No. 08-192

IN THE
Supreme Court of the United States

SALMAN KHADE ABUELHAWA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the use of a telephone to buy drugs for personal use "facilitates" the commission of a drug "felony," in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller's distribution of the drugs to him (a felony).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit professional bar association working in the interest of criminal defense attorneys and their clients.[1] NACDL was founded to ensure justice and

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other

due process for persons accused of crimes and other misconduct. NACDL has more than 12,800 members—joined by 94 affiliate organizations with 35,000 members—including criminal defense lawyers, active U.S. military defense counsel, and law professors committed to preserving fairness within America's criminal justice system.

The decision under review held that, although acquiring illicit drugs for personal use is ordinarily a misdemeanor under the federal drug laws, anyone who uses a cell phone (or any other "communication facility") in acquiring illegal narcotics for personal use may be charged with a felony offense punishable by up to four years of incarceration for each call. According to the government, such conduct violates 21 U.S.C. § 843(b) because buying narcotics, even for personal use, *facilitates the seller's distribution* of drugs, a felony. That ruling is of vital importance to NACDL and its members, who routinely represent criminal defendants facing federal drug charges. Given the increasingly pervasive use and extraordinary mobility of today's "communication facilit[ies]," the ruling threatens to turn almost any personal-use purchase into a felony offense. That does not merely contravene Congress's intent, which was to distinguish sharply between drug users and drug distributors. It also undermines efforts to ensure that drug users receive the treatment and opportunities that will maximize the likelihood of their rehabilitation and reintegration as useful members of society. NACDL thus has a unique perspective on, and a keen interest in ensuring, proper resolution of the question presented con-

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than *amicus* and its counsel made such a monetary contribution. Both parties have consented to the filing of this brief. The parties' letters so consenting have been filed with the Clerk's office.

sistent with equitable and evenhanded administration of the federal drug laws.

SUMMARY OF ARGUMENT

I. Section 843(b) of Title 21 makes it a felony to use a "communication facility," such as a cell phone, in "facilitating" the commission of a "felony" violation of the federal drug laws. In this case, the government would read § 843(b) as converting every misdemeanor purchase of a small quantity of drugs for personal use into a felony whenever the purchaser employs a "communication facility" in making the purchase. But the government does not rest that construction on the theory that personal-use purchasers necessarily employ communication facilities to facilitate *their purchases*. Nor could it: To violate § 843, the communication facility must be used to facilitate a *felony*; obtaining drugs for personal use is generally a *misdemeanor*. Instead, the government contends that, when a buyer uses a phone or communication facility in connection with a drug purchase, he is facilitating the *drug dealer's* distribution, a felony.

That strained construction of § 843(b) cannot be reconciled with ordinary meaning or common sense. When Congress overhauled this Nation's drug laws in 1970, it sharply distinguished between users and sellers, focusing on rehabilitating the former while reserving the harsh consequences of felony conviction for the latter. The government's construction is not merely contrary to that careful effort; it would destroy the effort entirely. In today's electronic and mobile society, cellular telephony, texting, e-mail, and other uses of communication facilities pervade our day-to-day lives (particularly among the youth). The government's over-expansive reading of § 843(b) thus threatens to turn virtually every personal-use acquisition into a federal felony, contravening Congress's intent. Section 843(b)'s text, structure, history, and purpose simply cannot bear that result.

A. The government's construction relies critically on the notion that the misdemeanor purchase of illegal narcotics can be viewed as "facilitating" the seller's felony distribution. This Court, however, has already rejected the argument that a buyer's purchase "facilitates" the seller's sale. In *United States* v. *Rewis*, 401 U.S. 808, 811 (1971), the Court explained that patronizing a gambling establishment does not "facilitate" the crime of operating such an establishment. That conforms with ordinary meaning. A shopper at Wal-Mart does not facilitate—*i.e.*, make easier, aid, or assist—that institution's retail operations (at least so long as he does not do anything unusual like operate the register for the cashier or assist other customers). More to the point, a shopper who calls Wal-Mart to find out its hours, or determine whether a particular item is in stock, would not ordinarily be thought to have used his phone in "facilitating" Wal-Mart's retail sales as opposed to facilitating his own purchases. There is a difference between assisting an operation and patronizing it. If Congress had meant to include the latter in § 843(b), it would have said so. It did not.

The government's construction violates other canons of statutory construction as well. When Congress amended § 843(b) in 1970, it introduced the requirement that the use of the communication facility aid or assist the commission of a *felony* violation of the federal drug laws. The government's theory converts that felony violation requirement into virtual surplusage. Indeed, it threatens to convert every personal-use acquisition from a misdemeanor into a felony whether it involves a communication facility or not.

