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No. 08-192

In the Supreme Court of the United States

SALMAN KHADE ABUELHAWA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner "use[d] [a] communication facility * * * in causing or facilitating * * * a felony" drug distribution, in violation of 21 U.S.C. 843(b), by using his cell phone to arrange with a drug dealer several purchases of cocaine for his own personal consumption.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 523 F.3d 415.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2008. A petition for rehearing was denied on May 23, 2008 (Pet. App. 37a). The petition for a writ of certiorari was filed on August 13, 2008, and was granted on November 14, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of using a communication facility in causing or facilitating a felony drug distribution, in violation of 21 U.S.C. 843(b). He was sentenced to two years of probation and a $2000 fine. The court of appeals affirmed. Pet. App. 1a-18a.

1. In early 2000, federal agents began investigating Mohammed Said, a suspected cocaine dealer in Virginia. In June 2003, they obtained an order under 18 U.S.C. 2518 authorizing a wiretap on Said's cellular telephone. In the course of the wiretap, they intercepted a series of cell-phone conversations between petitioner and Said. Pet. App. 2a-3a.

On the night of July 5, 2003, the agents intercepted three calls. Petitioner initiated the first call and asked Said for a gram of cocaine. Said called petitioner back to ask where he was, and the two men agreed on a rendezvous point. During the third call, petitioner told Said that petitioner had arrived at the arranged location but that there were some other people there. To avoid detection, the two agreed on a different location. Pet. App. 4a-5a.

On the night of July 12, 2003, the agents intercepted three more calls. Petitioner initiated the first call and asked Said for another half-gram of cocaine. Nearly an hour later, petitioner again called Said, this time to increase his order to a full gram of cocaine and to ask where the two should meet. Said told petitioner to meet him at a butcher shop owned by Said's father. Petitioner agreed, indicating that he would be on his way immediately. About half an hour after the second call, Said—apparently nervous that the authorities would

detect the drug sale because he had been loitering near the butcher shop for too long—called petitioner back, asking where petitioner was and stating that "I really want to leave this place." Pet. App. 5a-6a. Petitioner responded: "I am coming to you man. One minute." *Id.* at 6a. Said relented and told petitioner to meet him at the restaurant next door to the butcher shop. *Ibid.*

Based on the intercepted calls, agents arrested petitioner. When questioned, petitioner admitted that he had long purchased cocaine from a man named Issam Khatib; that when Khatib quit the drug trade, Said assumed control of his customer base; that petitioner then began ordering cocaine from Said; and that petitioner regularly used his cell phone to place his orders with Said and to arrange the deliveries. Pet. App. 6a. Said pleaded guilty to conspiracy to distribute cocaine, and he was sentenced to 87 months of imprisonment. Presentence Investigation Rep. ¶ 7 (PSR).

2. A grand jury in the Eastern District of Virginia charged petitioner with seven counts of using a communication facility (his cell phone) in causing or facilitating Said's felony distribution of a Schedule II controlled substance (cocaine), in violation of 21 U.S.C. 843(b). That provision makes it unlawful "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony" in violation of the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.* Count 1 of the indictment charged a June 29, 2003, call not at issue here, and the government dismissed it before trial. Counts 2 through 4 charged the three July 5 calls, and Counts 5 through 7 charged the three July 12 calls. Pet. App. 6a-7a.

Petitioner pleaded not guilty, and the case proceeded to trial. The government presented evidence pertaining to the telephone calls. At the close of the government's evidence, petitioner moved for a judgment of acquittal, arguing among other things that no rational juror could find him guilty because causing or facilitating a drug distribution by using a telephone "simply isn't a crime" when the telephone user buys the drugs for personal consumption. Pet. App. 20a. The district court denied the motion. *Id.* at 7a. It stressed that petitioner's conduct not only facilitated the felony distribution but also caused it. *Id.* at 21a-23a.

The jury found petitioner guilty on Counts 2 through 7. Pet. App. 7a. Petitioner again moved for a judgment of acquittal, reasserting his claim that "ordering personal use drugs on the telephone is not a violation of 21 U.S.C. 843(b)." C.A. App. 275. The district court again denied the motion. Pet. App. 7a, 33a-34a. The court sentenced petitioner to two years of probation and a $2000 fine. *Id*. at 7a-8a.

