American Bar Association
www.supremecourtpreview.org

No. 06-11429

In the Supreme Court of the United States

KEITH LAVON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

NICOLE A. SAHARSKY
Assistant to the Solicitor General

DANIEL S. GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a state drug offense that is punishable by more than one year of imprisonment must also be classified as a "felony" under state law in order to qualify as a "felony drug offense" for purposes of the recidivist sentencing provisions of 21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005).

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 2
Summary of argument 6
Argument:
Petitioner's prior conviction for possession of cocaine qualifies as a "felony drug offense" under 21 U.S.C. 841(b)(1)(A) 10
A. The plain text of Section 841(b)(1)(A) provides for enhanced punishment for a "felony drug offense" as that term is defined in 21 U.S.C. 802(44) 10
B. The statutory context supports the view that 21 U.S.C. 802(44) provides the exclusive definition of "felony drug offense" 21
C. The drafting history confirms that Congress intended Section 802(44) to provide the sole definition for "felony drug offense" 27
D. Defining a "felony drug offense" solely by reference to 21 U.S.C. 802(44) furthers Congress's reasonable policy objectives 33
E. The rule of lenity has no application to this case . . . 40
Conclusion 46
Statutory Appendix 1a

TABLE OF AUTHORITIES

Cases:

Ali v. *Federal Bureau of Prisons*, 128 S. Ct. 831 (2008) 15, 26
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 42

Cases—Continued: Page

Bates v. *United States*, 522 U.S. 23 (1997) 15
Bifulco v. *United States*, 447 U.S. 381 (1980) 41
Blanton v. *City of N. Las Vegas*, 489 U.S. 538 (1989) 37
Bogan v. *Scott-Harris*, 523 U.S. 44 (1998) 38
Branch v. *Smith*, 538 U.S. 254 (2003) 33
Brogan v. *United States*, 522 U.S. 398 (1998) 38
Busic v. *United States*, 446 U.S. 398 (1980) 41
Caron v. *United States*, 524 U.S. 308 (1998) 45
Carter v. *United States*, 530 U.S. 255 (2000) 30
Chandler v. *Miller*, 520 U.S. 305 (1997) 36
Chapman v. *United States*, 500 U.S. 453 (1991) 43, 44
Colautti v. *Franklin*, 439 U.S. 379 (1979) 12
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 30
Crandon v. *United States*, 494 U.S. 152 (1990) 40
Dickerson v. *New Banner Inst., Inc.*, 460 U.S. 103 (1983) 16
Dowling v. *United States*, 473 U.S. 207 (1985) 42
Dunn v. *CFTC*, 519 U.S. 465 (1997) 33, 34
Fox v. *Standard Oil Co.*, 294 U.S. 87 (1935) 15
Gonzales v. *Raich*, 545 U.S. 1 (2005) 22, 27
Harmelin v. *Michigan*, 501 U.S. 957 (1991) 36
Harris v. *United States*, 536 U.S. 545 (2002) 41, 42, 43
Huddleston v. *United States*, 415 U.S. 814 (1974) 44
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) . . . 10
Lamie v. *United States Tr.*, 540 U.S. 526 (2004) 30

Cases—Continued: Page

Lawson v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198 (1949) 11
Liparota v. *United States*, 471 U.S. 419 (1985) 41
Logan v. *United States*, 128 S. Ct. 475 (2008) 16
Lopez v. *Gonzales*, 127 S. Ct. 625 (2006) . . . . . *passim*
McBoyle v. *United States*, 283 U.S. 25 (1931) 41
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 43
Meese v. *Keene*, 481 U.S. 465 (1987) 12, 14
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 32
Muscarello v. *United States*, 524 U.S. 125 (1998) 6, 44, 45
National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 21
Patel v. *INS*, 542 F.2d 796 (9th Cir. 1976) 20
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 32
Reno v. *Koray*, 515 U.S. 50 (1995) 45
Rowland v. *California Men's Colony,* 506 U.S. 194 (1993) 45
Russello v. *United States*, 464 U.S. 16 (1983) 26
Salinas v. *United States*, 522 U.S. 52 (1997) 31, 45
Simpson v. *United States*, 435 U.S. 6 (1978) 41
Staples v. *United States*, 511 U.S. 600 (1994) 44
Stenberg v. *Carhart*, 530 U.S. 914 (2000) 12
Stone v. *INS*, 514 U.S. 386 (1995) 30
Taylor v. *United States*, 495 U.S. 575 (1990) 16, 35
United States v. *Brooks*, 508 F.3d 1205 (9th Cir. 2007) . . 12
United States v. *Brown*, 500 F.3d 48 (1st Cir. 2007) 12

Cases—Continued: Page

United States v. *Curry*, 404 F.3d 316 (5th Cir.), cert. denied, 544 U.S. 1067 (2005) 12

United States v. *Granderson*, 511 U.S. 39 (1994) 34

United States v. *Hansley*, 54 F.3d 709 (11th Cir. 1995) . . 39

United States v. *Huskey*, 502 F.3d 1196 (10th Cir. 2007) 12

United States v. *Jackson*, 504 F.3d 250 (2d Cir.), cert. denied, 128 S. Ct. 690 (2007) 12

United States v. *Kole*, 164 F.3d 164 (3d Cir. 1998), cert. denied, 526 U.S. 1079 (1999) 34

United States v. *Kozminski*, 487 U.S. 931 (1988) 40

United States v. *LaBonte*, 520 U.S. 751 (1997) 34, 43

United States v. *Mankins*, 135 F.3d 946 (5th Cir. 1998) 13

United States v. *Martinez*, 182 F.3d 1107 (9th Cir.), cert. denied, 528 U.S. 944 (1999) 13

United States v. *Maynie*, 257 F.3d 908 (8th Cir. 2001), cert. denied, 534 U.S. 1151, and 535 U.S. 944 (2002) . . 13

United States v. *Meza-Corrales*, 183 F.3d 1116 (9th Cir. 1999) 13

United States v. *Nelson*, 484 F.3d 257 (4th Cir.), cert. denied, 128 S. Ct. 614 (2007) 12, 45

United States v. *Richards*, 302 F.3d 58 (2d Cir. 2002) 12, 39

United States v. *Roberson*, 459 F.3d 39 (1st Cir. 2006), cert. denied, 127 S. Ct. 1261 (2007) . . . . . *passim*

United States v. *Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002) 13

Cases—Continued: Page

United States v. *Rodriquez*, No. 06-1646 (argued Jan. 15, 2008) 38
United States v. *Rosales*, No. 05-30260, 2008 WL 375207 (9th Cir. Feb. 13, 2008) 12, 39
United States v. *Sampson*, 385 F.3d 183 (2d Cir. 2004), cert. denied, 544 U.S. 924 (2005) 12
United States v. *Sandle*, 123 F.3d 809 (5th Cir. 1997) 13, 39
United States v. *Spikes*, 158 F.3d 913 (6th Cir. 1998), cert. denied, 525 U.S. 1086 (1999) 13, 38
United States v. *Turley*, 352 U.S. 407 (1957) 16
United States v. *Wells*, 519 U.S. 482 (1997) 44
United States v. *West*, 393 F.3d 1302 (D.C. Cir. 2005) . . . 13
Western Union Tel. Co. v. *Lenroot*, 323 U.S. 490 (1945) 12

Constitution and statutes:

U.S. Const. Amend. VI 41
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181:
§ 6452(a)(1), 102 Stat. 4371 28
§ 6452(a)(2), 108 Stat. 4371 28
Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) *et seq.* 18
18 U.S.C. 924(e) 39
18 U.S.C. 924(e)(2)(A)(ii) 39
18 U.S.C. 924(e)(2)(B) 18

Statutes—Continued: Page

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 501(1)(B)(iii), 98 Stat. 2069 . . . . . 27, 28

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 27

Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, § 401(b)(3), 110 Stat. 3107 29

Controlled Substance Import and Export Act, 21 U.S.C. 951 *et seq.* 8

21 U.S.C. 951-971 22

21 U.S.C. 951(b) 23

21 U.S.C. 960 32

21 U.S.C. 950(b)(1) (1988) 29

21 U.S.C. 950(b)(1) (1994) 29

21 U.S.C. 960(b)(1) (2000 & Supp. II 2002) 23

21 U.S.C. 960(b)(2) (1970) 27

21 U.S.C. 960(b)(2) (1988) 29

21 U.S.C. 960(b)(2) (1994) 29

21 U.S.C. 960(b)(2) (2000 & Supp. II 2002) 23

21 U.S.C. 960(b)(3) (1988) 29

21 U.S.C. 960(b)(3) (1994) 29

21 U.S.C. 960(b)(3) (Supp. II 2002) 23

21 U.S.C. 962 32

21 U.S.C. 962(b) 23

21 U.S.C. 962(b) (1970) 27

21 U.S.C. 962(b) (1982 & Supp. II 1984) 28

21 U.S.C. 962(b) (1988) 29

21 U.S.C. 962(b) (1994) 29

Statutes—Continued: Page

Controlled Substances Act, 21 U.S.C. 801 *et seq.* 2
21 U.S.C. 801-904 22
21 U.S.C. 802 . . . . . 23, 29
21 U.S.C. 802(13) (1988) 30
21 U.S.C. 802(13) . . . . . *passim*
21 U.S.C. 802(43) (1994) 29, 30
21 U.S.C. 802(44) (Supp. V 2005) . . . . . *passim*
21 U.S.C. 824(a)(2) 24, 25
21 U.S.C. 841(a) 3
21 U.S.C. 841(a)(1) 2, 4, 10
21 U.S.C. 841(b)(1)(A) (1970) 27
21 U.S.C. 841(b)(1)(A) (Supp. II 1984) 28
21 U.S.C. 841(b)(1)(A) (1988) 28, 30
21 U.S.C. 841(b)(1)(A) (1990) 39
21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005) . . . *passim*
21 U.S.C. 841(b)(1)(B) (1970) 27
21 U.S.C. 841(b)(1)(B) (Supp. II 1984) 28
21 U.S.C. 841(b)(1)(B) (1988) 28
21 U.S.C. 841(b)(1)(B) (1994) 29
21 U.S.C. 841(b)(1)(B) (2000 & Supp. II 2002) 22, 32
21 U.S.C. 841(b)(1)(C) (1988) 28
21 U.S.C. 841(b)(1)(C) (1994) 29
21 U.S.C. 841(b)(1)(C) (Supp. II 2002) 22, 32
21 U.S.C. 841(b)(1)(D) (1988) 28
21 U.S.C. 841(b)(1)(D) (1994) 29
21 U.S.C. 841(b)(1)(D) (Supp. II 2002) 23, 32
21 U.S.C. 841(e) 24

