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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Congress, in the Controlled Substances Act of 1970 (CSA), dramatically shifted its approach towards drug users, whether first-time youthful experimenters or longtime addicts. Congress made the possession of drugs for personal use a misdemeanor rather than a felony, and prescribed rehabilitation rather than punishment as the appropriate response. The government nonetheless charged petitioner, when he obtained two grams of cocaine for his own personal use, with six felony counts potentially carrying a total sentence of up to 24 years of imprisonment. In the government's view, petitioner would have merited lenient treatment and rehabilitation as a misdemeanant had he and his dealer conducted an entirely face-to-face transaction, but petitioner became transformed into a felon subject to severe punishment because he used his cellular phone in arranging their face-to-face meeting.

Nothing in the terms, context, or history of 21 U.S.C. § 843(b) supports that counterintuitive result. With respect to the text, Section 843(b) bars the use of a communication facility "in committing," "in causing," or "in facilitating" the commission of a drug "felony." Because petitioner purchased drugs strictly for his own use, a misdemeanor, there is no argument that petitioner "committed" a drug "felony." And in light of the long-settled understanding that a buyer of drugs does not aid or abet (or equivalently, "facilitate") his dealer's distribution of drugs to him, petitioner's purchase of drugs did not "facilitate" his dealer's "felony" distribution. Because petitioner's purchase of drugs did not "facilitate" his dealer's "felony" distribution, petitioner did not use his phone

"in facilitating"—*i.e.*, in the course of facilitating—a drug "felony."

With respect to the statutory context, the government offers no sound basis for concluding that Congress would make the fundamental choice to afford leniency and rehabilitation to drug users, but would cast aside that approach in favor of stiff felony punishment of any user who exchanges a phone call, e-mail, or text message in obtaining drugs instead of doing so entirely face-to-face. Attributing any such intention to Congress would be especially unwarranted in light of the statutory history of Section 843(b). When establishing in the CSA that possession of drugs for personal use would constitute only a misdemeanor, Congress simultaneously narrowed the terms of Section 843(b) specifically to exclude from its reach the use of a communication facility in connection with a drug misdemeanor. The government's efforts to minimize the significance of that textual change are unpersuasive: Congress would not have amended Section 843(b) to exclude a drug user's use of a phone in connection with his own misdemeanor, only to have the very same conduct come back within the provision if simply recast as "facilitating" his dealer's "felony."

The government fares no better in its alternative argument—not considered below—that petitioner used a phone in "causing" his dealer's "felony." If the government were correct, it could routinely circumvent the rule that a buyer of drugs does not "aid or abet" his dealer's distribution by charging the buyer instead with "causing" the distribution. The government's "cause" theory, no less than its "facilitate" theory, cannot be squared with the statutory text,

context, and history, and affords no sounder basis for transforming a misdemeanant drug user into a felon subject to stiff punishment based on his use of a phone in obtaining his drugs. Finally, with regard to both the "causing" and "facilitating" theories, the rule of lenity compels reading Section 843(b) to exclude the use of a phone by a misdemeanant drug user in purchasing drugs for his own personal use.

A. The Established Rule Under *Gebardi* That A Purchaser Does Not Facilitate His Seller's Distribution Applies To Section 843(b)

The government argues (Br. 10-14) that the use of a phone in buying drugs for personal use amounts to use of a phone in "facilitating" the dealer's "felony" distribution under Section 843(b). The government's reading of the statute is incorrect. The terms of the statute, when read against the backdrop of the long-settled buyer/seller rule and this Court's associated decision in *Gebardi v. United States*, 287 U.S. 112 (1932), do not encompass the use of a phone in obtaining drugs for personal use.

1. Under the buyer/seller rule, a buyer of contraband cannot be charged with "aiding or abetting" the seller's unlawful distribution. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(e), at 371 (2d ed. 2003); *Lott v. United States*, 205 F. 28, 29-31 (9th Cir. 1913). Relying on that principle in *Gebardi*, this Court recognized that a "purchaser of liquor" cannot be convicted "as an abettor of the illegal sale." 287 U.S. at 119; *see also United States v. Farrar*, 281 U.S. 624, 634 (1930). And applying *Gebardi*, courts of appeals have held that a person who purchases drugs for personal use cannot be convicted under 18 U.S.C. § 2 for "aiding or abetting" his seller's felony

distribution of the drugs to him. *See United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977); *United States v. Harold*, 531 F.2d 704, 705 (5th Cir. 1976).