3. The court of appeals affirmed. Pet. App. 1a-18a. Petitioner argued that Section 843(b) "is not violated when an individual facilitates the purchase of a drug quantity for personal use," since the purchase of cocaine for personal use is generally a misdemeanor, not a felony. *Id.* at 8a; see 21 U.S.C. 844. The court rejected that argument. The court noted that petitioner did not dispute that he had "used a communication facility (a cell phone) to arrange the drug transactions." Pet. App. 9a. Accordingly, the court reasoned that the case could "be decided by focusing only on whether [petitioner] facilitated the commission of a felony." *Ibid.* Giving the term "facilitate" its "common meaning"—namely, "to make easier or less difficult"—the court observed that

petitioner's "use of his cell phone undoubtedly made *Said*'s cocaine distribution easier." *Id.* at 11a (quoting *United States* v. *Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988)). Because Said's distribution of cocaine to petitioner was a felony under 21 U.S.C. 841(a)(1), the court concluded that petitioner's use of his cell phone to help arrange the distribution fell squarely within the coverage of Section 843(b). Pet. App. 11a-13a.

In reaching that conclusion, the court of appeals emphasized that "[t]he statute does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated." Pet. App. 11a. The court therefore considered it "irrelevant" that petitioner's possession of cocaine for personal use was "not itself * * * a felony." *Id.* at 12a. As the court explained, Congress "had reason" to impose additional punishment—beyond punishment for simple possession—upon personal-use defendants who employ communication facilities such as cell phones to arrange drug transactions: "[U]se of communication facilities makes it easier for criminals to engage in their skullduggery, and Congress may reasonably have desired to increase criminal penalties for those who use such means to evade detection by law enforcement." *Ibid.*

SUMMARY OF ARGUMENT

Under 21 U.S.C. 843(b), it is a felony "to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under" the Controlled Substances Act. The court of appeals correctly held that Section 843(b) is violated when a person uses a communication facility, such as a telephone, to purchase controlled substances from a drug dealer.

The court of appeals' interpretation is compelled by the plain language of Section 843(b). A dealer's distribu-

tion of drugs is a felony under the CSA, 21 U.S.C. 841, and a call to a dealer to purchase drugs both causes and facilitates the distribution. It causes the distribution because it effects it or brings it about—without an order from a purchaser, no distribution would take place. And it facilitates the distribution because it makes it easier, since the use of a communication facility allows the transaction to take place more efficiently and with less risk of detection.

In arguing that Section 843(b) is not violated when a drug purchaser uses a communication facility to obtain drugs for personal use, petitioner relies (Br. 25-31) on the principle of accessory liability recognized by this Court in *Gebardi* v. *United States*, 287 U.S. 112 (1932), that when a statute punishes only one party to a transaction that inevitably involves multiple actors, the other parties may not be punished for aiding and abetting the party whose conduct violates the statute. But while every drug distribution requires a drug receiver, not every drug distribution requires a receiver who uses a communication facility. Because a purchaser who uses a communication facility is not an inevitable participant in every drug distribution, *Gebardi* is inapplicable and does not justify declining to read Section 843(b) according to its terms.

Petitioner observes (Br. 14-15) that the receipt of drugs for personal use is ordinarily a misdemeanor, and he argues that it would be anomalous to treat a purchaser as a felon under Section 843(b) simply because he uses a communication facility to purchase drugs. Even if that were true, it would not justify petitioner's atextual reading of the statute; but in fact, there is nothing anomalous about applying Section 843(b) to purchasers. Not all drug possession is treated as a misdemeanor

under the CSA, and there are many circumstances in which even possessing or purchasing drugs for personal use is a felony. Congress could reasonably have determined that the use of a communication facility should be such a circumstance because it makes it easier for both parties to the transaction to avoid detection. In Section 843(b), as in several other statutes, Congress sought to protect the channels of communication from unlawful uses such as drug transactions. In doing so, it made no distinction between buyers and sellers.

Because the statutory text is clear, there is no need for recourse to legislative history. In any event, the legislative history does nothing to undermine the conclusion that Section 843(b) prohibits the use of a communication facility to purchase drugs. Petitioner suggests (Br. 15-18) that, because Congress lowered the penalty for simple possession when it enacted the CSA in 1970, it must have meant to exempt purchasers from the communication-facility statute. That claim finds no support in the CSA's legislative history. That history contains little discussion of Section 843(b), suggesting that Congress did not intend to alter the prior version of the statute, which applied to both buyers and sellers.