Statutes—Continued: Page

21 U.S.C. 843(b) 24
21 U.S.C. 843(d)(1) (Supp. II 2002) 25
21 U.S.C. 843(d)(2) (2000 & Supp. II 2002) 25
21 U.S.C. 843(e) 25
21 U.S.C. 844(a) 38
21 U.S.C. 848(c)(1) 24
21 U.S.C. 848(e)(1)(B) 25
21 U.S.C. 846 . . . . . 2, 4
21 U.S.C. 851 . . . . . 4, 29, 43
21 U.S.C. 853(d) 25
21 U.S.C. 862a 18
21 U.S.C. 862a(a) 25
21 U.S.C. 878(a)(3) 25
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 90105, 108 Stat. 1987 32
18 U.S.C. 921(a)(20) 16
18 U.S.C. 921(a)(20)(B) 18
18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005) 16
18 U.S.C. 1956(c)(3) 17
18 U.S.C. 1956(c)(4) 17
18 U.S.C. 1961(1) (Supp. II 2002) 17
18 U.S.C. 1961(5) 17
18 U.S.C. 3553(a)(6) 35
18 U.S.C. 3553(e) (Supp. II 2002) 5
18 U.S.C. 3559(a) 3
28 U.S.C. 994(h) 34

Statutes—Continued: Page

Ariz. Rev. Stat. Ann. (2001):
§ 13-701(5) 37
§ 13-3402 37
§ 13-3405(B)(1) (Supp. 2007) 37
§ 13-3406(B)(2) (Supp. 2007) 37
§ 13-3415(A) 37
§ 13-3415(B) 37
§ 13-3415(C) 37
Colo. Rev. Stat. (2006):
§ 18-3-412(2) 36
§ 18-1.3-501(1) 36
§ 18-1.3-501(3) 36
Conn. Gen. Stat. Ann. § 53a-40d(b) 36
Iowa Code Ann. (West):
§ 901A.2 (2006) 36
§ 903B.2 (Supp. 2007) 36
La. Rev. Stat. Ann. (2007):
§ 14:40.2(B)(6)(a) 36
§ 14:40.3(C)(2) 36
§ 14:40.3(C)(3) 36
§ 14:95.1.1 (Supp. 2008) 36
Md. Code Ann., Crim. Law (West 2007):
§ 3-203 36
§ 3-802 36
§ 8-401 36
§ 8-516 36

Statutes—Continued: Page

Mass. Ann. Laws (LexisNexis 2002):
ch. 265, § 13A 36
ch. 266, § 37E 36
Me. Rev. Stat. Ann. tit. 17-A, § 1252 (Supp. 2007) 35
N.J. Stat. Ann. § 2C:1-4 (West 2005) 35
S.C. Code Ann.:
§ 16-1-10(C) (2003) 36
§ 16-3-610 (2003) 36
§ 44-53-370(c) (2000) 4
§ 44-53-370(d)(1) (2000) 4

Miscellaneous:

Black's Law Dictionary (8th ed. 2004) 13, 14
4 William Blackstone, *Commentaries on the Laws of England* (9th ed. 2001) 43
Bureau of Justice Statistics, *The World Factbook of Criminal Justice Systems* (visited Feb. 21, 2008) <http://www.ojp.usdoj.gov/bjs/abstract/wfcj.htm #abstract> 20
22 C.J.S. *Criminal Law* (2006) 19
H.R. Rep. No. 694, 103d Cong., 2d Sess. (1994) 32
Geoffrey Robertston, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (2005) 43, 44
2A Norman J. Singer & J.D. Shambie Singer, *Sutherland: Statutes and Statutory Construction* (7th ed. 2007) 12

In the Supreme Court of the United States

No. 06-11429

KEITH LAVON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 478 F.3d 658.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2007. The petition for a writ of certiorari was filed on May 17, 2007, and was granted on December 7, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App, *infra*, 1a-4a.

STATEMENT

Petitioner was convicted of conspiracy to possess with the intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)[1] and 846. He had previously been convicted of cocaine possession under South Carolina law, an offense that was punishable by up to two years of imprisonment. Pet. App. A2. The district court determined that petitioner was subject to a mandatory minimum 20-year sentence under 21 U.S.C. 841(b)(1)(A) because his South Carolina conviction was a conviction for a "felony drug offense." C.A. App. 35-36, 64-68. The court of appeals affirmed, explaining that 21 U.S.C. 802(44) specifically defines "felony drug offense" as an offense "punishable by imprisonment for more than one year" under a law that "prohibits or restricts conduct" relating to drugs. Pet. App. A1-A7. This Court has granted review of that holding.

1. Under the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, it is unlawful for any person to "knowingly or intentionally" "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a)(1). Any person who conspires to commit such an offense is "subject to the same penalties as those prescribed for the offense." 21 U.S.C. 846.

---

[1] The relevant portions of the key sentencing statutes—21 U.S.C. 841(b)(1)(A) and 21 U.S.C. 802(44)—are unchanged from the time of petitioner's offense conduct, conviction, and sentence. Therefore, unless otherwise noted, all citations to 21 U.S.C. 841(b)(1)(A) refer to 21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005) and all citations to 21 U.S.C. 802(44) refer to 21 U.S.C. 802(44) (Supp. V 2005).

The CSA provides for enhanced penalties for recidivists. For example, if a person commits a violation of 21 U.S.C. 841(a) involving 50 grams or more of cocaine base "after a prior conviction for a felony drug offense has become final," that person is subject to a minimum term of imprisonment of 20 years and a maximum term of life imprisonment. 21 U.S.C. 841(b)(1)(A). The CSA defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44).

2. In October 2002, petitioner offered to sell cocaine to a Drug Enforcement Agency confidential source (CS). Presentence Investigation Report (PSR) ¶ 9. The CS asked petitioner the price of "half a big"—*i.e.*, 2.25 ounces—and petitioner replied that he would sell the CS that amount of either powder cocaine or crack cocaine for $1700. *Ibid.*

A few days later, the CS met petitioner again. PSR ¶ 10. Petitioner showed the CS four ounces of powder cocaine and four ounces of crack cocaine, and he told the CS to call him whenever he was ready to make a purchase. *Ibid.* Petitioner explained that his source of supply was a Jamaican from Miami, Florida, whom petitioner had met in prison. *Id.* ¶ 11. Petitioner also mentioned that he sold or otherwise distributed more than five kilograms of powder cocaine and crack cocaine per week. *Ibid.*

In December 2002, in a controlled, monitored, and recorded call to petitioner's cell phone, the CS inquired about purchasing nine ounces of crack cocaine for $6500. PSR ¶¶ 12-13. Petitioner agreed to sell that amount,

and petitioner and the CS made arrangements to meet the following day. *Id*. ¶¶ 13-14. The next day, petitioner and a co-conspirator met the CS in the parking lot of a shopping mall, and then left to go to petitioner's apartment to retrieve the drugs. *Id.* ¶ 15. When petitioner did not return after 45 minutes, the CS called petitioner, who explained that he and his associate were still "cooking" the cocaine into crack. *Id*. ¶ 16. About an hour later, petitioner returned to the mall parking lot and provided the CS with two Ziploc bags containing 240.3 grams of cocaine base in exchange for $2000. *Id*. ¶¶ 16-17, 19. Petitioner was arrested shortly thereafter. *Id.* ¶ 19.

Petitioner had previously been convicted of other crimes. In 1999, petitioner was convicted of two counts of federal bank robbery, offenses for which he was still on supervised release when he committed the instant offense. PSR ¶¶ 39, 42. In 2002, petitioner was convicted of possession of cocaine under South Carolina law. Pet. App. A2; PSR ¶ 40; see S.C. Code Ann. § 44-53-370(c) and (d)(1) (2000). The government filed an information pursuant to 21 U.S.C. 851 identifying petitioner's South Carolina drug conviction as subjecting him to enhanced penalties under 21 U.S.C. 841(b)(1)(A). C.A. App. 13.

3. Petitioner pleaded guilty to conspiracy to possess with the intent to distribute and conspiracy to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A) and 846. C.A. App. 9-12 (indictment); *id.* at 14-20 (plea agreement).

At sentencing, the district court determined that petitioner was subject to a statutory 20-year mandatory minimum sentence because his South Carolina cocaine offense qualifies as a "felony drug offense." The court

explained that 21 U.S.C. 841(b)(1)(A) requires an enhancement if an offender had previously committed a "felony drug offense," and the CSA specifically defines "felony drug offense" as an offense that is punishable by a term of imprisonment of one year or more under a law that prohibits conduct relating to illegal drugs. C.A. App. 35-36 (citing 21 U.S.C. 802(44)). Because possession of cocaine was a drug offense punishable under South Carolina law by up to two years of imprisonment, the court determined that petitioner had committed a "felony drug offense" and the sentence enhancement therefore applied. *Id.* at 39-40.

The district court rejected petitioner's argument that, because a different provision in the CSA—21 U.S.C. 802(13)—defines a "felony" as an offense "classified by applicable Federal or State law as a felony," and South Carolina law categorized petitioner's prior offense as a misdemeanor, his prior offense was not a "felony drug offense" for purposes of Section 841(b)(1)(A). C.A. App. 27-36. The court reasoned that because "felony drug offense" is the term Congress used in Section 841(b)(1)(A), and Section 802(44) defines that precise term, only the definition in Section 802(44) applied. *Id.* at 35-36.