Section 843(b) uses the term "facilitating," rather than "aiding or abetting." But the legal meaning of "facilitating" is equivalent to that of "aiding or abetting." *See* Pet. Br. 28-30; *Black's Law Dictionary* 76, 627 (8th ed. 2004) (defining "aid and abet" as to "facilitate the commission of a crime," and "facilitation" as the "act or an instance of aiding or helping"). Courts therefore have concluded that "'facilitation' for purposes of § 843(b) amounts to the same thing as 'aiding and abetting.'" *United States v. Jimenez*, 533 F.3d 1110, 1114 (9th Cir. 2008); *see United States v. Walton*, 56 F.3d 551, 556 (4th Cir. 1995) ("[U]sing the telephone system in facilitating the distribution of narcotics is equivalent to aiding and abetting that distribution.").

The parallel structure of the general aiding-or-abetting statute and Section 843(b) reinforces the definitional equivalence between "aiding or abetting" in the former and "facilitating" in the latter. The general aiding-or-abetting statute sets forth three categories of offenders who are punishable as a principal: (i) a person who "commits" an "offense against the United States"; (ii) a person who "aids" or "abets" (or "counsels, commands, induces, or procures") such an offense; and (iii) a person who "causes" such an offense. 18 U.S.C. § 2(a)-(b). In directly parallel fashion, Section 843(b) bars the use of a phone "in committing," "facilitating," or "causing" a drug "felony." 21 U.S.C. § 843(b). "Facilitating" in Section 843(b) thus serves precisely the same role as "aiding or abetting" in 18 U.S.C. § 2. And just as a person purchasing drugs for personal use is not "aiding or

abetting" his seller's distribution under 18 U.S.C. § 2, the person cannot be charged with "facilitating" his seller's "felony" distribution under Section 843(b). Indeed, this Court has recognized that a customer does not "facilitate" an illegal business. *See Rewis v. United States*, 401 U.S. 808, 811 (1971).[1]

2. The government concedes that, under *Gebardi*, a purchaser of drugs for personal use cannot be charged with "aiding or abetting" his seller's felony distribution. Gov't Br. 14-15. The government also does not dispute that the terms "facilitating" and "aiding or abetting" are legal equivalents, such that the purchaser also is not "facilitating" his seller's distribution. *See id.* at 16. The government nonetheless argues that *Gebardi* and the buyer/seller rule have no bearing on the applicability of Section 843(b) to this case. According to the government, *Gebardi* forecloses aider-or-abettor (or facilitator) liability only with respect to conduct "inevitably incident" to

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[1] The statute at issue in *Rewis*, the Travel Act, targets persons traveling in interstate commerce with an intent to "facilitate" the "promotion, management, establishment, or carrying on, of [certain] unlawful activity." 18 U.S.C. §§ 1952(a), (a)(3), (b)(i). The Court observed that "the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." 401 U.S. at 811. Although the government attempts to distinguish the Court's statement on the ground that the Travel Act requires an intent to facilitate (Gov't Br. 12), nothing in the Court's opinion suggests that its interpretation turned on the intent requirement. To the contrary, if, as the government evidently believes, a customer "facilitates" a business he patronizes, there would be no basis for categorically holding that he does not intend to facilitate the business. *See United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) (invoking the rule that "the jury is entitled to presume that a person intends the natural and probable consequences of his acts").

the primary offense; and while the purchase of drugs may be inevitably incident to the seller's felony distribution, the use of a cell phone or other communication facility by the purchaser is not. *Id.* The government's argument is fundamentally flawed for three separate reasons.

a. As an initial matter, assuming *arguendo* that the *Gebardi* principle is limited to conduct "inevitably incident" to the primary offense, the buyer/seller rule still dictates the inapplicability of Section 843(b)'s "facilitating" prong in this case. There is no merit to the government's effort to disentangle petitioner's use of a phone from the underlying act with which that use was integrally connected—*i.e.*, the purchase of drugs for personal use. The entire point of petitioner's phone use was to enable him to obtain drugs for personal use. His use of the phone thus was an inseparable component of the underlying purchase itself. And that underlying conduct *is* inevitably incident to the seller's "felony" distribution. If, as the government does not dispute, purchasing drugs for personal use therefore fails to constitute conduct "facilitating" the buyer's "felony" distribution, the use of a phone in connection with that purchase also cannot constitute conduct "facilitating" the "felony." *See* Pet. Br. 30.