Finally, petitioner's reliance on the rule of lenity (Br. 40-41) is misplaced. The rule of lenity is inapplicable here because there is no grievous ambiguity in the statutory language. On the contrary, the plain language of Section 843(b) covers petitioner's conduct.

ARGUMENT

SECTION 843(b) PROHIBITS THE USE OF A COMMUNICATION FACILITY TO PURCHASE A CONTROLLED SUBSTANCE

A. The Plain Language Of Section 843(b) Applies To The Use Of A Communication Facility To Purchase A Controlled Substance

Section 843(b) makes it a felony "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under" the CSA. The term "communication facility" is defined to include a telephone, see 21 U.S.C. 843(b), and the distribution of a controlled substance in schedule I, II, III, or IV—such as cocaine, heroin, or marijuana—constitutes a felony under the CSA, see 21 U.S.C. 841(a)(1) and (b). Thus, under the terms of the statute, any person who uses a telephone in causing or facilitating the distribution of such a controlled substance violates Section 843(b). And a person who uses a telephone in purchasing a controlled substance violates both components of that provision.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In a case where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). This is such a case, because, by its plain language, Section 843(b) prohibits the use of a telephone to purchase a controlled substance.

1. Using a communication facility to purchase a controlled substance "causes" the commission of a felony under the CSA

When a person uses a communication facility to purchase a controlled substance, he or she uses the facility to cause an act of distribution. In ordinary usage, to "cause" means to bring about. *Webster's Third New International Dictionary of the English Language* 356 (1993) (*Webster's*) ("to serve as cause or occasion of"); see *ibid*. (defining "cause," in its noun form, as something that "brings about an effect or that produces or calls forth a resultant action"); *Random House Dictionary of the English Language* 330 (2d ed. 1987) (*Random House*) ("to be the cause of; bring about"); *Black's Law Dictionary* 235 (8th ed. 2004) (*Black's*) ("[t]o bring about or effect"). And in this case, the district court instructed the jury, without objection from petitioner, that "[t]o cause something to happen, obviously, that's an ordinary English language word[], simply means to help bring it about." C.A. App. 250. Someone who calls a drug dealer to arrange a purchase of drugs brings about an act of distribution by the dealer and thereby uses the telephone to cause a distribution.

Petitioner argues (Cert. Reply Br. 10-11) that, because the court of appeals held that petitioner's use of a telephone to purchase cocaine "facilitated" a felony under the CSA, "the case comes to this Court solely as a facilitation case." But the "causing" component of the statute was charged in the indictment, C.A. App. 10-16, and the district court found the government's evidence sufficient to meet it, Pet. App. 22a-23a ("I really don't have a problem in finding that at least a cause prong is met when a purchaser calls. If I call L.L. Bean and order a shirt, * * * I caused L.L. Bean to ship a shirt to

me."). It was also argued to the jury by government counsel, *id.* at 26a-27a, and the government briefed it in the court of appeals, Gov't C.A. Br. 28-29. Because this Court may affirm the judgment of the court of appeals "on any ground properly raised below," there is no barrier to considering the "causing" component of Section 843(b) in this case. *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994).

2. Using a communication facility to purchase a controlled substance "facilitates" the commission of a felony under the CSA

A person who uses a communication facility to purchase a controlled substance also uses the facility to facilitate a distribution. As the court of appeals observed, the "common meaning" of "facilitate" is "to make easier or less difficult." Pet. App. 11a (quoting *United States* v. *Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988)); see *Webster's* 812 ("to make easier or less difficult"); *Random House* 690 (same); *Black's* 627 ("[t]o make the commission of a crime easier"). And the district court in this case instructed the jury, again without objection from petitioner, that "[t]he term 'to facilitate the commission' means to assist or help someone to do something or in some way make the task less difficult." C.A. App. 250. The use of a communication facility, such as a telephone, in a drug transaction allows the transaction to take place more efficiently, and with less risk of detection, than if the purchaser and seller had to meet in person. It therefore facilitates the distribution that occurs as part of that transaction.

a. Amicus National Association of Criminal Defense Lawyers (NACDL) argues that, in ordinary usage, a purchaser's use of a telephone would not be said to "facilitate" the drug-distribution offense. In its view (NACDL