The court then granted the government's motion for a downward departure based on petitioner's substantial assistance in the prosecution of another person, see 18 U.S.C. 3553(e) (Supp. II 2002), and sentenced petitioner to 156 months of imprisonment, to be followed by ten years of supervised release. Pet. App. A3-A4; C.A. App. 53-61.

4. The court of appeals affirmed. Pet. App. A1-A7. It first noted that a conviction for a violation of 21 U.S.C. 841(b)(1)(A) involving 50 grams or more of co-

caine base carries a mandatory sentence of ten years of imprisonment, and the mandatory sentence increases to 20 years if the offense was committed "after a prior conviction for a felony drug offense became final." Pet. App. A2. The court then determined that petitioner qualified for the 20-year mandatory minimum sentence because his South Carolina conviction for possession of cocaine was a "felony drug offense." *Id.* at A5-A6.

The court of appeals explained that because Section 802(44) defines "felony drug offense" in "plain and unambiguous terms," and Section 841(b)(1)(A) "makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by reference to the definition in § 802(44)." Pet. App. A5 (quoting *United States* v. *Roberson*, 459 F.3d 39, 52 (1st Cir. 2006), cert. denied, 127 S. Ct. 1261 (2007)). The court noted that the CSA separately defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony," *id.* at A3 (quoting 21 U.S.C. 802(13)), but it "discern[ed] no basis from the plain language or statutory scheme * * * to indicate that Congress intended 'felony drug offense' also to incorporate the definition in § 802(13)," *id*. at A6. The court rejected petitioner's attempt to invoke the rule of lenity, finding that the rule had no application in cases, like this one, where there is "no 'grievous ambiguity or uncertainty' in the pertinent statutes." *Ibid*. (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998)).

SUMMARY OF ARGUMENT

Petitioner's prior conviction for possession of cocaine qualifies as a "felony drug offense" under 21 U.S.C. 841(b)(1)(A) because that offense is "punishable by im-

prisonment for more than one year" under a state law that "prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44).

A. From the plain text of the statute, it is clear that a "felony drug offense" is a drug offense punishable by more than one year of imprisonment, regardless of how it is classified under state law. The trigger for a sentence enhancement under Section 841(b)(1)(A) is a "felony drug offense," and Congress provided a clear definition of that exact term in Section 802(44).

The statute's text provides no support for augmenting the definition of "felony drug offense" with the definition of "felony" provided in 21 U.S.C. 802(13). The definition of a felony in that subsection requires that the previous offense be classified under applicable state or federal law as a felony. But Congress did not use the word "felony" in the definition it supplied for the term of art "felony drug offense" in Section 802(44). Rather, it captured the concept of a felony in that subsection by referring to the *length* of the sentence by which the prior drug offense is punishable—*i.e.*, that it be punishable by more than one year of imprisonment. That is the usual line between a felony and a misdemeanor in federal criminal law, see 18 U.S.C. 3559(a); *Lopez* v. *Gonzales*, 127 S. Ct. 625, 630 n.4 (2006), and it provides a consistent standard for use across the range of state, federal, and foreign convictions covered. Congress required only a "felony drug offense" to trigger an enhanced sentence under Section 841(b)(1)(A), and it defined that term specifically. To apply both statutory definitions, as petitioner suggests, would create anomalies and ambiguities where none exists. In particular, it would create serious uncertainty about whether foreign

offenses (which frequently are not classified as felonies or misdemeanors) could be invoked for sentence enhancement, and, if so, how they would qualify.

B. The government's interpretation of Section 802(b)(1)(A) is bolstered by the context of the CSA as a whole. The definition of "felony drug offense" in Section 802(44) applies throughout the CSA and its neighboring statute, the Controlled Substance Import and Export Act (Import Act), 21 U.S.C. 951 *et seq.* Numerous provisions in the CSA and Import Act provide for an enhanced sentence if the offender has previously been convicted of a "felony drug offense." Rather than redefine the term "felony drug offense" in each such provision, Congress defined the term once, in Section 802(44), and used identical language in each sentence-enhancement provision to reference that definition. None of those provisions also requires that the offense that triggers an enhancement be classified as a "felony." The unadorned (and defined) term "felony," in contrast, is used for a variety of other purposes throughout the CSA and Import Act.

C. The drafting history of CSA makes clear that Section 802(44) provides the sole definition of "felony drug offense" for purposes of the sentence-enhancement provisions of Section 841(b)(1)(A). After previously defining a "felony drug offense" as "a felony" that had particular characteristics, Congress changed course in 1994 and substituted in the definition section a punishment-based description, *i.e.*, that the offense be punishable by more than one year of imprisonment. Congress applied that change throughout the CSA and Import Act through a series of conforming amendments that moved the definition of "felony drug offense" from Section 841(b)(1)(A) to Section 802 and changed the language of

other key sentence-enhancement provisions in the CSA and Import Act to mirror the language in Section 841(b)(1)(A). Taken together, those changes make clear that Congress intended to define a "felony drug offense" solely by reference to the specially-crafted language in Section 802(44).

D. Congress's decision to define a "felony drug offense" as a drug offense punishable by more than one year of imprisonment serves important purposes. It authorizes enhanced sentences to punish and deter repeat drug offenders, while bringing a measure of uniformity to those sentences by basing them on authorized terms of imprisonment rather than on the peculiarities of how they are classified under the law of the punishing jurisdiction. Petitioner suggests that Congress would not have intended to encompass drug possession offenses, which he considers minor, within "felony drug offenses." But the text of the CSA clearly reflects Congress's policy judgment that those crimes, when subject to felony-level punishment by the applicable jurisdiction, are, regardless of label, not minor. It is not a proper approach to statutory interpretation for courts to nullify that determination on policy grounds.

E. The rule of lenity does not apply in this case. In the case of a statute authorizing a mandatory minimum sentence for a recidivist, the rule of lenity has little force, both as a policy matter and as a historical matter. In any event, the rule of lenity is not applicable here because there is no grievous ambiguity in the statutory language. Congress provided a straightforward definition of "felony drug offense" in the CSA and used that precise term to trigger a mandatory minimum sentence in Section 841(b)(1)(A). That unambiguous reference precludes resort to the rule of lenity.

ARGUMENT

PETITIONER'S PRIOR CONVICTION FOR POSSESSION OF COCAINE QUALIFIES AS A "FELONY DRUG OFFENSE" UNDER 21 U.S.C. 841(b)(1)(A)

The court of appeals correctly concluded that an offense is a "felony drug offense" for purposes of the sentence-enhancement provision of 21 U.S.C. 841(b)(1)(A) if it meets the requirements set forth in the definition of "felony drug offense" in 21 U.S.C. 802(44). A qualifying offense is not also required to meet the separate definition of a "felony" in 21 U.S.C. 802(13). The statutory text, context, history, and purposes are all consistent with the view that Congress intended Section 802(44) to provide the exclusive definition of "felony drug offense." In the face of Congress's clear intent, the rule of lenity has no application in this case.

A. The Plain Text Of Section 841(b)(1)(A) Provides For Enhanced Punishment For A "Felony Drug Offense" As That Term Is Defined In 21 U.S.C. 802(44)

"As in any case of statutory construction, [this Court's] analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). And where "the statutory language provides a clear answer, it ends there as well." *Ibid.* In this case, the language Congress chose makes clear that petitioner's prior offense is a "felony drug offense" that triggers an enhanced sentence under Section 841(b)(1)(A).

1. a. The CSA makes it unlawful "for any person knowingly or intentionally" to "manufacture, distribute, or dispense, or possess with intent to manufacturer, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a)(1). The "penalties" provision of Section 841 pro-

vides that any person who violates that section through conduct involving, *inter alia*, 50 grams or more of a mixture containing cocaine base, "shall be sentenced to a term of imprisonment which may not be less than 10 years." 21 U.S.C. 841(b)(1)(A). The mandatory penalty is enhanced to 20 years of imprisonment if the violation was committed "after a prior conviction for a *felony drug offense* has become final." *Ibid.* (emphasis added).

Whether an offender's punishment should be enhanced under Section 841(b)(1)(A) thus depends upon whether the offender previously committed a "felony drug offense." The CSA helpfully defines that precise term:

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. 802(44). The definition provides a complete description of the type of offenses covered, referring to the length of authorized punishment, the nature of the proscribed conduct, and the jurisdiction supplying the law. No further requirements need be met for a crime to constitute a "felony drug offense."

b. The explicit, precise definition of "felony drug offense" as a term of art in Section 802(44) clearly applies to that exact term as used in Section 841(b)(1)(A). It is well-settled that "[s]tatutory definitions control the meaning of statutory words." *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). "When a statute includes an explicit definition, [courts] must follow

that definition, even if it varies from that term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000); see, *e.g.*, *Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490, 502 (1945) ("Of course, statutory definitions of terms used therein prevail over colloquial meanings."); 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland: Statutes and Statutory Construction* § 47:7, at 298-299 (7th ed. 2007) ("[s]tatutory definitions * * * establish meaning where the terms appear in that same act").