The government's argument would equally apply, for instance, if petitioner had been charged under a hypothetical statute barring the "use of a phone in aiding or abetting the distribution of drugs." Even though petitioner's purchase of drugs, under the buyer/seller rule, would fail to constitute conduct "aiding or abetting the distribution of drugs," the government nonetheless would permit his prosecution on the basis that the statute singles out the "use

of a phone" in "aiding or abetting the distribution of drugs." That result would make little sense: if the purchase of drugs fails to constitute "aiding or abetting the distribution of drugs," the buyer's use of a phone in furthering the purchase could not constitute the "use of a phone in aiding or abetting the distribution of drugs." At the least, a legislature enacting the hypothetical statute would so assume. The same reasoning should control here.

The text of Section 843(b) speaks directly to the matter. Section 843 bars the use of a communication facility "in facilitating" a "felony" distribution of drugs. The term "facilitating" is in the present progressive tense, which "indicates a happening in progress at a given time." Randolph Quirk et al., *A Comprehensive Grammar of the English Language* 197 (1985) (capitalization deleted).[2] When preceding a verb in the present progressive tense, the word "in" means "in the course of." *Webster's Third New International Dictionary* 1139 (1961) ("in the course of," with the examples "drowned [in] crossing the river"; "[in] cooling this material hardens"); *The American Heritage Dictionary of the English Language* 910 (3d ed. 1992) ("[d]uring the act or process of," as in the phrase "tripped in racing for the bus" (emphasis deleted)); *Webster's New International Dictionary* 1253 (2d ed. 1953) ("[d]uring the course of," with the example "spoiled *in* the making").

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[2] 1 George O. Curme, *A Grammar of the English Language* § 52(2), at 233 (1935) ("[The progressive] aspect represents the action as progressing, proceeding, hence as not ended."); *United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) (present progressive tense, or "-ing form" of a verb, "generally indicates continuing action").

The text of Section 843(b) therefore requires that the use of a phone occur in the course of "facilitating" a drug "felony"—*i.e.*, in the course of some underlying "facilitating" conduct. In the context of this case, the purchaser uses a phone in the course of purchasing drugs for personal use. But because, under *Gebardi* and the buyer/seller rule, the underlying conduct of purchasing drugs for personal use does not qualify as "facilitating" a "felony" distribution, the use of a phone to arrange the transaction fails to constitute use of a communication device "in facilitating" a drug "felony." *See* Pet. Br. 30.

The government assumes that Section 843(b) addresses the use of a communication device "that facilitates" a drug "felony." For instance, the government contends that "it is not at all strange to say that a customer's *use* of something . . . *would facilitate* an individual sale," and that "Section 843(b) speaks in just such terms." Gov't Br. 11 (second emphasis added). But Section 843(b) does not speak in terms of whether a person's use of a phone "facilitates" (or "would facilitate") a drug "felony." The provision instead asks whether a person uses a phone "*in* facilitating"—in the course of facilitating—a drug "felony." So understood, the buyer/seller rule fully applies, and dictates the inapplicability of Section 843(b) to the purchase of drugs for personal use.

b. In any event, *Gebardi*'s approach, contrary to the government's understanding, is not confined to conduct that is "inevitably incident to" the primary offense, or even to conduct almost always incident to it. Rather, *Gebardi* by its own terms applies to conduct "frequently, if not normally," incident to the principal offense. 287 U.S. at 121. As the Court there reasoned, when Congress forgoes directly pun-

ishing in the primary offense conduct that is "frequently" incident to the commission of that offense, any effort to punish it indirectly as aiding, abetting, or facilitating the offense would presumptively circumvent Congress's intent. *See id.* at 121-23.[3]

Gebardi illustrates that principle. The statute in *Gebardi* made it unlawful for a person to transport a woman for immoral purposes or to "aid or assist" in the transportation. *Id.* at 118. The Court addressed whether a woman who participated voluntarily in the transportation could be convicted of "aiding or assisting" it or conspiring to commit the offense. The Court expressly acknowledged that, because a woman could be "intimidated or forced into the transportation," a woman's voluntary participation was not inevitably incident to the transporter's offense. *Id.* at 121. But because the offense "frequently, if not normally, involve[d] consent and agreement on the part of the woman to the forbidden transportation," *id.*, the Court held that a woman who participated voluntarily in the transportation could not be convicted of either "aiding or assisting" it or conspiring to commit the offense. *Id.* at 118-23.