B. The government's theory also contravenes the Act's structure and purpose. In 1970, Congress drew a clear and intentional line between drug users and drug dealers, promoting rehabilitation for the former and

imposing incarceration on the latter. The government's construction would erase that line and turn back congressional drug policy by 40 years. Communications technology is ubiquitous. Whether walking, driving, riding on the subway, or just sitting in the park, people are constantly using cell phones to talk, text message, or e-mail. An expansive reading of § 843(b) could transform all of those individuals into felons if they make even a one-time mistake of buying drugs for personal use and use a cell phone in the process. There are dramatic differences between a felony conviction and a misdemeanor violation. Congress intended to impose the draconian consequences of felony conviction on those who distribute illegal narcotics, not on those who merely acquire them for personal use, even if they employ a phone or other communications device in doing so.

II. Even if the text, structure, and purpose of Section 843(b) do not dictate that "facilitate" be given its ordinary meaning, the rule of lenity does.

ARGUMENT

The use of communication facilities pervades our daily lives. The simple telephone of yesteryear has been supplemented and often displaced by a dizzying array of communication devices and associated facilities, including the now-ubiquitous cell phone, text-message, e-mail, pager, and fax. In virtually any location or activity—whether at the office, at home, while driving, traveling, sitting on the subway, sitting in a park, at a coffee shop, or in a classroom—people use those devices to conduct their daily affairs.

In this case, the government contends that anyone who obtains illegal drugs for personal use, itself a misdemeanor, instantaneously becomes guilty of a felony violation of 21 U.S.C. § 843(b) if he or she uses a cell phone (or any other "communication facility") in doing so.

Section 843(b), however, provides that it is a felony punishable by up to 4 years of incarceration to use a "communication facility" in "facilitating" the commission of a "*felony*" violation of federal drug laws. Buying drugs for personal use is a misdemeanor, not a felony. Nonetheless, the government claims that using a cell phone to purchase drugs for personal use violates § 843(b) because it "facilitates" *the seller's* commission of felony *distribution*. The text, structure, and history of § 843(b), however, simply do not support that staggeringly expansive view of § 843(b).

As a matter of plain text and common understanding, the purchaser's act of buying (or actions preparatory to buying) goods from a seller does not "facilitate" the seller's distribution. To "facilitate" means to aid, assist, or make easier. There is an enormous difference between merely patronizing a seller and aiding or assisting him. When Congress overhauled the federal drug laws in 1970, moreover, it adopted a new approach to the war on drugs, sharply distinguishing between drug users and drug dealers with respect to punishment. Purchasers of small quantities of drugs for personal use were no longer treated as felons, but were instead reclassified as misdemeanants to allow for rehabilitation in place of lengthy periods of incarceration. The government's theory is at war with that effort, for it threatens to convert virtually every drug user from a misdemeanant into a felon. To the extent any residual doubt regarding the scope of § 843(b) remains, it should be resolved in favor of lenity.

I. Purchase Of Drugs For Personal Use Does Not "Facilitate" Commission Of A Felony

Since 1970, this Nation's drug laws have focused on distinguishing between drug users and drug dealers. While those who distribute illegal narcotics face the harsh consequences of felony conviction, the purchase of small quantities of drugs for personal use is a misde-

meanor offense, and users are treated in the first instance as requiring rehabilitation rather than lengthy incarceration. The text, structure, and history of § 843(b) preserve that careful distinction between users on the one hand and distributors on the other. The government's over-expansive construction of § 843(b) would obliterate it.

A. The Ordinary Meaning Of The Term "Facilitate" Does Not Encompass Purchases For Personal Use

Any statutory analysis must "look first to the language of the statute itself." *Hughey* v. *United States*, 495 U.S. 411, 415 (1990). In analyzing the statutory text, courts do not read individual words in isolation. Rather, "the words of a statute must be read in their context with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (statutory language should be interpreted consonant with "the provisions of the whole law, and * * * its object and policy") (internal quotation marks omitted). In this case, § 843(b)'s plain text makes clear that it does not reach individuals who use cell phones and the like to make misdemeanor purchases of narcotics for personal use.

1. By its terms, § 843(b) makes it a felony for "any person knowingly or intentionally to use any communication facility" (including land-line telephones, cell phones, and e-mail) "*in committing or in causing or facilitating* the commission of any act or acts constituting *a felony*" under the federal drug laws. 21 U.S.C. § 843(b) (emphasis added). Thus, to violate Section 843(b), the defendant must do two things. First, he must "commit[]" or "caus[e] or facilitat[e] the commission of * * * a felony" violation of the federal drug laws. Second, he must have

"knowingly or intentionally" "use[d] any communication facility" in doing so. The government's effort to expand the scope of § 843(b) to encompass individual purchases for personal use fails at the first step because such purchases do not "facilitate" the commission of a felony offense.

There is no dispute that a person who purchases drugs for personal use does not "*commit* * * * any act or act constituting a felony" violation of the federal drug laws. To the contrary, possession of illegal narcotics for personal use is a misdemeanor violation. 21 U.S.C. § 844. As explained below, Congress amended the drug laws in 1970 for the specific purpose of making possession for personal use a misdemeanor, reserving the harsh consequences of felony conviction for those who traffic in narcotics. See pp. 14-15, *infra*.

