results in" or "results from." *Burrage*, 134 S. Ct. at 889-90. That principle applies with equal force to tort statutes.[2]

Third, the background against which Congress created that language is essential to interpreting the language of § 3664(e). In 1990, this Court decided *Hughey* v. *United States*. *Hughey* interpreted the Victim and Witness Protection Act (VWPA), then 18 U.S.C. §§ 3579-80, which is now §§ 3663-64: "The court, in determining whether to order restitution . . . shall consider the amount of the loss sustained by any victim *as a result of the offense* . . . ." *Hughey*, 495 U.S. at 417 (quoting 18 U.S.C. § 3580(a)). The exact same language appears in § 3664(e). In *Hughey,* the Court rejected the Solicitor General's policy arguments for expanded consideration of conduct outside of the defendant's convicted

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[2] Amy recognizes that but-for causation can apply even in tort cases when she further attempts to distinguish the causation standard in tort statutes between negligent torts (which require but-for causation) and intentional torts (which, according to Amy, require only contributing causation). Resp't Supp. Br. 9-10. This argument overlooks that the torts involved in *Nassar* and *Gross* (employment discrimination torts) are intentional. Further, as discussed in Petitioner's initial Reply Brief, the *mens rea* requirement (knowingly) in this case falls short of the requisite state of mind in intentional torts (intent). *See* Pet'r Reply Br. 8.

offense, and was adamant that the scope of restitution must be tied strictly to the crime of conviction. *Id.* at 420 ("[T]he loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order."); see also *id.* at 422 (holding that, even if the statutory language were ambiguous, "longstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history.").

In 1996, in the wake of *Hughey*, Congress amended the VWPA to create the MVRA, including § 3664(e). By doing so, it codified *Hughey*, incorporating a but-for causal link between the crime of conviction and losses sustained by a victim. The Court's observation in *Burrage*, that Congress could have written the statute to "impose a mandatory minimum when the underlying crime 'contributes to' death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes" but chose not to, applies here. *Burrage*, 134 S. Ct. at 891. Congress created in the MVRA a uniform standard of proof consistent with this Court's precedent. Amy's argument, therefore, boils down to a policy argument that *both* Congress *and* this Court have repeatedly considered and rejected by writing and interpreting statutes to include a but-for causation requirement in a variety of contexts.

4. Even if the language of § 2259 does not explicitly require but-for causation, the rule of lenity mandates that it be interpreted as requiring but-for causation. The rule of lenity requires that "construction of a criminal statute" like § 2259 "must be guided by the need for fair warning . . . ." *Crandon* v. *United States*, 494 U.S. 152, 160 (1990). It therefore "demand[s] resolution of ambiguities in criminal statutes in favor of

the defendant . . . ." *Hughey*, 495 U.S. at 422 (applying the rule of lenity in the context of a restitution order); see also *Moskal* v. *United States*, 498 U.S. 103, 107-08 (1990) ("the touchstone of the rule of lenity is statutory ambiguity" (internal quotation marks omitted) (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980))).

In *Burrage*, Justices Ginsburg and Sotomayor disagreed with the Court's holding that "results from" statutory language always requires a showing of but-for causation, but concurred in the judgment, explaining that the rule of lenity precluded interpreting the statute against the defendant. As Justice Ginsburg wrote, "where there is room for debate, one should not choose the construction 'that disfavors the defendant.'" *Burrage*, 134 S. Ct. 892 (Ginsburg, J., concurring) (quoting *Id.* at 891).

For the same reason, if the Court finds § 2259 to be ambiguous, it should apply the rule of lenity and refuse to give it "a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Id.* at 891. Accordingly, this Court should read "as a result of" to demand the same "but-for" causation as was required in *Burrage*.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit granting mandamus should be reversed and the opinion of the District Court should be upheld.

Respectfully submitted,

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