Br. 10-11), if a "shopper * * * used the phone or the Internet to facilitate his own shopping," "he would not have used them to facilitate [the retailer's] operations," because "we all recognize that shoppers do not 'facilitate' a retailer's operations—they patronize it." That is incorrect. While it may not be common to speak of customers or purchasers "facilitating" the operations of a seller—perhaps because most purchasers do not have the *purpose* of facilitating a seller's activities—such usage is certainly consistent with the ordinary understanding of the word "facilitate." More to the point, whether or not one would say that the customers themselves facilitate the seller's operations, it is not at all strange to say that a customer's *use* of something, such as a credit card, a telephone, or the Internet, would facilitate an individual sale. Section 843(b) speaks in just such terms, making it unlawful "to use any communication facility in * * * facilitating" a drug felony.

b. Petitioner errs in arguing (Br. 31-32) that *Rewis* v. *United States*, 401 U.S. 808 (1971), establishes that "a customer of drugs does not 'facilitate' his dealer's drug distribution." In *Rewis*, this Court interpreted the Travel Act, 18 U.S.C. 1952, which prohibits interstate or foreign travel or the use of an instrumentality of interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate" certain kinds of "unlawful activity." 18 U.S.C. 1952(a)(3). "Unlawful activity" is defined to include a "business enterprise" involving gambling or prostitution; it also includes individual offenses, such as "extortion, bribery, or arson" in violation of state or federal law. 18 U.S.C. 1952(b). The Court in *Rewis* held that a gambler who crossed state lines to be a customer of a gambling business enterprise did not violate the Travel Act. 401 U.S. at 811. The

Court explained that the "intent to 'promote, manage, establish, carry on, or facilitate'" language in the Travel Act "suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." *Ibid.* The Court buttressed its brief textual analysis by noting the absence of a mention of customers in the legislative history; the degree to which inclusion of them "would alter sensitive federal-state relationships"; and the rule of lenity. *Id.* at 811-812.

Petitioner's reliance on *Rewis* is misplaced, because there are significant differences between the Travel Act and Section 843(b). First, because the Travel Act requires an intent to facilitate unlawful activity, it suggests an inquiry into "the traveler's purpose." *Rewis*, 401 U.S. at 811. The Court in *Rewis* had no occasion to hold—and did not hold—that interstate travel by the customers of a gambling enterprise does not facilitate the operation of the enterprise. Instead, it held only that the customers do not have the *intent* to facilitate the enterprise. Section 843(b), by contrast, does not require intent to facilitate. It applies to anyone who "knowingly or intentionally" uses a communication facility in facilitating the commission of a drug felony.

Second, in *Rewis*, the meaning of the word "facilitate" depended in large measure on the terms that preceded it ("promote, manage, establish, carry on"), all of which are more restrictive than "caus[e]," the word that appears in conjunction with "facilitate" in Section 843(b). The meaning of a particular statutory term may be broadened or narrowed "by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008). Here, the use of the word

"cause" indicates that "facilitate" carries a broader meaning than it has in the context of the Travel Act.

Third, while the Travel Act criminalizes the use of a facility of interstate commerce to facilitate the carrying on of a business enterprise involving gambling, illegal liquor, drugs, or prostitution, it does not cover facilitation of individual instances of such activities that are not part of a business enterprise. See, *e.g.*, *United States* v. *Pollock*, 926 F.2d 1044, 1050 (11th Cir.) (proof of a "continuous course of conduct" required to establish that a "business enterprise" was involved in a Travel Act violation), cert. denied, 502 U.S. 985 (1991); *United States* v. *Muskovsky*, 863 F.2d 1319, 1327 (7th Cir. 1988) (a "business enterprise" requires "more than isolated, casual, or sporadic activity"), cert. denied, 489 U.S. 1067 (1989). By contrast, the CSA does cover individual drug transactions. It may be odd to say that a customer facilitates the continuous course of conduct of the business enterprise that he or she patronizes, but it is much more natural to say that the customer who makes specific arrangements for a transaction over the telephone facilitates that individual transaction.