For that reason, the government and the court below both invoked § 843(b)'s "facilitating" language. See Pet. App. 9a; Br. in Opp. 10. But they do not claim that a defendant who uses a cell phone to purchase narcotics for personal use "facilitates" his own misdemeanor possession. Instead, they urge that such a defendant "*facilitates* * * * a felony" because, in buying drugs, a purchaser facilitates the *dealer's* felony of narcotics distribution. That strained position, however, cannot be squared with the ordinary meaning of the term "facilitate," both generally and within the criminal law. To "facilitate" an act, one must "make [it] easier or less difficult," or "assist" or "aid" it. *Webster's Second New Int'l Dictionary* 908 (2d ed. 1954). It is well established that being a patron of an illegal activity does not "facilitate" it. See *Rewis*, 401 U.S. at 811. Being a purchaser does not make the activity "easier" or "assist" or "aid" it; rather, it merely makes the buyer a counterparty to the illegal transaction.

In *Rewis*, for example, this Court addressed the meaning of the Travel Act, 18 U.S.C. § 1952, which prohibits interstate travel with the intent to "promote, manage, establish, carry on, or facilitate" certain kinds of illegal activity. See 401 U.S. at 811. The defendants in *Rewis* were operators of a gambling establishment that was patronized by out-of-state customers. *Rewis* v. *United States*, 418 F.2d 1218, 1220 (11th Cir. 1969). Although the lower court overturned the convictions of the customers of the gambling establishment under § 1952, it upheld the convictions of the proprietors based on their agreement "to operate a lottery which would be 'facilitated' by being patronized by persons coming to it." *Id.* at 1221. This Court reversed. Starting with the statutory text, the Court held that "the ordinary meaning of this language suggests that the traveler's purpose must involve *more than the desire to patronize illegal activity*." 401 U.S. at 811 (emphasis added). Turning to the legislative history, the Court found no indication that the reach of § 1952 was meant to turn on whether gambling patrons happened to travel in interstate commerce. *Id.* at 811-12. The Court noted that construing the Travel Act to reach the defendants' conduct, solely because their illegal activity was patronized by out-of-state customers, "might well produce situations in which the geo-graphic origin of customers, a matter of happen-stance, would transform relatively minor state offenses into federal felonies." *Id.* at 812.

That same analysis controls here. Just as the customer of a gambling establishment does not "facilitate" the illegal gambling operation under *Rewis*, the personal-use purchaser of drugs does not facilitate the drug dealer's felony distribution. Nor does anything in the legislative history suggest that Congress intended to convert every personal-use purchaser who happens to use a phone from a misdemeanant into a federal felon.

To the contrary, the legislative history makes clear that Congress did *not* intend that result. "If the abuser is to be penalized, he should not be penalized in the spirit of distribution." H.R. Rep. No. 91-1444, at 9 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4575.[2]

The government's position also fails as a matter of ordinary meaning. For example, a Wal-Mart customer is unlikely to claim that he is "facilitating"—*i.e.*, making easier, aiding, or assisting—Wal-Mart's retail sales operations merely by choosing to shop there (unless the customer also assists other customers or fixes a broken cash register while shopping). Likewise, if a customer uses the Internet to check Wal-Mart's hours, phones ahead to determine if an item is in stock, or uses a cell phone while in the store to check with the spouse about items on the shopping list, no one would think that the customer had used a communications facility to facilitate *Wal-Mart's* activities. The shopper may have used the phone or the Internet to facilitate his own shopping. But he would not have used them to facilitate Wal-Mart's operations. As a matter of common understanding, we all recognize that shoppers do not "facilitate" a retailer's

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[2] The government argues that this Court's construction of "facilitate" in *Rewis* was strongly influenced by the words surrounding the term "facilitate." Br. in Opp. 7 n.2. According to the government, the term "facilitate" in the Travel Act was preceded by specific words; here, the government urges, the term "facilitate" is preceded by the general verb "cause" in § 843(b). *Ibid.* That argument does not withstand scrutiny. In both the Travel Act and in § 843(b), the term "facilitate" operates as a catch-all that encompasses not merely commission of the offense but assisting others in committing the offense. Besides, the government's argument effectively concedes ambiguity—that "facilitating" another's illegal activity does not necessarily include merely being a patron. Here, all of the canons of statutory construction require that ambiguity to be resolved against the government's position.

operations—they patronize it. There is no reason for a different result merely because the seller distributes narcotics rather than t-shirts and electronics.