Here, there is no dispute that purchasers of drugs for personal use "frequently, if not normally" use a phone or other communication facility in the course of arranging to obtain drugs from their distributors. *Id.* at 121. As a result, even if the government were correct to focus exclusively on the extent to which a

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[3] *See also People v. Manini*, 594 N.E.2d 563, 567-68 (N.Y. 1992) (holding that a seller cannot be convicted of aiding or abetting a buyer's possession, because even though a person can possess drugs "by finding, stealing or manufacturing them," the legislature would not have intended to impose accessory liability in "the typical drug transaction").

purchaser's use of a communication device is incident to the seller's felony distribution, *Gebardi* establishes that the purchaser may not be charged under Section 843(b) with using a phone in "facilitating" the seller's "felony."

c. The government's effort to avoid the *Gebardi* principle fails for an additional, independent reason. Although the government's argument assumes that the primary offense is the seller's felony distribution, *see* 21 U.S.C. § 841(a)(1), and addresses whether the use of a phone is inevitably incident to that offense, Section 843(b) also contains its *own* primary offense—*i.e.*, use of a "communication facility in committing" a drug "felony." 21 U.S.C. § 843(b). With respect to that primary offense, Congress pointedly declined to prohibit the use of a communication facility "in committing" the misdemeanor offense of possession for personal use. *See* 21 U.S.C. § 844(a); *see also* 21 U.S.C. § 846 (barring "attempts . . . to commit" any drug offense and subjecting person who attempts to commit a drug offense "to the same penalties as those prescribed for the [underlying] offense.").

In *Gebardi*, the Court refused to allow the prosecution as an "aider or assister" of a woman who voluntarily agreed to the prohibited transportation, reasoning that her prosecution on that theory would undermine Congress's decision to exclude her from the primary transportation offense and to confine it instead to "the person by whom she is transported." 287 U.S. at 119. The same reasoning applies here. It likewise would undermine Congress's election in Section 843(b) to refrain from penalizing the buyer's use of a phone in "committing" the crime of misde-

meanor simple possession to treat the very same conduct as "facilitating" the seller's "felony."

3. *Gebardi* and the buyer/seller rule also dispose of the government's argument that the use of a phone in purchasing drugs for personal use violates Section 843(b) because, under the dictionary definition of the term "facilitate," the purchaser's use of a phone ostensibly "make[s] easier" the seller's distribution. Gov't Br. 10. Under *Gebardi* and the buyer/seller rule, purchasing drugs for personal use fails to constitute conduct "facilitating" a "felony" distribution, regardless of whether it could be said in some sense to make the distribution easier. Just as a person who purchases drugs for personal use cannot be convicted of "aiding or abetting" a distribution under 18 U.S.C. § 2, regardless of whether the purchaser could be said to make the distribution easier, the purchaser also does not "facilitate" a "felony" distribution for purposes of Section 843(b). And the use of a phone in the course of the purchase could no more facilitate the distribution than the purchase itself.

Contrary to the government's characterization, that is not in any way an "atextual" interpretation of the statute. Gov't Br. 14. It instead applies the settled legal meaning of the terms "facilitating" and "aiding or abetting" rather than the outer bounds of their dictionary definitions, consistent with this Court's standard approach in interpreting statutory text. *See, e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consult-

ing any precedents or authorities that inform the analysis.").[4]

4. The government also errs in arguing (Gov't Br. 16-17) that the penalty structure of Section 843(b) precludes application of the traditional buyer/seller rule. To be sure, Section 843(b), unlike aiding-or-abetting liability under 18 U.S.C. § 2, carries a single statutory maximum penalty of four years of imprisonment regardless of the underlying offense of distribution, and "[e]ach separate use of a communication facility" is "a separate offense." 21 U.S.C. § 843(b), (d)(1). But while Congress departed from the operation of 18 U.S.C. § 2 in that limited respect, there is no basis for supposing that Congress intended to cast aside all other aiding or abetting principles, including the traditional buyer/seller rule. Indeed, at least one federal statute uses the term "aid or abet" even though it sets penalties that do not mirror the underlying offense. *See* 18 U.S.C. § 1028(a)(7) (making it a crime to use or possess "a means of identification of another person" with the intent, *inter alia*, "to aid or abet" any "unlawful activity that constitutes a violation of Federal law"); *id.* § 1028(b) (setting fixed penalties for that offense that do not track the punishment for the underlying unlawful activity). There is no reason to conclude

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[4] Even if the outer limits of the dictionary definitions—rather than the legal meaning of "facilitating" or "aiding or abetting"—were controlling, it would be far from clear that a person who uses a phone in buying drugs for personal use violates Section 843(b). The *seller* may make his *sales* easier by allowing buyers to order their drugs over the phone. But there is a strong sense in which a *buyer* who uses a phone merely takes advantage of the seller's preexisting method of doing business; the buyer's use of the phone thus would not make the distribution easier than the seller had already made it.

that the distinct penalty structure of that provision abrogates all ordinary aiding-or-abetting principles.