Petitioner is therefore incorrect when he relies on (Br. 32) the principle that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005). The predecessor of Section 843(b) was enacted several years before the Travel Act—and thus well before this Court's decision in *Rewis* interpreting the Travel Act. See Narcotic Control Act of 1956, ch. 629, § 201, 70 Stat. 573; Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498. The

two statutes do not have closely related purposes. And most importantly, the language of the two statutes is not similar in the relevant sense, because although they both use the word "facilitate," they do so in very different contexts.[*]

B. Principles Of Accessory Liability Do Not Support Petitioner's Interpretation

Petitioner argues that someone who uses a communication facility to purchase drugs does not violate Section 843(b) if the drugs are to be used for personal consumption. Under 21 U.S.C. 844(a), first-offense possession of personal-use quantities of most controlled substances is a misdemeanor, and petitioner contends that Congress could not have meant to impose additional, felony punishment on purchasers for using a communication facility to arrange the transactions through which they obtain drugs. Petitioner does not suggest that the text of Section 843(b) contains any provision that would exempt purchasers for personal use, and it does not. Instead, he argues (Br. 25-32) that this Court should recognize an atextual exception for any person who uses a telephone to purchase drugs for personal use because, he says, a buyer cannot aid or abet a distribution offense.

Petitioner's argument relies on the principle, recognized by this Court in *Gebardi* v. *United States*, 287 U.S. 112 (1932), that "a buyer of contraband cannot be prosecuted as 'a party to the crime of illegal sale,'" or for aiding and abetting the sale. Pet. Br. 25 (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(e) at 371 (2d ed. 2003) (LaFave)). That principle, however, has no application to Section 843(b).

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[*] Of course, *Rewis* is also entirely irrelevant to liability for *causing* a drug felony, in violation of Section 843(b).

1. In *Gebardi*, this Court reversed a conviction for conspiracy to violate the Mann Act, ch. 395, § 2, 36 Stat. 825, which made it unlawful to "transport * * * any woman or girl for the purpose of prostitution." The Court concluded that a woman who was transported in violation of the statute could not be guilty of conspiring with those who transported her. *Gebardi*, 287 U.S. at 123. It explained that the "participation which the [Mann Act] contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, [is] not automatically to be made punishable" under the conspiracy statute. *Ibid.* In so holding, the Court cited several cases establishing that a "purchaser of liquor" should not "be regarded as an abettor of the illegal sale." *Id.* at 119.

Gebardi establishes that, when a statute "contemplates"—but does not itself punish—participation by another party "as an inseparable incident of all cases" of a statutory violation, then the other party may not be punished as an accessory or a conspirator. 287 U.S. at 123. "The rationale is that the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by others in the offense as a crime." *United States* v. *Southard*, 700 F.2d 1, 20 (1st Cir.), cert. denied, 464 U.S. 823 (1983). Applying *Gebardi*, courts have held that a receiver of drugs may not be prosecuted for aiding and abetting the illegal distribution of drugs, since receipt by *someone* is a necessary incident of all cases of distribution. 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).

The *Gebardi* principle does not apply here, however, because it is limited to cases in which the "participation by another is *inevitably* incident to" the commission of the underlying offense. LaFave § 13.3(e) at 370 (emphasis added). The drafters of the Model Penal Code described the rule in similar terms: "[T]he exception is confined to conduct 'inevitably incident to' the commission of the crime." Model Penal Code § 2.06 cmt. 9(b), at 325 (1985) (citation omitted). Significantly, Section 843(b), unlike the aiding-and-abetting and conspiracy statutes, requires more than simple participation in a drug-distribution offense or agreement to participate in such an offense: it requires the use of a communication facility to cause or facilitate that offense. And although receipt is "an inseparable incident of all cases" of distribution, the use of a communication facility is not. *Gebardi*, 287 U.S. at 123. In other words, because Section 843(b) requires that the facilitation occur through the use of a communication facility, giving "facilitating" its ordinary meaning would not make all or even most purchasers liable for facilitating sales. Petitioner's observation (Br. 30) that some cases have treated "facilitating" and "aiding" or "abetting" as synonyms is therefore beside the point, and *Gebardi* provides no basis for departing from a plain-language interpretation of Section 843(b).

2. Two other features of Section 843(b) reinforce the conclusion that Congress intended the violation to be independent of the drug offense either facilitated or committed by the offender, and that it elected not to incorporate *Gebardi* principles of accessory liability. First, under Section 843(b), "[e]ach separate use of a communication facility shall be a separate offense." Thus, if an offender makes multiple telephone calls to

purchase a single quantity of drugs—as petitioner did in this case, see Pet. App. 4a-6a—he is liable for multiple Section 843(b) offenses. Under an aiding-and-abetting theory, by contrast, multiple telephone calls in furtherance of a single distribution would constitute a single aiding-and-abetting offense. That is because 18 U.S.C. 2 provides that those who aid and abet the commission of an offense are punishable as principals, and the principal has committed only one distribution. Cf. *Busic* v. *United States*, 446 U.S. 398, 411 n.18 (1980) (multiple acts of aiding and abetting may merge once defendant is treated as a principal in committing the offense he aided and abetted). If Congress had intended to incorporate aiding-and-abetting prinicples into Section 843(b), it would have made the unit of prosecution the offense facilitated, not the individual use of a communication facility.