Section 802(44) itself makes clear that its definition provides the exclusive meaning of a "felony drug offense" under the CSA. That subsection states that "the term 'felony drug offense' *means*" a drug offense punishable by more than one year of imprisonment. 21 U.S.C. 802(44) (emphasis added). "As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979) (internal quotation marks omitted); see *Meese* v. *Keene*, 481 U.S. 465, 484-485 (1987); *Sutherland: Statutes and Statutory Construction, supra*, § 47:7, at 299. Not surprisingly, the courts of appeals have routinely assumed that Section 802(44) provides the exclusive definition for the term "felony drug offense," as it is used in Section 841(b)(1).[2]

---

[2] See, *e.g.*, *United States* v. *Rosales*, No. 05-30260, 2008 WL 375207, at *7-*8 (9th Cir. Feb. 13, 2008); *United States* v. *Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007); *United States* v. *Jackson*, 504 F.3d 250, 253 (2d Cir.), cert. denied, 128 S. Ct. 690 (2007); *United States* v. *Huskey*, 502 F.3d 1196, 1198 (10th Cir. 2007); *United States* v. *Brown*, 500 F.3d 48, 59 (1st Cir. 2007); *United States* v. *Nelson*, 484 F.3d 257, 260 (4th Cir.), cert. denied, 128 S. Ct. 614 (2007); *United States* v. *Curry*, 404 F.3d 316, 318 (5th Cir.), cert. denied, 544 U.S. 1067 (2005); *United States* v. *Sampson*, 385 F.3d 183, 194 (2d Cir. 2004), cert. denied, 544 U.S. 924 (2005); *United States* v. *Richards*, 302 F.3d 58, 70-71 (2d Cir. 2002);

c. Nothing in the statute suggests that the meaning of the phrase "felony drug offense" must be supplemented by applying separate definitions from some other part of the CSA. The definition of "felony drug offense" that Congress provided is coherent and complete, because it gives meaning to each of the three words in that phrase. First, Congress used the word "felony" to describe the seriousness of the offense, and the definition states that the offense must be "punishable by imprisonment for more than one year" under state, federal, or foreign law. 21 U.S.C. 802(44). That comports with the general definition of felony in federal criminal law, see 18 U.S.C. 3559(a); *Lopez* v. *Gonzales*, 127 S. Ct. 625, 630 n.4 (2006), as well as the common definition of "felony." See *Black's Law Dictionary* 651 (8th ed. 2004) (defining "felony" as "[a] serious crime usu[ally] punishable by imprisonment for more than one year or by death"); see also, *e.g.*, *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002) (noting Congress's "longstanding practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment"). Second, Congress used the word "drug" to describe the type of prohibited conduct, and

---

United States v. *Maynie*, 257 F.3d 908, 919 n.5 (8th Cir. 2001), cert. denied, 534 U.S. 1151, and 535 U.S. 944 (2002); *United States* v. *Meza-Corrales*, 183 F.3d 1116, 1126 (9th Cir. 1999); *United States* v. *Martinez*, 182 F.3d 1107, 1113 & n.6 (9th Cir.), cert. denied, 528 U.S. 944 (1999); *United States* v. *Spikes*, 158 F.3d 913, 931 (6th Cir. 1998), cert. denied, 525 U.S. 1086 (1999); *United States* v. *Mankins*, 135 F.3d 946, 949 (5th Cir. 1998); *United States* v. *Sandle*, 123 F.3d 809, 810-811 (5th Cir. 1997); see also *United* States v. *Roberson*, 459 F.3d 39, 50-55 (1st Cir. 2006), cert. denied, 127 S. Ct. 1261 (2007) (holding that only Section 802(44), and not Section 802(13), informs the meaning of "felony drug offense" in Section 841(b)(1)(A)); but see also *United States* v. *West*, 393 F.3d 1302, 1311-1315 (D.C. Cir. 2005).

the definition provides that it must be conduct "relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44); see, *e.g.*, *Black's Law Dictionary, supra*, at 535 (defining "drug" as "[a] natural or synthetic substance that alters one's perception or consciousness," and referencing the definition of "controlled substance"). Finally, Congress used the word "offense" to signify conduct that is criminal, and the definition states that the conduct must be "punishable * * * under any law of the United States or of a State or foreign country." 21 U.S.C. 802(44); see, *e.g.*, *Black's Law Dictionary, supra*, at 1110 (defining "offense" as "[a] violation of the law; a crime"). Because Congress's definition of "felony drug offense" is complete and coherent, there is no reason for this Court "to suspend the respect [it] normally owe[s] to the Legislature's power to define the terms that it uses in legislation." *Meese*, 481 U.S. at 484. And because Congress did not use *in the definition* any terms that it defined elsewhere, there is no basis for looking to those terms to supplement the definition of "felony drug offense."

2. Petitioner contends (Br. 9-16) that the term "felony drug offense" as used in Section 841(b)(1)(A) takes its meaning not only from the provision of the CSA that specifically defines that three-word term of art, *i.e.*, Section 802(44), but also from a separate provision, Section 802(13), which defines the term "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). In petitioner's view, the sentence enhancement in Section 841(b)(1)(A) applies only when a defendant's prior conviction is punishable by more than one year in prison *and* that prior conviction was classified as a felony under applicable state

or federal law. Under that interpretation of the CSA, petitioner's prior state cocaine possession conviction would not qualify as a "felony drug offense" for purposes of the sentencing enhancement in Section 841(b)(1)(A), because the applicable South Carolina law classifies that offense as a misdemeanor. Petitioner's effort to inject confusion into a statutory definition of a term of art is mistaken.

a. Petitioner's reading cannot be squared with the statute's text. Congress defined both the terms "felony" and "felony drug offense" in the CSA, gave them different meanings, and it used only the latter in Section 841(b)(1)(A). That use of the three-word, defined phrase "felony drug offense" unmistakably signals Congress's choice to use only that definition to trigger a sentence enhancement. See pp. 10-14, *supra*. "[T]here would be little use in" Congress's providing a specific definition of "felony drug offense" if courts "were free in despite of it to choose a meaning for [them]selves." *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 95-96 (1935). When such a phrase has a specific definition as a term of art, courts are not at liberty to use definitions of constituent words in the defined phrase to inject ambiguity or confusion.

Because neither Section 802(44) nor Section 841(b)(1)(A) requires that an offense be classified as a felony (as defined in Section 802(13)) in order to qualify as a "felony drug offense," petitioner's argument would require this Court to insert words into the definition to add that requirement. But this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997); see *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008). That is particularly true with respect to statutory interpretations that would make

federal treatment of an offense depend upon how the offense is characterized under state law. See, *e.g.*, *United States* v. *Turley*, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law."); see also, *e.g.*, *Lopez*, 127 S. Ct. at 629-633 (finding "no hint in the statute's text that Congress was courting * * * state-by-state disparity"); *Taylor* v. *United States*, 495 U.S. 575, 591 (1990) (declining to depart from Congress's "general approach" of using categorical definitions not dependent on state law, absent a "clear indication" to that effect). Indeed, when Congress intends to make a federal criminal provision depend upon a feature of state law, it generally says so. See, *e.g.*, 18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005) (defining "misdemeanor crime of domestic violence" as an offense that "is a misdemeanor under Federal, State, or Tribal law"); see also, *e.g.*, 18 U.S.C. 921(a)(20) ("What constitutes a conviction of [a defined] crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."); *Logan* v. *United States*, 128 S. Ct. 475, 479-480, 485 (2008) (Congress specifically amended Section 921(a)(20) to reject this Court's holding in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), that the predecessor version did not allow "state law [to] * * * determine the present impact of a prior conviction.").

b. If Congress had intended the definition in Section 802(44) to include by cross-reference the definition in Section 802(13), there are numerous ways it could have done so. First, Congress could have added words to the definition in Section 802(44) to include the word "felony" and thus pick up the definition in Section 802(13). For

example, Congress could have changed Section 802(44) to read: "The term 'felony drug offense' means a felony * * *." Or it could have said: "The term 'felony drug offense' means any Federal or State offense classified by applicable Federal or State law as a felony that is punishable by imprisonment for more than one year * * *." See *Roberson*, 459 F.3d at 52-53 (suggesting similar alternatives).

Alternatively, Congress could have drafted Section 841(b)(1)(A) in a way that would have incorporated Section 802(13). It could have said, for example, that a mandatory minimum sentence applies if a person commits his offense "after a prior conviction for a felony drug offense that is classified by applicable Federal or State law as a felony has become final." See *Roberson*, 459 F.3d at 53. Or Congress could have defined only the term "drug offense" in Section 802(44), then used the phrase "felony drug offense" in Section 841(b)(1)(A), in which case the phrase "felony drug offense" would be defined by reference to both the definition of "drug offense" in Section 802(44) and the definition of "felony" in Section 802(13). *Ibid.* Congress did none of those things.

Congress has, in other statutes, demonstrated its ability to make one defined term include another, which it has accomplished by placing the second term in the definition of the first. See, *e.g.*, 18 U.S.C. 1956(c)(3) and (4) (first defining "transaction," then defining "financial transaction" as "a transaction which" meets certain additional requirements); 18 U.S.C. 1961(1) (Supp. II 2002) and 18 U.S.C. 1961(5) (defining "racketeering activity," then defining "pattern of racketeering activity" as including, *inter alia*, "at least two acts of racketeering activity"). In contrast, petitioner has not noted *any* in-

stances in which Congress has defined one term to include another by placing the second term in the first phrase to be defined, rather than in the text of its definition.

Further, Congress has, in other contexts, used clear language to make sentence enhancements depend upon an offense's classification under state or federal law. For example, in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) *et seq.*, Congress provided for enhanced penalties if an offender has previously committed a "violent felony," defined as certain "crime[s] punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). Congress then specified, however, that the term "crime punishable by imprisonment for a term exceeding one year" excludes "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less," 18 U.S.C. 921(a)(20)(B). Thus, in the ACCA, Congress made a sentence enhancement generally depend on the term of imprisonment imposed, but then exempted offenses that were classified as misdemeanors and punished by relatively short prison terms under state law. That is precisely the intention that petitioner attributes to Congress in this case. See Pet. Br. 14, 16, 17-23. The fact that Congress chose not to use such a formulation in the CSA, but rather to define "felony drug offense" solely by reference to the authorized term of imprisonment, makes clear that Congress did not intend to exempt offenses classified as misdemeanors under state law from categorization as "felony drug offenses." See also 21 U.S.C. 862a (stating that any person "convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the

possession, use, or distribution of a controlled substance * * * shall not be eligible for" certain federal benefits).

c. There is no textual basis for importing Section 802(13)'s requirement that an offense be classified by state law as a felony into Section 841(b)(1)(A). Petitioner first suggests (Br. 13-14) that the word "felony" in the defined term "felony drug offense" signals Congress's intent to import the Section 802(13) definition of "felony." But Congress did *not* include the word "felony" in the *definition* of a felony drug offense, which is how it would have accomplished that importation. Rather, Congress used the more-than-one-year-of-imprisonment formulation—with the obvious consequence of adopting an objective time-based felony/misdemeanor line that is not dependent on the vagaries of state classifications and labels.