Moreover, Section 843(b) parallels the penalty structure in 18 U.S.C. § 2 in important respects, in that it maintains an equivalence in punishment between a person who "commits" the offense and a person who "facilitates" it. Under 18 U.S.C. § 2, a person who "commits" the principal offense faces the same penalty as a person who "aids or abets" it. Section 843(b) likewise subjects to the same maximum penalty of four years of imprisonment both a person who uses a phone "in committing" a felony distribution and a person who uses a phone "in facilitating" a felony distribution. In that regard, the provision also precisely parallels the statute at issue in *Gebardi*, which imposed equivalent penalties on the transportation of a woman for immoral purposes and on "aid[ing] or assist[ing]" such a transportation. *See* 287 U.S. at 118 & n.1. Accordingly, nothing in Section 843(b)'s penalty structure precludes applying the traditional rule that a purchaser of drugs does not "aid or abet" or "facilitate" his seller's "felony" distribution.[5]

[5] Congress through the years has enacted a number of provisions that, like Section 843(b), themselves establish both a primary crime and a prohibition against aiding the commission of that crime. *See, e.g.*, 18 U.S.C. § 1461 (2006); 18 U.S.C. § 72 (1946); 18 U.S.C. § 354 (1946); 18 U.S.C. § 408a (1946); 19 U.S.C. § 1598 (1946). Congress did so notwithstanding the existence of a general aiding-or-abetting prohibition akin to current 18 U.S.C. § 2. *See* 18 U.S.C. § 550 (1924).

B. The Government's Theory Would Undermine Congress's Fundamental Statutory Distinction Between Drug Dealers And Drug Users

Interpreting Section 843(b) to reach buyers for personal use would stand markedly at odds with the fundamental statutory distinction drawn by Congress in the CSA between drug dealers and drug users. Congress made drug dealing a felony and imposed stiff penalties for that offense. 21 U.S.C. § 841(a)(1) and (b). At the same time, in a highly prominent change of policy, Congress made the possession of drugs for personal use a misdemeanor for first-time offenders, and prescribed rehabilitation rather than punishment as the appropriate response. 21 U.S.C. § 844(a). Indeed, Congress established that such individuals could avoid any conviction at all upon successful completion of a probationary period. 18 U.S.C. § 3607(a).

Congress's carefully-crafted approach of leniency and rehabilitation for drug users cannot be reconciled with the government's theory that the same persons should be convicted of a felony and exposed to stiff punishment whenever they use a phone in obtaining their drugs, rather than obtain them in an entirely face-to-face transaction. Any such interpretation would fail to construe the CSA's provisions to "fit" into a "harmonious whole." *FTC v. Mandel*, 359 U.S. 385, 389 (1959); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133-39 (2000) (declining to apply literal definition of statutory term "drug" to nicotine on ground that other provisions would require tobacco to be banned if nicotine were a "drug" and tobacco-specific statutes presuppose lawfulness of marketing tobacco products).

1. The government attributes to petitioner (Br. 18-19) an "implicit" argument, based on statutory context, that the user of a communication facility must himself commit a felony to violate Section 843(b). Petitioner makes no such argument, however, implicitly or otherwise. Petitioner's interpretation instead is that Section 843(b)'s "facilitating" prong covers all persons who qualify as an aider-or-abettor of a drug "felony," including persons who help arrange "a distribution to someone else." Gov't Br. 19.

The government errs in perceiving (*id.*) no textual basis for distinguishing between persons who arrange a distribution to someone else and persons who obtain drugs for their own use. First, persons who arrange sales to others, unlike purchasers for personal use, fall within the established legal meaning of aiding-or-abetting or facilitating. Second, while the terms of Section 843(b) must be harmonized with the terms of Section 844(a) making it a misdemeanor to possess drugs for personal use, there is no comparable language making it a misdemeanor to help arrange a distribution to another person. And third, the narrowing of the terms of Section 843(b) to encompass committing or facilitating only a "felony" (rather than any "offense"), *see* pp. 19-22, *infra*, excludes purchasers for personal use but has no bearing on distributions to others.

2. The government contends (Br. 19-22) that there is no anomaly in treating drug users as felons whenever they use a phone because Congress routinely treats possession as a felony when accompanied by certain aggravating circumstances, and the

use of a phone is simply another such aggravating circumstance. That argument lacks merit.