2. That same understanding is reflected throughout the criminal law. The term "facilitate" is most readily understood as synonymous with the phrase "aid and abet." Black's Law Dictionary, for example, defines the term "aid and abet" as "[t]o *assist or facilitate* the commission of a crime." *Black's Law Dictionary* 76 (8th ed. 2004) (emphasis added). It is well established that a personal-use purchaser does not aid or abet the seller's sale. See Pet. Br. 25-28; *United States* v. *Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977); *United States* v. *Harold*, 531 F.2d 704, 705 (5th Cir. 1976); *Lott* v. *United States*, 205 F. 28, 29-31 (9th Cir. 1913).[3] By the same token, a personal-use purchaser does not "facilitate" the seller's felony distribution merely by making a purchase. See *Dixon* v. *United States*, 548 U.S. 1, 17 (2006) (Kennedy, J. concurring) (stating that Congress enacted § 843(b) against "background understandings set forth in judicial decisions."). The purchaser does not "aid" the distribution, "assist" it, or make it "easier"; he merely acts as a customer of it. See *United States* v. *Binkley*, 903 F.2d 1130, 1138 (7th Cir. 1990) (Cudahy, J., dissenting). Particularly given Congress's intent to distinguish between users on

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[3] Numerous state courts have reached a similar conclusion interpreting their own drug laws. See *Brown* v. *State*, 203 So. 2d 700 (Ala. Ct. App. 1967); *Howard* v. *State*, 496 P.2d 657, 660 (Alaska 1972); *State* v. *Cota*, 956 P.2d 507, 509-10 (Ariz. 1998); *Sweatt* v. *State*, 473 S.W.2d 913, 914-15 (Ark. 1971); *People* v. *Mimms*, 110 Cal. App. 2d 310, 314 (1952); *Sobrino* v. *State*, 471 So. 2d 1333, 1335 (Fla. Dist. Ct. App. 1985); *Gamble* v. *State*, 62 S.E. 544 (Ga. Ct. App. 1908); *State* v. *Payton*, 45 Idaho 668, 670-71 (1928); *Wakeman* v. *Chambers*, 28 N.W. 498, 499 (Iowa 1886); *Dunaway* v. *Commonwealth*, 39 S.W.2d 242, 242 (Ky. Ct. App. 1931); *State* v. *Celestine*, 671 So. 2d 896, 897-98 (La. 1996).

the one hand and sellers on the other—and to reserve felony conviction for the latter—there is no reason to think Congress intended to depart from that ordinary understanding of the term "facilitate" so as to make every drug user who employs a phone in making a purchase a felon under § 843(b).

Indeed, such an expansive interpretation would effectively gut the distinction between users and sellers throughout the federal drug laws without regard to the use of communications facilities. If the purchaser of a personal-use quantity of drugs "facilitates" the seller's felony distribution, then such a purchaser might also be said to aid and abet that distribution. As noted above, "aid or abet" *means* to "assist or facilitate." Under the federal aiding-and-abetting statute, however, anyone who "aids and abets" another's commission of "an offense against the United States" is "punishable as a principal." 18 U.S.C. § 2(a). The government's view could thus convert *every* purchaser of personal-use drugs into a felon—each such purchaser could be liable not merely as a personal-use purchaser but as a principal in narcotics trafficking for having aided or abetted his source's felony distribution. Congress clearly did not intend that absurd result. It intended to subject purchasers and traffickers to different treatments and penalties. See H.R. Rep. No. 91-1444 at 10, *reprinted in* 1970 U.S.C.C.A.N. 4515.

3. The government's effort to define "facilitate" expansively also offends the cardinal principle of statutory construction that a court should "give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (citation omitted); see also *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116 (1879) ("a statute ought * * * to be so construed" if possible so that "no clause, sentence, or word shall be superfluous, void, or insignificant"). The "resistance" against treating language as superfluous is "heightened"

where, as here, "the words describe an element of a criminal offense." *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994).

Here, the government's expansive reading of "facilitate" would render Congress's use of the word "felony" all but meaningless. As petitioner explains (at 23), § 843(b)'s predecessor did not distinguish between facilitating felonies and facilitating misdemeanors. Instead, it prohibited the use of a communication facility to facilitate "any act or acts constituting an offense" under federal drug laws. Narcotics Control Act § 201, 70 Stat. at 573 (codified at former 18 U.S.C. § 1403 (repealed)). Because most drug offenses at the time were classified as felonies, see Pet. Br. 23, there was little reason for Congress to distinguish between facilitating felonies and facilitating misdemeanors. But once Congress revamped the drug laws in 1970 to treat drug users and drug dealers differently, it became necessary to treat them differently under § 843(b) as well. Congress implemented that distinction by narrowing § 843(b), replacing the term "offense" with the word "felony." *Id.* at 24. In doing so, Congress made clear that § 843(b) reaches only uses of communication facilities that facilitate *felony* offenses—not *any* offense.

The government's construction renders that important change superfluous or nearly so. Nearly every purchase of drugs for personal use somehow "makes it easier" for someone else to distribute drugs in the over-expansive sense in which the government uses those terms. The government thus would make almost every use of a phone in committing a misdemeanor violation of the federal drug laws fall within § 843(b). Such a construction thus makes the careful limit Congress added in 1970—that the use of the communications facility facilitate a *felony*—"superfluous" or at least "insignificant,"

something this Court should decline to do. *Hoffman*, 101 U.S. at 115.