Second, the penalty imposed by Section 843(b) also supports the conclusion that Congress elected not to apply aiding-and-abetting principles to the violation. The maximum penalty for a first offense under Section 843(b) is four years of imprisonment. In some cases, that penalty may be greater than that associated with the drug felony that is caused or facilitated; in other cases, it may be substantially less. Had Congress intended to employ an aiding-and-abetting approach, the penalty would have been linked to the offense facilitated, as it would be for an accessory. See 18 U.S.C. 2.

C. The Statutory Context Does Not Support Petitioner's Interpretation

Petitioner argues (Br. 14-22) that applying Section 843(b) according to its plain meaning would be inconsistent with Congress' treatment of simple possession as a misdemeanor. In his view (*id.* at 18), the CSA "draw[s]

a fundamental distinction between drug traffickers and drug users," treating the former as felons and the latter as misdemeanants. He contends that the application of Section 843(b) to those who use a communication facilty to purchase drugs would undermine that distinction. For that reason, he asserts, the "context" of Section 843(b) dictates that the statute be read not to apply to those who use a communication facility in purchasing drugs for their own use. That argument lacks merit.

1. Petitioner is correct when he observes (Br. 13) that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). But the meaning of the words used in Section 843(b) is plain, and petitioner has not shown that the statutory context overcomes the plain text and leads to the result he advocates.

In particular, petitioner's implicit premise—that the user of a communication facility cannot be guilty under Section 843(b) unless he is committing a felony himself—fails to take account of the word "any" in the statutory phrase "causing or facilitating the commission of *any* act or acts constituting a felony." 21 U.S.C. 843(b). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's* 97), and in this case it makes clear that the "acts constituting a felony" can be committed by the user of the telephone or by a third party. See Pet. App. 11a ("The statute does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated."). Petitioner's premise is also inconsistent with his apparent recognition (Br. 35-36) that a non-purchaser can violate Section 843(b) by causing or facilitat-

ing a third-party's distribution. See, *e.g.*, *United States* v. *Toro*, 840 F.2d 1221, 1233 (5th Cir. 1988) (use of telephone to arrange for drug sale to third party violates Section 843(b)). He does not explain how the language of the statute can be read to cover facilitation of a distribution to someone else if it does not cover facilitation of a distribution to the defendant.

In sum, petitioner cannot show that the context of Section 843(b) sheds any light on the meaning of the statutory terms in a way that would yield the outcome he seeks. Instead, his argument based on "context" is essentially a claim that reading the statute as written would yield bad policy. Even if that were correct, it would not justify departing from the statutory language. See *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.").

2. In any event, petitioner's contention that it would be incongruous to apply Section 843(b) when a would-be drug possessor uses a covered means of communication to facilitate a felony distribution to himself lacks merit. Petitioner concedes (Br. 14 n.3) that Congress has not treated all drug-possession offenses as misdemeanors. He suggests (*ibid.*) that Congress has declined to show solicitude for possessors of drugs in "situations involving aggravating circumstances." Those "aggravating circumstances" are so numerous, however, that they undermine petitioner's claim that Congress intended to establish a general rule that not only possession, but also all related offenses, would be treated as misdemeanors.

Under 21 U.S.C. 844(a), simple possession of controlled substances is a misdemeanor only when it is a first offense. When it follows a prior conviction under

state or federal law for any drug offense—including possession—it is a felony punishable by "not less than 15 days but not more than 2 years" of imprisonment. 21 U.S.C. 844(a). In this case, for example, petitioner had sustained a prior state conviction for cocaine possession, and if it remained in effect (a matter not determined in this case, see C.A. App. 351-353), his possession of cocaine could have been prosecuted as a felony under Section 844(a). PSR ¶ 24.