Petitioner alternatively proposes (Pet. 14-15) to import the definition of "felony" in Section 802(13) through the noun "offense" found in the phrase "an offense punishable by imprisonment for more than one year," which appears in the definition of "felony drug offense" in Section 802(44). But not every "offense" is a felony, see, *e.g.*, 22 C.J.S. *Criminal Law* § 3 (2008), and it would be strange for Congress to go to the trouble of specifying that a criminal offense (of any description) qualifies if it is punishable by more than one year of imprisonment if what it actually meant to do was obliquely incorporate the defined term "felony."

Moreover, importing the definition of "felony" in Section 802(13) in either of the ways petitioner envisions would disregard Congress's deliberate choice to use a different way of defining felony (*i.e.*, by authorized term of imprisonment rather than by its classification under state or federal law) in Section 802(44). There is no rea-

son to adopt the strained, atextual reading of the statute that petitioner suggests in light of the fact that Congress has carefully chosen to use the phrase "felony drug offense" and has given it a sensible definition in Section 802(44).

d. Petitioner's proposals would create ambiguity where none exists. That is because, *inter alia*, importing Section 802(13) into the definition of "felony drug offense" would raise questions about whether a prior foreign offense can be a "felony drug offense." In Section 802(44), the term "felony drug offense" includes state, federal, and foreign offenses. See 21 U.S.C. 802(44) (offense must be "punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country"). In Section 802(13), by contrast, a "felony" is "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13).

Petitioner's reading of the statute would create significant uncertainty about the status of foreign offenses. Indeed, the classification requirement in Section 802(13) makes little sense with respect to foreign offenses, because many foreign countries, unlike the United States, do not distinguish between felonies and misdemeanors in their criminal laws. See, *e.g.*, *Patel* v. *INS*, 542 F.2d 796, 798 (9th Cir. 1976) (rejecting an interpretation of an immigration statute requiring classification of foreign offenses as felonies or misdemeanors); see also Bureau of Justice Statistics, *The World Factbook of Criminal Justice Systems* (visited Feb. 21, 2008) <http://www.ojp.usdoj.gov/bjs/abstract/wfcj.htm#abstract> (nations that do not classify offenses as felonies or misdemeanors include, *inter alia*, Canada, Denmark, Italy, Sweden, Finland, England and Wales, New Zealand, and Singa-

pore). Courts considering whether a previous foreign offense is a "felony drug offense" therefore would have to find either that no foreign offense can be a "felony drug offense" in a jurisdiction that does not classify offenses that way, thus reading the foreign-offense provision out of Section 802(44) entirely, or that Section 802(13)'s classification requirement has no application to foreign offenses. Either option would do significant violence to the statute's text and would be contrary to Congress's purpose of treating similarly situated recidivists the same, see pp. 33-35, *infra*. The significant interpretative difficulties created by petitioner's reading of the statute thus provide yet another reason why it should not be adopted.

In sum, if Congress had intended that an offense be classified as a felony under state or federal law in order to qualify as a "felony drug offense," "it would have found a much less misleading way to make its point." *Lopez*, 127 S. Ct. at 631.

B. The Statutory Context Supports The View That 21 U.S.C. 802(44) Provides The Exclusive Definition Of "Felony Drug Offense"

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (internal quotation marks omitted). In this case, the government's reading of the plain text of the statute is bolstered by the context in which the term "felony drug offense" appears in the CSA and Import Act.

1. The placement and use of the term "felony drug offense" in the CSA and in the Import Act confirms that

Section 802(44) provides the exclusive definition for that term. Chapter 13 of Title 21, United States Code, "Drug Abuse Prevention and Control," is divided into two subchapters, Subchapter I, "Control and Enforcement," 21 U.S.C. 801-904, which encompasses the CSA, and Subchapter II, "Import and Export," 21 U.S.C. 951-971, which covers the Import Act. Together the CSA and Import Act provide a comprehensive regime for "combat[ting] the international and interstate traffic in illicit drugs." *Gonzales* v. *Raich,* 545 U.S. 1, 12 (2005).

Congress used the term "felony drug offense" throughout the penalty provisions of the CSA and Import Act to provide for enhanced penalties for repeat offenders. In each of those circumstances, Congress defined a particular type of conduct that violates the CSA or Import Act and then provided that a person who commits such an offense after a conviction for a previous "felony drug offense" has become final is subject to an enhanced penalty for being a recidivist. In the CSA, commission of a previous "felony drug offense" results in a mandatory minimum sentence for some offenses and an increased statutory maximum sentence for others.[3]

---

[3] See 21 U.S.C. 841(b)(1)(A) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment," and "any person [who] commits a violation of [specified provisions of the CSA] * * * after two or more prior convictions for a felony drug offense have become final * * * shall be sentenced to a mandatory term of life imprisonment without release"); 21 U.S.C. 841(b)(1)(B) (2000 & Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment"); 21 U.S.C. 841(b)(1)(C) (Supp. II 2002) ("any person [who] commits such a

The Import Act uses the term "felony drug offense" in essentially the same way.[4] The Import Act also contains a broad provision calling for increased punishment for any "second or subsequent offense," defined as "one or more prior [final] convictions * * * for a felony drug offense." 21 U.S.C. 962(b).

The structures of both the CSA and the Import Act confirm that Congress intended the definition of "felony drug offense" in 21 U.S.C. 802(44) to provide the exclusive meaning of that phrase throughout both statutes. Both the CSA and the Import Act begin with a "definitions" section and then continue with a series of sections defining substantive offenses and penalties. Rather than redefine the term "felony drug offense" each time it appears in the CSA and Import Act, Congress provided one definition of that term in Section 802(44) that applies to all references in both statutes. See 21 U.S.C. 802; 21 U.S.C. 951(b). And each of the times the term

---

violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not more than 30 years"); 21 U.S.C. 841(b)(1)(D) (Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not more than 10 years").

[4] See 21 U.S.C. 960(b)(1) (2000 & Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment"); 21 U.S.C. 960(b)(2) (2000 & Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment"); 21 U.S.C. 960(b)(3) (Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not more than 30 years").

"felony drug offense" appears in a sentence enhancement provision in the CSA and Import Act, it is surrounded by the same words—*i.e.*, an enhanced penalty applies when the offense is committed "after a prior conviction for a felony drug offense has become final"—and serves essentially the same purpose—to provide for an increased punishment for a repeat drug offender. See pp. 22-23 & notes 3-4, *supra*. Congress's sensible choice to define the term "felony drug offense" and then use it for the limited purpose of sentence enhancement throughout the CSA and Import Act ensured that the term would have a consistent meaning in the federal laws that regulate controlled substances.

2. Petitioner's amici contend (Br. 23-24) that Section 802(13)'s requirement that an offense be classified as a felony must be incorporated into the definition of "felony drug offense" because each time the term "felony" appears in the CSA, it is in the context of a drug offense. The fact that the term "felony" is often used in reference to drug offenses is hardly surprising, because, after all, the statute at issue is the *Controlled Substances* Act. The important point is that Congress chose to use the (unadorned and defined) single term "felony" in provisions of the CSA other than the one at issue here, to serve a variety of different purposes.

The term "felony" is used to define substantive offenses,[5] to authorize certain punishments,[6] and to pro-

---

[5] See 21 U.S.C. 843(b) (forbidding the use of a communication facility to accomplish the commission of a felony); 21 U.S.C. 848(c)(1) (defining a "continuing criminal enterprise" as involving certain felonies).

[6] See 21 U.S.C. 824(a)(2) (authorizing the Attorney General to revoke a registration to manufacture or distribute controlled substances based on a conviction of a felony); 21 U.S.C. 841(e) (providing circumstances in which a person may be enjoined for up to ten years from participat-

vide certain powers to law enforcement authorities.[7] In each of these instances, Section 802(13) indicates that a "felony" is defined by reference to its classification under the law of the relevant jurisdiction, not by the length of the authorized term of imprisonment. For example, in 21 U.S.C. 824(a)(2), Congress stated that the Attorney General may revoke a registration to manufacture, distribute, or dispense a controlled substance "upon a finding that the registrant * * * has been convicted of a felony under [the CSA or Import Act] or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance or a list I chemical." In that context, Section 802(13) clarifies that "a felony under * * * any other law * * * of any State" relating to drugs means a state offense that is classified as a felony, rather than an offense that could be considered a felony based on the

---

ing in further transactions involving controlled substances); 21 U.S.C. 843(d)(1) (Supp. II 2002) and 21 U.S.C. 843(d)(2) (2000 & Supp. II 2002) (authorizing increased maximum sentences for violations of that statute when offender has previously committed certain federal felonies); 21 U.S.C. 843(e) (providing circumstances in which a person may be enjoined for up to ten years from participating in further transactions involving controlled substances); 21 U.S.C. 848(e)(1)(B) (providing mandatory minimum sentence for person who causes the killing of a law enforcement official in order to avoid prosecution for a felony); 21 U.S.C. 853(d) (creating a rebuttable presumption in favor of forfeiture against any person convicted of a felony); 21 U.S.C. 862a(a) (denying eligibility for certain assistance and benefits programs for any person convicted of an offense classified as a felony).

[7] See 21 U.S.C. 878(a)(3) (granting drug enforcement officers the power to make warrantless arrests where there is probable cause to believe a felony has been committed).

length of imprisonment authorized.[8] Petitioner's amici argue (Br. 25) that Section 802(13) is "irrelevant" for the provisions of the CSA and Import Act that use the term "felony" in reference to certain *federal* offenses. But there, as well, the definition of "felony" dispels any ambiguity about what it means for an offense to be considered a "felony." See *Ali*, 128 S. Ct. at 840 (noting that Congress may use certain language "to remove any doubt" about the meaning of a term). Section 802(13) thus informs the use of "felony" in a variety of functions in the CSA and Import Act.