B. The Government's View Defies The Structure And Purpose Of The Federal Drug Laws By Turning Virtually Every Purchaser Into A Felon

"To discern Congress's intent," this Court examines not merely the "the explicit statutory language" but also "the structure and purpose of the statute." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990). Here, the Act's structure and purpose defy the government's position. Congress intended to distinguish sharply between drug users and drug dealers, humanely addressing the former through treatment and rehabilitation while punishing the latter through incarceration. The government's over-expansive reading of § 843(b) does not merely offend that effort. It does so *en mass*, threatening to convert virtually every drug user from a misdemeanant into a felon; creating nonsensical distinctions; and denying drug users the effective opportunity for treatment and rehabilitation that Congress intended to give them.

1. When Congress crafted the Comprehensive Drug Abuse Prevention and Control Act—including Section 843(b)—it sought "to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *United States* v. *Martin*, 599 F.2d 880, 889 (9th Cir. 1979). Congress adopted the philosophy of the President's Advisory Committee on Narcotic and Drug Abuse (the "Prettyman Commission"), established by President Kennedy in 1963. *Swiderski*, 548 F.2d at 449; see H.R. Rep. No. 91-1444, at 8-10, *reprinted in* 1970 U.S.C.C.A.N. 4574-4575. Although the Prettyman Commission proposed strong measures to combat drug trafficking, it advocated lesser penalties for individual drug abusers in order to promote rehabilitation. *Id.* at 10, *reprinted in* 1970 U.S.C.C.A.N. 4575 ("[T]he rehabilita-

tion of the individual [drug user], rather than retributive punishment, should be the major objective."). Congress sought to punish commercial trafficking and distribution more harshly because "such conduct tends to have the dangerous, unwanted effect of drawing additional participants into the web of drug abuse." *Swiderski*, 548 F.2d at 450; 116 Cong. Rec. 33,647 (1970) (statement of Rep. Sisk) (stating that the new legislation draws "a distinction between the unfortunate user or addict of narcotics and * * * [t]he dealer or pusher who reaps huge financial benefits from the misery of the user").

As a result, simple possession, or possession for personal use, is classified as a misdemeanor, 21 U.S.C. § 844, while possession with intent to distribute is a felony, 21 U.S.C. § 841. That distinction reflects the judgment that personal use, a misdemeanor, "does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in * * * drug distribution." *Swiderski*, 548 F.2d at 450; 116 Cong. Rec. 33,307 (1970) (statement of Rep. Robison) (stating that the legislation "recognizes that the mere use of dangerous drugs is more of a sickness" and that individuals who "merely use or possess drugs for their personal use, and who are caught, should not have their futures ruined"); H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4575 ("The illegal traffic in drugs should be attacked with the full power of the federal government" and "[t]he price for participation in this traffic should be prohibitive."). That distinction is also critical to Congress's effort to provide better opportunities to rehabilitate drug users. See H.R. Rep. No. 91-1444, at 8-10, 18-19, *reprinted in* 1970 U.S.C.C.A.N. 4574-75, 4584-85.

2. The government's construction would eviscerate that distinction, with devastating results. Under the government's approach, all drug users—purchasers of personal-use quantities—would become felons whenever

they employ a phone, cell phone, or other means of electronic communication in acquiring drugs. In today's mobile and digital society, however, electronic communications are used by virtually everyone in almost every aspect of daily life. Cell phones, e-mail, text messages, and instant messaging are rapidly displacing in-person communications for almost every sort of interaction. In the last five years, the number of mobile wireless telephone subscribers grew by almost 100 million; almost everyone has one.[4] E-mail proliferates.[5] Internet usage is ubiquitous as well.[6]

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[4] Compare FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Chart 11.3 (2008) (241,945,000 subscribers per Form 502), *avail. at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf, with FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Table 11.1 (2003) (141,776,000 subscribers per Form 502), *avail. at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend803.pdf. The impact of the cell phone is everywhere. Local convenience stores sell pre-paid phones that require no contract. Ben Charny, *7-11 Rings in Cell Phone Service*, Apr. 27, 2004, *avail. at* http://news.zdnet.com/2100-9584_22-135741.html. Movie theater owners have petitioned the FCC to allow owners to block cell phone service in theaters. *Movie Theater Owners Want Cell Phones Blocked*, Dec. 19, 2005, *avail. at* http://www.mobiledia.com/news/41645.html. States, including the District of Columbia, have started to ban the use of cell phones while driving. See Governors Highway Safety Association, Summary of State Laws, *avail. at* http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html. Many courts now have explicit policies regarding cell phone use and possession, see, *e.g.*, Gabrielle Banks, *Judges Ban Cell Phones, Camera Near Criminal Trials in Courthouse*, Pittsburgh Post-Gazette, Nov. 30, 2007, even going as far as to prohibit certain types of phones but not others, see, *e.g.*, Standing Order re Use of Cellular Telephones in Courthouses and Courtrooms (W.D. Tex. Aug. 1, 2003).