For instance, the government observes that possession of drugs is a felony in the case of a person with a prior drug conviction. But that limitation simply establishes the boundaries of the general rule: Congress prescribed rehabilitation rather than punishment for experimenters and addicts who are first-time offenders, but had no such solicitude for persons who failed to take advantage of a prior opportunity for rehabilitation.[6]

The four remaining felony possession offenses identified by the government establish only that Congress declined to extend leniency to drug possessors who engage either in conduct demonstrably harmful to third parties or in particularly dangerous

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[6] The government suggests (Br. 20) that petitioner had a prior drug conviction and that his possession of drugs for personal use thus could have been prosecuted as a felony. The government until now has made no suggestion that petitioner's possession itself constituted a felony. Instead, the government's charging theory and position throughout the proceedings has been that petitioner facilitated his *dealer*'s felony. That is with good reason. As petitioner's counsel explained at sentencing, the prior state charge against petitioner resulted in a "deferred imposition of sentence" and the charge was "dismissed" based on petitioner's "good behavior." C.A. App. 352; *see* PSR ¶ 24. Counsel agreed with the district court's suggestion that the disposition amounted to the state equivalent of "a 3607," C.A. App. 352—*i.e.*, a federal disposition under 18 U.S.C. § 3607. Such a disposition "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose," 18 U.S.C. § 3607(b), including for purposes of assessing under the simple-possession statute whether a possessor of drugs for personal use has a prior drug conviction, 18 U.S.C. § 844(a).

or independently wrongful conduct. Congress made possession of flunitrazepam a felony because it is used in "date rape" of third parties. 142 Cong. Rec. S12,377 (daily ed. Oct. 3, 1996) (Sen. Hatch). Congress made the possession of crack cocaine a felony because it viewed the drug to be especially dangerous to the user, and believed the drug to be "closely correlated with the commission of other serious crimes." Br. for the United States at 5, *Kimbrough v. United States*, 128 S. Ct. 558 (2007). The receipt of drugs from a minor constitutes a felony because the conduct involves exploitation of children. And the acquisition of a controlled substance by fraud is a felony because Congress has long viewed fraud as an independent wrong warranting felony treatment, *see, e.g.*, 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud), and because the conduct can ensnare innocent third parties, *see, e.g.*, *United States v. Silva*, 554 F.3d 13, 16 (1st Cir. 2009) (patient duped doctors into prescribing narcotics).[7]

The use of a phone or other communication device, by contrast, does not visit demonstrable harm on third parties or involve inherently dangerous drugs or independently wrongful conduct. And while the government asserts without support (Br. 21-22) that a drug user's use of a communication facility demonstrates "acclimation" to the drug trade, first-time youthful experimenters might well communicate with a dealer by phone, e-mail, or text message, while seasoned addicts might conduct transactions exclusively face-to-face, perhaps to avoid government

[7] The government also points (Br. 21) to provisions barring sharing of drugs with third parties and making a place available for drug-related activities. Neither is a possession offense, however, and both in any event involve harm to third parties.

surveillance. In any event, Congress *favored* rehabilitation for addicts who may be "acclimated" to using drugs but lack any prior convictions. *See* Pet. Br. 17-18.

Finally, whereas the offenses identified by the government expressly treat possession as a felony, no provision expressly treats drug possessors who use phones as felons. If Congress desired to except from its rehabilitative policy those first-time possession offenders who use a phone, it would have done so expressly.

3. The government defends its theory on the ground that a purchaser's use of a phone makes his drug transaction more difficult to detect. Gov't Br. 22-25. But insofar as Congress was concerned about the ability of the parties to evade detection by using a phone, *id.* at 23, the *seller*'s use of a phone in committing or facilitating his "felony" distribution is plainly barred by Section 843(b). With respect to the buyer, if Congress had been concerned that the use of a phone by a buyer for personal use would enable him to avoid detection, Congress would have expanded Section 843(b) beyond committing or facilitating only a "felony" to reach committing or facilitating "misdemeanor" simple possession. Congress's election not to do so demonstrates that any concerns about a drug user's ability to evade detection by using a phone were insufficient to subject him to the stiff penalties authorized by Section 843(b).

That is unsurprising. Congress should not be assumed to have intended leniency and rehabilitation for users who conduct entirely face-to-face transactions, but stiff felony punishment of users who use a

phone to arrange their face-to-face transactions. Any difference in the ease of detection presumably would not warrant such dramatically different treatment of otherwise similarly situated persons.

That is particularly true because it is not clear that a drug user who uses a communication device to arrange an exchange is more likely to avoid detection than a user who arranges the exchange through a face-to-face encounter. Congress believed that the use of a phone made it easier for drug kingpins and others who avoid physical contact with drugs to escape detection, Pet. Br. 34-35, but there is no indication of a comparable belief about persons who purchase (and physically possess) drugs for personal use. And the government offers no evidence that users who phone their dealers before obtaining their drugs in a face-to-face transaction are more successful in evading detection than users who meet their dealers at a prearranged place communicated to them face-to-face or by word-of-mouth.