In contrast to the myriad usages of "felony" in the CSA and Import Act, Congress chose to use the more precise phrase "felony drug offense" solely to specify the type of prior conviction that will trigger a sentence enhancement for a repeat offender. See pp. 22-23, *supra*. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). That principle applies with even greater force in the context of a specifically-defined phrase. Here, "Congress's decision to use the precise term 'felony drug offense' in § 841(b)(1), instead of the more broadly used term 'felony,' evidences an intent to distinguish these sentence-enhancement provisions from the other provisions that refer to the generic 'felony.'" *Roberson*, 459 F.3d at 54.

---

[8] Indeed, petitioner recognizes that Section 802(13) serves an important function under such circumstances, because it is the same function that he contends Section 802(13) served with respect to Section 841(b)(1)(A) prior to 1994. See Pet. Br. 9-11.

C. The Drafting History Confirms That Congress Intended Section 802(44) To Provide The Sole Definition For "Felony Drug Offense"

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236, which includes the CSA and the Import Act, in order to reorganize and consolidate existing federal drug laws and to enhance federal drug enforcement powers. See *Raich*, 545 U.S. at 11-13. Since that time, the CSA and Import Act have consistently included enhanced penalties for repeat offenders. The statutory evolution of the penalty-enhancement provision of Section 841 makes clear that Section 802(44) now provides the exclusive meaning for the term "felony drug offense" in that provision.

1. a. Initially, in 1970, Congress provided for an increased statutory maximum penalty for an offender who had previously violated certain *federal* drug laws in Section 841(b)(1)(A). See 21 U.S.C. 841(b)(1)(A) (1970) (enhanced maximum sentence if offender previously committed "an offense punishable under this paragraph, or for a felony under any other provision of this subchapter [the CSA] or subchapter II of this chapter [the Import Act] or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances"). Congress used that same formulation in other provisions of the CSA and the Import Act to increase the maximum statutory penalty for recidivists. See 21 U.S.C. 841(b)(1)(B) (1970); 21 U.S.C. 960(b)(2) (1970); 21 U.S.C. 962(b) (1970).

In 1984, Congress broadened the scope of triggering offenses for those penalty-enhancement provisions in the CSA and Import Act to include state and foreign offenses. See Comprehensive Crime Control Act of

1984, Pub L. No. 98-473, § 502(1)(B)(iii), 98 Stat. 2069. As a result, Section 841(b)(1)(A) provided for an enhanced penalty when an offender previously committed "an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances." 21 U.S.C. 841(b)(1)(A) (Supp. II 1984); see 21 U.S.C. 841(b)(1)(B) and (C) (Supp. II 1984) (same); 21 U.S.C. 962(b) (1982 & Supp. II 1984) (same).

In 1988, Congress introduced the term "felony drug offense" to describe the type of prior offense that would trigger an enhancement, and it expressly defined that term in Section 841:

> For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.

21 U.S.C. 841(b)(1)(A) (1988). See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6452(a)(1) and (2), 102 Stat. 4371. Congress then provided that a prior "felony drug offense" would result in a statutory minimum sentence, as opposed to an enhanced statutory maximum sentence. See *ibid.* Congress did not, however, utilize the term "felony drug offense" in other key sentence-enhancement provisions in the CSA and Import Act. See 21 U.S.C. 841(b)(1)(B), (C) and (D) (1988) (using

previous formulation of enhancement trigger); 21 U.S.C. 960(b)(1), (2) and (3) (1988) (same); 21 U.S.C. 962(b) (1988) (same).

Finally, in 1994, Congress changed the definition of "felony drug offense" and broadened its applicability. Congress amended the definition of "felony drug offense" to delete the word "felony" from the definition and replace it with the descriptive phrase "an offense that is punishable by imprisonment for more than one year" under a state, federal, or foreign law. 21 U.S.C. 802(43) (1994).[9] Congress also moved the definition of "felony drug offense" from Section 841(b)(1)(A) to Section 802, so that it would apply to all references to "felony drug offense" in the CSA and Import Act, see 21 U.S.C. 802(43) (1994), and it amended those provisions of Sections 841(b)(1), 960, and 962 that had retained the previous formulation of the sentence-enhancement trigger to use the term "felony drug offense." See 21 U.S.C. 841(b)(1)(B), (C) and (D) (1994); 21 U.S.C. 960(b)(1), (2) and (3) (1994); 21 U.S.C. 962(b) (1994).

b. The drafting history of Section 841(b)(1)(A) makes several points clear. First, because the definition of "felony drug offense" in 21 U.S.C. 802(44) originated in Section 841(b)(1)(A), and because it applies throughout the CSA and Import Act, see 21 U.S.C. 802 and 851, it is clear that Congress intended that the definition in Section 802(44) control the meaning of the phrase "felony drug offense" as it appears in Section 841(b)(1)(A).

Second, the 1994 amendments brought uniformity and clarity to the CSA and Import Act by providing a single, unambiguous definition of "felony drug offense"

---

[9] Section 802(43) was renumbered Section 802(44) in 1996. See Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, § 401(b)(3), 110 Stat. 3107.

to be used throughout both statutes in the context of sentence-enhancement provisions.

Finally, the drafting history makes it pellucidly clear that Congress intended that whether an offense is serious enough to be considered a "felony drug offense" turns exclusively on the term of imprisonment imposed, not its classification by the punishing jurisdiction. Before 1994, Congress defined the triggering offense as one that is "a felony" under state, federal, or foreign drug law, 21 U.S.C. 841(b)(1)(A) (1988), which suggested, in conjunction with 21 U.S.C. 802(13) (1988), that an offense must be classified as a felony under state, federal, or foreign law. The 1994 amendments removed from the definition of a "felony drug offense" the word "felony," and replaced it with the explicit, punishment-based requirement that the offense be punishable by a term of imprisonment of more than one year. 21 U.S.C. 802(43) (1994). "When Congress acts to amend a statute," this Court "presume[s] it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995). Taken together, the changes in the 1994 Act remove any conceivable doubt that Congress intended the freestanding definition now codified in Section 802(44) to supply the exclusive source of the meaning of the defined phrase as used in the applicable penalty-enhancement provisions.

2. Petitioner contends (Br. 12-14, 16) that Congress's change in the statutory text in 1994 is insufficient to show that Congress intended the definition in Section 802(44) to define the term "felony drug offense" in Section 841(b)(1). Petitioner is mistaken, for it is beyond question that the best indication of Congress's intent is a change in the statutory text itself. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Congress deleted the precise word that petitioner now seeks to add back into the statute, and Congress's change in the statutory text must be given effect. See, *e.g.*, *Carter* v. *United States*, 530 U.S. 255, 270-271 (2000). The resulting statutory text is clear, and petitioner cannot now create ambiguity simply by referencing the prior statute. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes.") (citation omitted).

Notably, petitioner has not identified any legislative history indicating that Congress had any intention to incorporate Section 802(13)'s classification requirement into the definition of "felony drug offense." Instead, he hypothesizes reasons why Congress might have wanted to define "felony drug offense" to require both that an offense be punishable by more than one year of imprisonment and be classified as a felony under the law of the punishing jurisdiction. Pet. Br. 17-23. But even where such reasons are not speculative, as they are here, "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language"; "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas* v. *United States*, 522 U.S. 52, 57 (1997) (internal quotation marks, citations, and brackets omitted).

Relatedly, petitioner suggests (Br. 14, 31, 34) that this Court should require an explicit statement of congressional intent in the legislative history before finding that Congress intended to change the substantive scope of a sentencing provision. This Court has repeatedly made clear, however, that "legislative history need not confirm the details of changes in the law effected by

statutory language before [it] will interpret the language according to its natural meaning." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) (citing cases); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history.").

Petitioner notes (Br. 12-13, 16-17) that Congress labeled the 1994 amendments to Section 841(b)(1)(A) "conforming amendments," suggesting that that label means that Congress did not intend to modify the scope of the term "felony drug offense." That is incorrect. Congress called its 1994 amendments "conforming amendments" because they brought uniformity to the key sentence-enhancement provisions in the CSA and Import Act by ensuring that they were all triggered by the same type of offense—a "felony drug offense," as defined in Section 802(44). See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 90105, 108 Stat. 1987-1988; see also H.R. Rep. No. 694, 103d Cong., 2d Sess. 419 (1994). The fact that the amendments served that purpose does not mean that they did not also have substantive effect. In addition to broadening the applicability of the term "felony drug offense" by applying it, for the first time, to Sections 841(b)(1)(B), (C) and (D); 960; and 962, Congress modified the definition of that term to achieve even greater uniformity by ensuring that the applicability of an enhanced penalty would not depend upon the happenstance of state classifications and labels, but would instead turn on an objective, consistent indication of seriousness—a maximum authorized punishment of more than one year.

Finally, petitioner suggests (Br. 15-16) that the 1994 amendments constituted an "implied partial repeal," and this Court should not presume such a result absent evidence of such an intention in the legislative record. But Congress *explicitly* altered the definition of "felony drug offense," and it did not repeal the definition of "felony" implicitly or otherwise. A repeal by implication "will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks omitted). Neither situation is present here: Sections 802(13) and 802(44) are not in "irreconcilable conflict"; they are just two different definitions of separate terms. Nor is Section 802(44) a wholesale substitute for Section 802(13), for the two definitions serve distinct purposes under the CSA, see pp. 24-26, *supra*. Section 802(13) may not be as widely applicable in the CSA after the 1994 amendments, but it certainly was not repealed. And to the extent that the addition of Section 802(44) limited the applicability of Section 802(13) with respect to sentence-enhancement provisions, Congress clearly indicated its intention to make such a change by deleting the language that could have been read to incorporate Section 802(13) and adding a new, explicit definition in Section 802(44).