[5] More than half of working adults in the United States have both a personal and a work email account. Mary Madden & Sydney Jones,

Perhaps most significantly, text-messaging has shown astronomical growth over the past few years. Just 10 years ago, text-messaging was virtually unheard of in this country. According to the Cellular Telephone Industry Association (CTIA), Americans sent 57.2 billion text messages in 2005 and now send more than ten times that amount—about 600.5 billion text messages—a year. See CTIA Wireless Quick Facts, http://www.ctia.org/media/ /index.cfm/AID/10323.[7] With most of that growth among America's youth,[8] the text message has basically replaced

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PEW Internet & American Life Project, Networked Workers 20 (2008) *avail. at* http://www.pewinternet.org/pdfs/PIP_Networked _Workers_FINAL.pdf. Of working adults under 30, 20% report having three or more personal email accounts. *Ibid.* Microsoft and Yahoo, the market leaders in free webmail, have 256.2 million and 254.6 million subscribers, respectively. Jefferson Graham, *E-mail Carriers Deliver Gifts of Nifty Features To Lure, Keep Users*, USA Today, April 16, 2008.

[6] On average, Americans now spend 26 hours and 26 minutes per month using the Internet. Gary Holmes, The Nielsen Company, Press Release, *Nielsen Reports TV, Internet and Mobile Usage Among Americans*, July 8, 2008, *avail. at* http://www.nielsenmedia .com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a06 2a0/?vgnextoid=fe63c9769fcfa110VgnVCM100000ac0a260aRCRD.

[7] By contrast, in 2000, the total number of text messages sent in the United States was less than .003 percent of that total, or about 14.4 million. Reuters, *Text Messaging Use in South Carolina Soars by Nearly 500 Percent*, July 23, 2008, *avail. at* http://www.reuters.com/ article/pressRelease/idUS210860+23-Jul-2008+PRN20080723.

[8] Teens send, on average, 455 text messages and receive 467 messages each month; they thus send and receive about 15 or 16 text messages a day. Reuters, *Text Messaging Improves Parent-Teen Relationship*, April 16, 2008, *avail. at* http://www.reuters.com/ article/pressRelease/idUS117578+16-Apr-2008+BW20080416. Consumers most likely to send and receive text messages are those between 13 and 24 years old. Margaret Webb Pressler, *For Texting Teens, an OMG Moment When the Phone Bill Arrives*, Wash. Post, May 20, 2007, at A1. As of 2006, 65% of people ages 18-29 used their cell phones for text messaging, compared with 37% of people ages

the whisper as the preferred means of communicating during class.[9] Given the pervasiveness and constant use of communications facilities, the government's approach threatens to turn virtually all purchases into felony offenses.

That approach, moreover, would radically alter the culpability associated with infrequent, experimental drug use, particularly among the Nation's youth. For example, under the government's construction of § 843(b), a student's text-messaged inquiry about his neighbor's willingness to bring his ecstasy to a party and share it—"R U able to brng X to prty tnite" or "can U bring?"—would become a potential federal felony.[10] It is hard to see why the individual who obtains a personal-use quantity of drugs by whispering an inquiry about its availability to his neighbor in class should be guilty of a

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30-49, 13% of people ages 50-64, and 8% of people 65 and older. Lee Rainie, *PEW Internet & American Life Project, PEW Internet Project Data Memo* 6 (2006), *avail. at* http://www.pewinternet.org/pdfs/PIP_Cell_phone_study.pdf. About 85 percent of teens ages 12-17 engage in some form of electronic communication, including text messaging, sending email, or instant messages. Amanda Lenhart *et al.*, *Pew Internet & American Life Project, Writing, Technology and Teens* 24 (2008), *avail. at* http://www.pewinternet.org/pdfs/PIP_Writing_Report_FINAL3.pdf.

[9] See Tony Gonzalez, *Know Your Text-Messaging Limits Before Being Caught at School*, Minneapolis Star Tribune, Sept. 4, 2008, at E1; Lisa Guernsey, *When Gadgets Get in the Way*, N.Y. Times, Aug. 19, 2004, at G1.

[10] Some courts have held that sharing narcotics with a friend can be a felony. See, *e.g.*, *Washington* v. *United States*, 291 F. Supp. 2d 418, 436 (W.D. Va. 2003) ("Sharing with friends is distribution, and it is no defense that Washington did not know that his acts would be considered distribution under 21 U.S.C. § 841(a)."); see also *United States* v. *Wallace*, 532 F.3d 126, 128-129 (2d Cir. 2008); *United States* v. *Washington*, 41 F.3d 917, 919 (4th Cir. 1994); *United States* v. *Ramirez*, 608 F.2d 1261, 1264 (9th Cir. 1974).

misdemeanor, while the person who texts the same inquiry to the same neighbor should be guilty of a felony.

The government's construction would not merely turn those youths whose drug use amounts to a youthful indiscretion into federal felons merely because they happen to use their cell phones. It would permanently destroy their futures and chances at rehabilitation, depriving them of some of the most important rights a citizen can have in our republican form of Government. Criminal disenfranchisement laws routinely deny those convicted of felonies the right to vote.[11] Conviction of a crime punishable by imprisonment for more than one year—including a violation of § 843(b)—also disqualifies citizens from serving on a federal jury indefinitely (absent a restoration of civil rights). See 28 U.S.C. § 1865(b)(5). And the "only method currently provided by federal law to restore civil rights is a pardon." Office of the Pardon Attorney, *Federal Statutes Imposing Collateral Consequences Upon Conviction* 1 (2000).