C. Congress Narrowed Section 843(b) To Exclude Persons Who Purchase Drugs For Personal Use

Congress in the CSA not only made simple possession of drugs a misdemeanor. In an immediately adjacent provision, Congress also narrowed the reach of Section 843(b) from covering the use of a communication device in committing or facilitating any drug "offense," to covering the use of a communication device in committing or facilitating only a drug "felony." Pet. Br. 22-25. By changing the term "offense" to "felony," Congress reinforced that Section 843(b) would not apply to persons who use a phone in committing or facilitating its newly created

misdemeanor offense of possessing drugs for personal use. While the government addresses that statutory change in a section if its brief discussing "legislative history," Gov't Br. 26, 30-31, Congress amended the *text* of the provision to narrow its reach. The Court assumes such textual changes to have real and substantial effects. *See Stone v. INS*, 514 U.S. 386, 397 (1995).

The government hypothesizes (Br. 30-31) that Congress's textual change could have had the limited purpose of ensuring that persons who use a phone in facilitating misdemeanor regulatory offenses—such as mislabeling a controlled substance, failing to keep records, or unlawfully distributing a schedule V controlled substance—would fall outside the reach of Section 843(b). The terms of Section 843(b), however, exclude the use of a phone in committing or facilitating *any* misdemeanor offense, not just the misdemeanor regulatory offenses identified by the government. There is therefore no textual basis for the government's speculation about the amendment's intended effect.

Moreover, the creation of the simple possession misdemeanor offense was "[o]ne of the most striking" and prominent features of the CSA. 116 Cong. Rec. 33,316 (1970) (Rep. Boland); *see* Pet. Br. 17-18; H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4577 (discussing the misdemeanor change); *id.* at 4584-85 (explaining that Congress was responding to the recommendation of the President's Advisory Commission on Narcotic and Drug Abuse "that the penalty provisions of the federal narcotics and marihuana laws which now prescribe mandatory minimum sentences and pro-

hibit probation or parole be amended to fit the gravity of the particular offense so as to provide greater incentive for rehabilitation"); Congressional Research Service, Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513): Summary of Major Provisions, Report No. 70-257 ED, at 6 (listing the reduction in penalty for first-time users as one of six "substantial revision[s] in previously existing law"). In contrast, the regulatory offenses identified by the government gained mention only in passing, and even then mainly in observing that they were comparable to the simple possession offense, which had the "least severe penalties of all." H.R. Rep. No. 91-1444, 1970 U.S.C.C.A.N. at 4576. If Congress had intended to narrow the statute from "offense" to "felony" in order to exclude only regulatory misdemeanors, and not the most prominent new misdemeanor of simple possession, there presumably would have been some indication to that effect in the legislative materials.

The government's explanation for the textual change in Section 843(b) is unconvincing for another reason. For two of the three regulatory offenses the government identifies—mislabeling a controlled substance and failing to keep records relating to controlled substances—it is difficult to imagine how a communication device would be used in committing or facilitating the offense. The third offense identified by the government—unlawful distribution of a schedule V substance—could be furthered through the use of a phone. But even that offense might fall outside the exclusion on the government's own theory because distribution to a person with a prior conviction would constitute facilitation of that person's felony possession.

"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). The amendment should not be interpreted to have effect in only the "rarest of circumstances," *id.* at 397, but should be given "as full a play as possible," *Markham v. Cabell*, 326 U.S. 404, 409 (1945). Interpreting the amendment to exclude from Section 843(b) the class of misdemeanants who were foremost on Congress's mind—persons who buy drugs for personal use—gives the amendment "real and substantial effect" and "as full a play as possible." The government's interpretation, by contrast, would confine it to "the rarest of circumstances."

D. Under The Rule Of Lenity, Any Ambiguity Must Be Resolved In Petitioner's Favor

Under standard principles of statutory interpretation, Section 843(b) does not encompass persons who use a phone in purchasing drugs for personal use. To the extent there is any ambiguity, however, the rule of lenity would require the Court to interpret Section 843(b) to exclude such persons. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion); *id.* at 2033-34 (Stevens, J., concurring in the judgment).