D. Defining A "Felony Drug Offense" Solely By Reference To 21 U.S.C. 802(44) Furthers Congress's Reasonable Policy Objectives

"[T]he purposes underlying the [statute in issue] are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it." *Dunn*

v. *CFTC*, 519 U.S. 465, 474 (1997). Using the definition in Section 802(44) to provide the meaning for "felony drug offense" in Section 841(b)(1)(A) furthers the important purpose of punishing and deterring repeat drug offenders, in a manner designed to ensure a measure of uniformity across state lines and international borders.

1. The CSA's enhanced penalties reflect a "congressional intent to significantly increase sentences for drug offenders with prior convictions for felony drug offenses" because "[r]epeat drug offenders are clearly more culpable than first time offenders, and the enhanced sentences required under [the CSA and Import Act] serve to incapacitate and punish those who have continued their involvement with drug trafficking despite prior prosecution." *United States* v. *Kole*, 164 F.3d 164, 175 (3d Cir. 1998), cert. denied, 526 U.S. 1079 (1999). The reasonable judgment that recidivists are deserving of increased punishment is consistent with Congress's general sentencing policy. See 28 U.S.C. 994(h) (directing the United States Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for serious recidivist offenders); *United States* v. *LaBonte*, 520 U.S. 751, 758 (1997) ("Congress has expressly provided enhanced maximum penalties for certain categories of repeat offenders in an effort to treat them more harshly than other offenders.").

Congress's decision to make the definition of "felony drug offense" independent of any given State's classification scheme for criminal offenses makes sense "in the context of the evolving nature of the CSA." *Roberson*, 459 F.3d at 54 n.10. As Congress "enact[ed] mandatory penalties," and then "increased the consequences of those mandatory penalties," it likely wanted "to ensure

that the mandatory recidivist penalty provisions would be applied uniformly not only across statutory lines, but also across state lines." *Ibid*. See 18 U.S.C. 3553(a)(6) (citing "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); see also *Taylor*, 495 U.S. at 591 (noting Congress's "general approach of using uniform categorical definitions to identify predicate offenses"). This is especially true because some states and many foreign jurisdictions eschew the felony/misdemeanor distinction entirely. See N.J. Stat. Ann. § 2C:1-4 (West 2005); Me. Rev. Stat. Ann. tit. 17-A, § 1252 (Supp. 2007); p. 20, *supra*. By employing the specific phrase "felony drug offense," Congress "avoid[ed] the possibility that the substantial consequences of the mandatory sentence enhancements in § 841(b)(1)(A) would turn on the happenstance of a state's classification of a prior offense." *Roberson*, 459 F.3d at 54.

2. Petitioner contends (Br. 17-23) that Congress did not intend for offenses that are classified as misdemeanors under state law to be considered "felony drug offenses" because they are not sufficiently serious. As an initial matter, it cannot be assumed that an offense is not serious simply because a state chooses to classify it as a misdemeanor rather than a felony. Any number of serious offenses are classified as misdemeanors under certain States' laws but are punishable by more than one year of imprisonment. Those offenses include sex of-

fenses,[10] stalking,[11] assault and battery,[12] supplying a felon with a firearm,[13] identity theft,[14] and fraud.[15] Nor can it be assumed that possession of controlled substances is a minor offense, as petitioner contends (Br. 19 n.9). Although simple possession is a misdemeanor under federal law, many states punish it as a felony, see *Lopez*, 127 S. Ct. at 630 n.4, and the devastating consequences of drug use are well-established. See, *e.g.*, *Chandler* v. *Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting); *Harmelin* v. *Michigan,* 501 U.S. 957, 1002-1004 (1991) (Kennedy, J., concurring in part and concurring in the judgment). And petitioner's approach would eliminate recidivist enhancements based on prior convictions in States that do not classify *any* offenses as felonies. See p. 35, *supra.* But more to the point, the text of Section 802(44) reflects a judgment that the length of authorized punishment is a better measure of

---

[10] *E.g.*, Colo. Rev. Stat. §§ 18-3-412(2), 18-1.3-501(1), (3) (2006) (sex offenses and abuse of children); Iowa Code Ann. § 901A.2 (West 2006); *id.* § 903B.2 (West Supp. 2007) ("sexually predatory" offenses).

[11] *E.g.*, La. Rev. Stat. Ann. §§ 14:40.2(B)(6)(a), 14:40.3(C)(2) and (3) (2007) (stalking and cyberstalking); Md. Code Ann., Crim. Law § 3-802 (West 2007) (stalking).

[12] *E.g.*, Conn. Gen. Stat. Ann. § 53a-40d(b) (West 2007) (persistent commission of crimes such as "assault, stalking, trespass, threatening and violation of a restraining order); Md. Code Ann., Crim. Law § 3-203 (West 2007) (assault); Mass. Ann. Laws, ch. 265, § 13A (LexisNexis 2002) (assault and battery); S.C. Code Ann. §§ 16-1-10(C), 16-3-610 (2003) (assault with concealed weapon).

[13] *E.g.*, La. Rev. Stat. Ann. § 14:95.1.1 (Supp. 2008) (illegally supplying a felon with a firearm).

[14] *E.g.*, Mass. Ann. Laws ch. 266, § 37E (LexisNexis 2002).

[15] *E.g.*, Md. Code Ann., Crim. Law § 8-401 (West 2007) (fraudulent conversion of partnership assets), *id.* § 8-516 (West 2007) (Medicaid fraud).

severity than a State's label for the offense. Rather than relying on States' divergent classification schemes to determine the severity of a prior drug offense, Congress reasonably chose to look to the authorized term of imprisonment. Cf. *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 541 (1989) (in addressing the seriousness of an offense for jury-trial purposes, the most "relevant" objective criteria is "the severity of the maximum authorized penalty," which constitutes a legislative "judgment about the seriousness of the offense") (internal quotation marks omitted).

Petitioner relatedly contends (Br. 23) that the definition of felony drug offense in Section 802(44) "swe[pt] under the enhancement provision, for the first time, thousands of minor misdemeanor violations as the basis for" enhanced punishment. The 1994 amendments to the CSA likely did not have the widespread effect petitioner claims, because the vast majority of States define offenses punishable by more than one year of imprisonment as felonies, see Gov't Br. at 26 n.20, *Lopez* v. *Gonzales*, *supra* (No. 05-547) (citing state statutes), and because the 1994 amendments removed from the category of "felony drug offenses" state offenses classified as felonies but not subject to more than one year of imprisonment, see, *e.g.*, Ariz. Rev. Stat. Ann. §§ 13-701(5), 13-3402, 13-3415(A), (B) and (C) (2001); *id.* §§ 13-3405(B)(1), 13-3406(B)(2) (Supp. 2007). And to the extent that Congress did bring into the definition of "felony drug offense" misdemeanor offenses that would not have qualified under previous versions of the statute, Congress made that choice based on the commonsense notion that more serious offenses generally are

punished more severely, regardless of the descriptive label attached to the offense.[16]

In any event, petitioner's policy arguments are directed to the wrong authority, because it is well-established that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *Brogan* v. *United States*, 522 U.S. 398, 408 (1998). Whether to include possession offenses within the ambit of "felony drug offenses" was Congress's choice to make, and Congress made it clearly in Section 802(44). Indeed, the courts of appeals have routinely rejected the argument that Congress did not intend for drug possession offenses to qualify as "felony drug offenses" as contrary to the clear statutory text.[17]

---

[16] Petitioner also contends (Br. 23 n.13) that "the number of state misdemeanor offenses that would be considered felonies under Section 802(44) alone would increase substantially" if the government were to prevail in *United States* v. *Rodriquez*, No. 06-1646 (argued Jan. 15, 2008), because then any crime would be "'punishable by' more than a year's imprisonment if the maximum sentence under the provision exceeds a year for recidivist offenders." That is incorrect. The government's position is that recidivist offenders face the maximum sentence that applies to recidivists; first offenders face the maximum sentence that applies to first offenders. Nothing in that position would unjustifiably extend the class of felony offenses. Under that position, the only "misdemeanor" offenses that would be considered felonies are those that are in fact punished at the felony level by virtue of the defendant's recidivism. Cf. *Lopez*, 127 S. Ct. at 630 n.76 (describing recidivist drug possession, in violation of 21 U.S.C. 844(a), as a "felony violation[]," even though it is generally otherwise a misdemeanor).

[17] For example, in *United States* v. *Spikes*, 158 F.3d 913, 932 (1998), cert. denied, 525 U.S. 1086 (1999), the Sixth Circuit rejected the argument that, "in order for a prior drug conviction to count as a 'felony drug offense' * * *, the crime must involve possession of drugs plus some additional element, such as their manufacture or distribution," noting that "[n]othing in the statutory definition * * * remotely hints

If Congress wished to limit the type of offense to those that are (in petitioner's view) more serious, it easily could have provided an exclusion for simple possession offenses in the statutory text. In the ACCA, for example, Congress predicated the enhanced sentence for recidivist firearms offenders on whether they had committed a prior "serious drug offense," which is defined as a prior offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. 924(e)(2)(A)(ii). If Congress had intended to omit state possession offenses as petitioner claims, it could have done so in a manner similar to that employed in the ACCA. See *United States* v. *Hansley*, 54 F.3d 709, 718 (11th Cir. 1995) (rejecting defendant's argument that 21 U.S.C. 841(b)(1)(A) (1990) excludes drug possession offenses from the definition of "felony drug offense," in part because "if Congress meant to place a similar limitation [like that in 18 U.S.C. 924(e)] on section 841(b)(1)(A), it would have used the 'serious drug of-

---

at the 'possession plus' gloss [the defendant] seeks to add to the statute." Similarly, in *United States* v. *Sandle*, 123 F.3d 809, 810-812 (1997), the Fifth Circuit rejected the argument that a possession offense without a specific intent element cannot qualify as a "felony drug offense," explaining that "[n]othing in the statutory definition of 'felony drug offense' suggests that the term is limited to those possession offenses involving an additional intent element." In *United States* v. *Richards*, 302 F.3d 58, 70-71 (2002), the Second Circuit found that the "plain language of [Section] 802(44)" refuted the argument that a state offense cannot be a "felony drug offense" when "a *federal* offense for the same conduct * * * would have been only a misdemeanor." And in *United States* v. *Rosales*, 2008 WL 375207, at *7-*8, the Ninth Circuit rejected the contention that the "legislative history and policy" of Section 841(b)(1)(A) suggest that a prior state conviction for simple possession cannot qualify as a felony drug offense.

fense' language and it would have provided a similar definition").