The impact on an individual's ability to earn a living and financial well-being is equally severe. For example, a convicted felon may not be able to serve this country by enlisting in the armed forces, 10 U.S.C. § 504(a), or be permitted to be a pilot or flight instructor, 14 C.F.R. § 61.15(c), (d). Although a felony conviction does not disqualify a person from federal employment, it "is a factor in determining suitability for it." Office of the Pardon

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[11] In 46 States and the District of Columbia, citizens who are incarcerated lose the right to vote. Jamie Fellner & Marc Mauer, Human Rights Watch and The Sentencing Project, *Losing the Vote, the Impact of Felony Disenfranchisement Laws in the United States*, Table 1 (1998), *avail. at* http://www.hrw.org/reports98/vote/usvot98o.htm. Felons on parole are disenfranchised in 32 States, while 29 States disenfranchise those on probation. *Ibid.* Another 14 States disenfranchise former felons even after their sentences are served, with ten States disenfranchising felons permanently. *Ibid.*

Attorney, *supra*, at 3. A felony conviction, moreover, may cost the convicted individual not merely his job but also his home and safety net. Those convicted of an offense punishable by more than one year of incarceration, such as § 843(b), may find their property forfeited under 21 U.S.C. § 881(a)(7). They can be evicted from public housing under 42 U.S.C. § 1437f(d)(1)(B)(iii). And they may lose federal benefits as well. Individuals with felony drug convictions are permanently barred from receiving food stamps and cash benefits funded under part A of Title IV of the Social Security Act. Robin Levi & Judith Appel, Office of Legal Affairs, *Collateral Consequences: Denial of Basic Social Services Based Upon Drug Use* 4-5 (2003) (citing 21 U.S.C. § 862a). There is simply no evidence Congress intended to visit those harsh consequences on mere users, much less as a result of a single instance of youthful indiscretion in obtaining a personal-use quantity using a cell phone.

3. Such results are not merely harsh. They are also wholly at odds with Congress's many goals in distinguishing between users and traffickers. As an initial matter, Congress determined that traffickers are more dangerous and culpable than mere users. See pp. 14-15, *supra*. It is hard to see how the user's decision to use his cell phone could be thought to radically alter that calculus and make him into a felon with culpability approaching that of the dealer.

More fundamentally, Congress's focus for users was *rehabilitation*. See p. 15, *supra*. Treating initial personal-use purchasers as misdemeanants who can benefit from counseling and treatment is consistent with that goal. But converting the personal-use purchaser into a felon, simply because he uses a phone, is not. While treatment programs are often available in federal prisons, those convicted of a drug offense are more likely to receive treatment or participate in a substance-abuse

program while on probation or parole, rather than in prison or jail. Bureau of Justice Statistics, *Substance Dependence, Abuse, and Treatment of Jail Inmates* 8 (2002). Incarceration, moreover, often prolongs the road to recovery or simply exacerbates pre-existing addiction. As a result, many have come to the conclusion that "jail sanctions are not a recognized part of any medically accepted approach for the treatment of alcohol or drug addiction, or as a medically appropriate response to alcohol or drug relapse * * * ."[12]

Indeed, subjecting personal-use purchasers to incarceration on the same terms as traffickers would play havoc with Congress's rehabilitation efforts. Surrounding drug users in prison with hardened criminals and drug traffickers for a potentially extended period of time is simply counterproductive where the goal is reformation and reintegration into society.[13] Even apart from the impact of incarceration, branding someone a felon itself can interfere with rehabilitation. Increasingly, modern criminology has recognized that rehabilitation and reform can require the offender to create or renew a "prosocial" identity, a process called "desistance." Stephen

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[12] See Declaration of Peter Banys, M.C., M.Sc., in Support of Temporary Restraining Order and Preliminary Injunction at 3, ¶ 11, in *Gardner* v. *Schwarzenegger*, No. RG06278911 (Cal. Super. Ct. July 13, 2006). For that reason, many state governments are recognizing the negative impact of a jail sentence on drug rehabilitation. Since 2000, at least 17 States have rolled back mandatory minimum sentences and similar harsh penalties for nonviolent offenders, particularly individuals convicted of drug offenses. Scott Ehlers & Jason Ziedenberg, Justice Policy Institute, *Proposition 36: Five Years Later* 1 (2006).

[13] In the words of Anthony Burgess, "Cram criminals together and see what happens. You get concentrated criminality, crime in the midst of punishment." *A Clockwork Orange* 102 (W.W. Norton & Co. ed. 1986) (1962).

Farrall & Shadd Maruna, *Desistance-focused Criminal Justice Policy Research: Introduction to a Special Issue on Desistance from Crime and Public Policy*, 43 How. J. of Crim. Just. 358, 358-359 (2004). Permanently branding the offender a "felon"—and denying him the myriad rights described above, see pp. 19-20, *supra*—can have a devastating effect on that process: It can reinforce the offender's criminal identity and make it more difficult for him build a new, civic-minded one.[14] By choosing to treat drug users as misdemeanants, Congress maximized their chances at rehabilitation by shedding their identity as criminals. By permanently branding those same individuals as felons (for having supposedly "facilitated" their source's felony of selling drugs to them), the government's construction eviscerates Congress's efforts.