The government suggests (Br. 31-32) that the rule of lenity applies only when the defendant's conduct is otherwise innocent. That understanding is incorrect. The rule of lenity precludes applying ambiguous statutes to persons simply because they may have violated a different criminal law with lesser punishment. *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) ("the rule [of lenity] has been applied

not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing"); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("Th[e] policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958))). That is particularly true here in light of Congress's emphasis on extending leniency and a chance for rehabilitation to misdemeanant drug users. Accordingly, while the government might have been able to charge petitioner with misdemeanor possession for personal use, that possibility affords no basis for expanding Section 843(b) to reach his conduct when the provision's applicability in the circumstances is at least ambiguous.

E. Insofar As The Court Considers The Government's Alternative Argument, The Court Should Reject It

The government begins its brief, not by defending the reasoning of the court of appeals, but instead by urging affirmance of the judgment on an alternative ground not addressed below. Specifically, the government argues (Br. 9-10) that a person who uses a phone in purchasing drugs for personal use has used a communication device in "causing" the seller's "felony" distribution in violation of Section 843(b). Gov't Br. 9-10. That argument, insofar as the Court considers it, lacks merit.

1. The court of appeals grounded its decision solely on the basis that a purchaser of drugs for per-

sonal use "facilitates" the seller's felony. Pet. App. 9a. The court did not address the government's "cause" argument. The government of course may urge any ground in support of the judgment below. But no court of appeals has discussed the government's "cause" argument; and while the government raised the argument in its opposition to the petition, the petition raises only the "facilitate" question, and the Court granted certiorari on that question. In those circumstances, the Court ordinarily refrains from considering an alternative ground for an affirmance. *See, e.g., Archer v. Warner*, 538 U.S. 314, 322 (2003).

2. Should the Court reach the question, it should hold that a person who uses a phone in purchasing drugs for personal use no more uses the phone in "causing" a "felony" distribution than in "facilitating" a "felony" distribution. The very same arguments demonstrating that the use of a phone in purchasing drugs for personal use does not violate the "facilitating" prong of Section 843(b) also demonstrate that it does not violate the "causing" prong.

For instance, the background principle that a purchaser is not a party to a seller's unlawful distribution would preclude liability based on the word "'causing" no less than it precludes liability based on the word "facilitating." Indeed, "cause" liability is simply another form of accessory liability in the aiding-or-abetting statute. 18 U.S.C. § 2(b) ("Whoever willfully causes an act to be done . . . is punishable as a principal."). Thus, just as a purchaser for personal use could not be convicted of "causing" a distribution in violation of 18 U.S.C. § 2, he cannot be

convicted of using a phone "in causing" a distribution in violation of Section 843(b).

Indeed, the statute at issue in *Gebardi* prohibited both "aiding or assisting" the prohibited transportation and "causing" the transportation. *See* 287 U.S. at 118 n.1. The government presumably could not circumvent the Court's holding that a willing participant in the transportation may not be charged with "aiding or assisting" the transportation simply by charging her instead with "causing" the transportation. The same is true here.

Additionally, reliance on "cause" to support the application of Section 843(b) to personal-use buyers would stand at odds with Congress's fundamental distinction between drug dealers and users no less than would reliance on "facilitate." And reliance on the "causing" prong of Section 843(b) could no more be reconciled with the narrowing of Section 843(b) from reaching any drug "offense" to reaching only a drug "felony." Finally, at most, the applicability of the "causing" prong of Section 843(b) in the circumstances is ambiguous, such that the rule of lenity would require the Court to hold that the "causing" prong fails to encompass to a person who uses a phone in buying drugs for personal use.

Significantly, petitioner argued at the certiorari stage that the government had identified no single argument that would allow it to prevail under the "causing" prong if it could not prevail under the "facilitating" prong. Pet. Cert Reply 11-12. In its merits brief, the government again fails to identify any such argument. Accordingly, should the Court reach the argument, it should hold that a person who uses

a phone in purchasing drugs for personal use may not be convicted of a violation under Section 843(b) on the theory that he used a phone "in causing" his seller's "felony" distribution.[8]

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[8] Even if there were some basis for distinguishing "cause" from "facilitate," it would not afford a ground for affirming the judgment below. "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 129 S. Ct. 530, 530 (2008) (*per curiam*) (citing *Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957)). Accordingly, if the Court invalidates the government's facilitation theory, petitioner's conviction must be reversed unless the government proves the error harmless. *See Hedgpeth*, 129 S. Ct. at 532. No such showing could be made here. Assuming that the government's interpretation of the cause prong of Section 843(b) were correct, the jury could have impermissibly found that petitioner's use of a phone made the transaction easier and therefore facilitated it, but that it did not cause the distribution because, even absent the use of a phone, petitioner would have purchased the drugs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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