E. The Rule Of Lenity Has No Application To This Case

Finally, petitioner and his amici contend that petitioner's interpretation of Section 841(b)(1)(A) is compelled by the rule of lenity. Pet. Br. 26-34; NACDL/FAMM Br. 20-26. They are mistaken. The rule of lenity should have less, not more, force in the context of sentencing (as opposed to whether primary conduct is criminal at all), especially mandatory minimum sentences imposed on recidivists. In any event, the rule of lenity is inapplicable in his case because there is no "grievous ambiguity" about the meaning of "felony drug offense" in Section 841(b)(1)(A).

1. Petitioner and his amici contend that the rule of lenity applies "with special force" to statutes requiring mandatory minimum sentences. Pet. Br. 30-32; see NACDL/FAMM Br. 16-20. To the contrary, the rule of lenity should have *less* force when the relevant question is not whether a defendant's primary conduct is criminal, but whether the defendant is subject to a longer mandatory sentence for indisputably criminal conduct based solely on the legal classification of prior convictions. That is so because the fundamental purposes of the rule are to ensure that defendants have fair warning of the boundaries of criminal conduct; that Congress, not the judiciary, defines criminal liability; and that selective or arbitrary enforcement be minimized. See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988).

Those purposes have sharply reduced force as applied to mandatory minimum recidivist enhancements.[18]

a. Statutes requiring mandatory minimum sentences do not implicate the fundamental concern of the rule of lenity, which is the principle that a person should have fair notice of what conduct is prohibited. The rule of lenity is premised on the principle that criminal statutes should provide fair warning of what conduct is illegal. See *Liparota* v. *United States*, 471 U.S. 419, 427 (1985); *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). Application of the rule of lenity would not serve such a notice purpose in this case, because petitioner was not required to speculate with regard to whether his trafficking in more than five kilograms of cocaine per week was illegal. PSR ¶ 11; see *id.* ¶ 24 (petitioner's statement upon sentencing: "I know what I did and I know it was wrong.").

Sentencing statutes that require imposition of mandatory minimum sentences do not raise the same type of heightened notice concerns as statutes that prohibit primary conduct or that increase the maximum sentence available for an offense. This Court suggested as much in *Harris* v. *United States*, 536 U.S. 545 (2002), when it held that the Sixth Amendment permits a sentencing judge to find facts by a preponderance of the evidence that warrant the imposition of a mandatory minimum

---

[18] This Court relied on the rule of lenity to adopt constructions of mandatory or mandatory minimum sentencing statutes that favored the defendants in *United States* v. *Granderson*, 511 U.S. 39 (1994), *Bifulco* v. *United States*, 447 U.S. 381 (1980), *Busic* v. *United States*, 446 U.S. 398 (1980), and Simpson v. *United States*, 435 U.S. 6 (1978). None of those cases, however, addressed the arguments made below concerning why the rule of lenity should apply with less force with respect to mandatory minimums.

sentence, so long as the sentence imposed is not beyond the authorized statutory maximum. That holding was based on the recognition that imposition of a mandatory minimum sentence does not raise the same types of constitutional concerns as a finding of guilt or an increase in the maximum punishment beyond that authorized by law. *Id.* at 558 (plurality opinion).

b. The second principle animating the rule of lenity—"[d]ue respect for the prerogatives of Congress in defining federal crimes," *Dowling* v. *United States*, 473 U.S. 207, 213 (1985)—also applies with less force to statutes requiring imposition of mandatory minimum sentences. The concern about Congress's power to define crimes is not implicated here, because there is no question about what conduct Congress prohibited or what maximum sentence it authorized to punish that conduct. Section 841(b)(1)(A), in setting a mandatory minimum sentence, simply specifies an appropriate point in a sentencing range, thereby limiting judicial discretion to impose a sentence below that point. Where the legislature has clearly defined the illegality of the underlying conduct and the maximum sentence for that conduct, courts need not put a thumb on the scales of statutory interpretation to avoid defining crimes or punishments that Congress did not intend. See *Harris*, 536 U.S. at 558 (plurality opinion).[19]

---

[19] Contrary to petitioner's contention (Br. 32), mandatory minimum sentencing statutes do not alter the "traditional" balance of sentencing responsibilities between the legislative and judicial branches. Separation-of-powers concerns about legislative control over sentencing certainly have no historical pedigree in the founding era, when both English and American crimes were characterized by fixed penalties that left courts with little if any discretion in sentencing. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 479, 481 (2000). And this Court has more

c. The purpose of the rule of lenity to restrict arbitrary or selective enforcement is also inapplicable in this context. To the extent that Congress has mandated an increased minimum sentence based on recidivism, the determination whether to impose it turns on the legal significance of the defendant's prior criminal conduct. The government cannot act "arbitrarily" in that context because the court's legal determinations control the applicability of the enhancement. To the extent that the government has discretion whether to seek the enhancement at all (*i.e.*, by filing or withholding an information under 21 U.S.C. 851), nothing is improper about that; rather, "[s]uch discretion in an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors." *LaBonte*, 520 U.S. at 762.

d. To the extent that history is relevant, the concerns behind the rule of lenity apply with even less force to statutes that require enhanced sentences for recidivist offenders, because the rule of lenity had no application to them at common law. As petitioner's amici acknowledge (Br. 6 n.6), the benefit of clergy was only available for first-time offenders at common law; recidivists were afforded no such lenity. See, *e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* *362-*364 (9th ed. 2001); see also Geoffrey Robertson,

---

recently reaffirmed that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman* v. *United States*, 500 U.S. 453, 467 (1991). By enacting a mandatory minimum, Congress "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given to that factor" within the authorized range. *Harris*, 536 U.S. at 568 (quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 89-90 (1986)).

The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold 73 (2005) (explaining that those who received the benefit of clergy were branded on the thumb to ensure that they could not receive that benefit again). That limitation on the rule of lenity makes sense, for it cannot be said that one who repeatedly commits (and is repeatedly convicted for) the same offense did not have fair warning of the illegality of his conduct. Thus, any force that the rule of lenity has with respect to mandatory minimum sentences is further lessened when applied to recidivists.

2. To the extent that the rule of lenity has any force in the context of recidivist sentencing enhancements, it is nonetheless inapplicable in the present case. The rule of lenity is applicable only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted).[20] A statute does not have a "grievous

[20] Petitioner's amici suggest (Br. 15 n.17) that this Court should "clarify" that the trigger for the rule of lenity is a "reasonable doubt," not a "grievous ambiguity." No such clarification is required. This Court has long used the "grievous ambiguity" formulation to define the narrow circumstances in which the rule of lenity applies. See *Muscarello*, 524 U.S. at 138-139; *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994); *Chapman* v. *United States*, 500 U.S. 453, 463 (1991); *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974). And the "grievous ambiguity" standard is just a different way of expressing the long-settled rule that the rule of lenity only applies if, "after seizing everything from which aid can be derived," courts can make "no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (internal quotation marks omitted). As this Court has emphasized in the criminal context, "[t]he simple existence

ambiguity" simply because courts have disagreed as to its meaning. *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995). Moreover, "[a] statute can be unambiguous without addressing every interpretive theory offered by a party," *Salinas*, 522 U.S. at 60, and a mere "grammatical possibility" is likewise not enough to trigger the rule of lenity, *Caron* v. *United States*, 524 U.S. 308, 316 (1998).

There is no grievous ambiguity here. See 21 U.S.C. 802(44); *United States* v. *Nelson*, 484 F.3d 257, 263 (4th Cir. 2007). Courts "hardly need direction where Congress ha[s] thought to include an express, specialized definition for the purpose of a particular Act." *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993). The only logical reading of Section 841(b)(1)(A) is that it incorporates only the definition of "felony drug offense" in Section 802(44), thereby covering all offenses "punishable by imprisonment for more than one year" under laws that prohibit "conduct relating to narcotic drugs, marihuana," and other controlled substances. Petitioner does not dispute that the plain language of Section 802(44) encompasses his prior cocaine possession conviction. In light of Section 802(44)'s specific definition of the exact term at issue in Section 841(b)(1)(A); the fact that the definition in Section 802(44) originated in Section 841(b)(1)(A) itself; and Congress's decision specifically to delete the requirement that petitioner

---

of some statutory ambiguity * * * is not sufficient to warrant application of th[e] rule." *Muscarello*, 524 U.S. at 138-139.

Petitioner (Br. 14, 31, 34) and his amici (Br. 13-14) similarly contend that this Court should broaden the rule of lenity to require that Congress provide a "clear statement" of its intentions in sentencing statutes. This Court has never adopted such a rule, and to do so would raise serious separation-of-powers concerns by transforming courts into super-legislatures in the sentencing context.

seeks to engraft onto the statute, there is no ambiguity in the statute, let alone any "grievous" ambiguity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

NICOLE A. SAHARSKY
Assistant to the Solicitor General

DANIEL S. GOODMAN
Attorney

FEBRUARY 2008

STATUTORY APPENDIX

1. 21 U.S.C. 802 (2000 & Supp. V 2005) provides, in pertinent part:

Definitions

As used in this subchapter:

* * * * *

(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

* * * * *

(44) The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

2. 21 U.S.C. 841 (2000 & Supp. V 2005) provides, in pertinent part:

(b) Penalties

Except as otherwise provided in section 849, 859, 60, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such

term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.