4. The Fourth Circuit's contrary view rested in part on its claim that users who make purchases using a communications facility deserve greater punishment because the facility "makes it easier for criminals to engage in skullduggery, and Congress may reasonably have desired to increase criminal penalties for those who use such means to evade detection by law enforcement." Pet. App. 12a. That argument proves too much. If Congress's goal was to increase the penalty whenever someone uses a cell phone—because it putatively makes detection more difficult or because Congress sought to protect communications networks from misuse—there would have been no reason for Congress to limit § 843(b) to use of a communication facility in a "felony" drug offense; it

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[14] See Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* 165 (2001); John Laub & Robert Sampson, *Understanding Desistance from Crime*, 28 Crime and Justice: A Review of Research 1 (M. Tonry ed. 2000); Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 Soc. Psychol. Q. 284 (2000).

would have drafted the provision to address use of a communication facility to facilitate *any* drug offense (as was the case in the predecessor to § 843(b), see p. 13, *supra*). Nor is it sensible to suggest that using a communication facility makes detection more difficult. E-mail, text-messaging, and faxing not only leave an electronic or physical paper trail, but are capable of being intercepted by law enforcement. Indeed, it was a wiretap of the dealer's cell phone that was used to collect the evidence that eventually led to petitioner's conviction. Pet. App. 3a.

In any event, it is nonsense to suggest that Congress somehow had a preference for in-person transactions in open-air drug markets. Those markets often operate in a specific, geographically defined area at identifiable times so that buyers and sellers are able to locate one another with ease. See Alex Harocopos & Mike Hough, Community Oriented Policing Services, *Drug Dealing in Open-Air Markets* 1 (2005). Such street dealing has devastating societal impacts on people other than the purchaser and seller. Open-air drug markets blight inner-city neighborhoods, reducing economic, educational, and social opportunities available to law-abiding adults and children. Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 Conn. L. Rev. 571, 584 (1995). Street dealing increases violent crime, with dealers routinely battling for territory to sling their wares, endangering innocent bystanders and law enforcement personnel. *Ibid.*; see also *Cotton* v. *State of Maryland*, 872 A.2d 87, 92-93 (Md. 2005). And open-air drug markets have a disparate impact on those who occupy inner-city areas and neighborhoods. National Drug Intelligence Center, *Washington/Baltimore High Intensity Drug Trafficking Area Drug Market Analysis* 9 (2008). Whatever might be said about Congress's chosen policies for combating illegal drug use and distribution, favoring

street-dealing over electronic communications is not among them.

II. This Court Should Apply The Rule Of Lenity To Resolve Any Ambiguity Regarding The Scope Of Section 843(b)

To the extent that a "reasonable doubt" still persists about the scope of the statute, the rule of lenity should be applied. See *United States* v. *R.L.C.*, 503 U.S. 291, 305-06 (1992). The rule of lenity dictates that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoke in language that is clear and definite." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks omitted). Application of the rule is particularly appropriate in the context of § 843(b), which has serious consequences for purchasers of personal-use quantities of drugs as well as the prerogative of the legislative branch to designate certain individuals as deserving of treatment rather than harsh punishments.

The government's position would convert treatable users into federal felons for making what are otherwise misdemeanor purchases merely because they happen to use a phone. It seems unlikely indeed that Congress intended to convert every youthful indiscretion in seeking to acquire drugs for experimentation into a felony just because the inquiry about drugs is texted rather than whispered—indeed, that it intended to deny those committing such indiscretions using a phone the right to vote, serve on juries, serve in the military, and deny them federal benefits in perpetuity. See pp. 19-20, *supra*. That seems particularly clear given the ubiquity of cell phones, text messaging, and other "communication facilities" in modern society. See pp. 16-18, *supra*. Here, Congress has not clearly stated that § 843(b) encompasses buyers of small quantities of drugs for personal

use. As a result, this Court should apply the rule of lenity before subjecting an entirely new class of individuals—purchasers of personal-use quantities of drugs—to the harsh consequences of felony conviction.

Moreover, application of the rule preserves the separation of powers between Congress, the executive branch, and the courts. The executive branch should not be allowed to use the guise of prosecutorial discretion to eradicate Congress's careful distinction between drug users on the one hand, and sellers and distributors on the other. It remains within the sound discretion of Congress to review the statute, and if it intends to include buyers of personal-use quantities within the scope of § 843(b), to make that intention clear through plain and unambiguous language. Indeed, the rule of lenity serves as an incentive to Congress to clarify its intent. Broad interpretations of criminal statutes such as § 843(b) are likely to stick, because there is simply no effective lobby for narrowing criminal statutes. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162, 2194 (2002). A narrower interpretation, by contrast, is far more likely to be corrected if erroneous because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and more readily have the ear of the legislative branch. *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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