Moreover, even as a first offense, simple possession of certain particularly dangerous controlled substances is a felony. See, *e.g.*, 21 U.S.C. 844(a) ("[A]ny person convicted under [Section 844] for the possession of flunitrazepam shall be imprisoned for not more than 3 years."). Indeed, simple possession of more than 5 grams of "a mixture or substance which contains cocaine base" is a felony with a mandatory minimum sentence of 5 years of imprisonment. *Ibid.*

Receiving a controlled substance can also be punished as a felony in certain circumstances. For example, 21 U.S.C. 861(a)(3) makes it a felony to "receive a controlled substance from a person under 18 years of age, other than an immediate family member." That receipt offense is indistinguishable from the Section 844(a) possession offense, except in regard to the source of the drugs, and the statute does not require that the receiver know the age of the person supplying the drugs. *United States* v. *Cook*, 76 F.3d 596, 599-602 (4th Cir.), cert. denied, 519 U.S. 939 (1996). It is also a felony to "acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." 21 U.S.C. 843(a)(3). See, *e.g.*, *Hays* v. *United States*, 397 F.3d 564 (7th Cir.), cert. denied, 546 U.S. 936

(2005); *United States* v. *Wells*, 211 F.3d 988, 1000-1001 (6th Cir. 2000).

Many acts closely related to possession are also felonies under the CSA. For example, when one user of a drug such as cocaine shares it with another person, even without any sale, that drug-sharing is a felony distribution. See *United States* v. *Pearson*, 391 F.3d 1072, 1075-1077 (9th Cir. 2004); *United States* v. *Washington*, 41 F.3d 917, 920 (4th Cir. 1994); but see 21 U.S.C. 841(b)(4) (providing a limited exception for certain cases of sharing marijuana). In addition, a person who facilitates the simple possession of drugs by others by "mak[ing] available for use, with or without compensation, [a] place for the purpose of unlawfully * * * using a controlled substance," is punishable by up to 20 years of imprisonment, even though the crime facilitated may be merely a misdemeanor. 21 U.S.C. 856(a)(2) and (b).

Contrary to petitioner's suggestion, Congress' solicitude for simple possession is not the rule that should govern the interpretation of other statutory provisions; it is an exception to Congress' severe criminalization of the drug trade, including of acts that facilitate the possession and use of drugs. It is precisely because such lenient treatment of first-offender drug users was exceptional that, as petitioner puts it (Br. 16) "Congress devoted considerable attention to the contours of the new misdemeanor offense of simple possession" when it enacted the CSA in 1970. A first offender who is found in possession of drugs for personal use is treated with special leniency in the hope that his first involvement with drugs will be his last. By the time he has committed his second offense, that special leniency is exhausted and he is treated as a felon. When he is sufficiently acclimated to the drug trade that he is causing or facilitat-

ing drug distribution by using a communication facility to arrange for a sale by a drug dealer, he likewise is treated as a felon, although there is no minimum punishment and he might receive probation—as petitioner did, Pet. App. 7a-8a—if he shows to the satisfaction of the court that he warrants special leniency.

3. Petitioner's argument about the supposed anomaly of allowing Section 843(b) to cover drug purchasers is flawed for the additional reason that it ignores an important element of that provision: the use of a communication facility. Indeed, he refers repeatedly (Br. 9, 10, 19, 34) to drug purchasers who "happen" to use a telephone, going so far as to suggest that it is "routine" (*id.* at 12) or "utterly commonplace" (*id.* at 20) for people to purchase drugs by means of telephone or email communications. Petitioner's view appears to be that the use of a telephone or other communication facility is a matter of mere happenstance that should have no legal significance. The very existence of Section 843(b), however, demonstrates that Congress's judgment was quite different. And there are several reasons why Congress could reasonably have chosen to provide for felony punishment of those who use communication facilities to cause or facilitate a drug transaction.

Congress has traditionally sought "to keep the channels of interstate commerce free from immoral and injurious uses." *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917). Its authority to do so "has been frequently sustained, and is no longer open to question." *Ibid.* Section 843(b) represents an effort to ensure that such channels of communication as the mail, telephones, wire, and radio will not be used for illegal drug transactions.

That effort has become even more important as a result of the rapid development of modern communica-

tions technologies. Today's communication facilities make legitimate commerce easier and more efficient, but they also make illicit drug transactions easier and more efficient. Indeed, they offer particular advantages to illicit commerce, because they greatly reduce the risk that the participants will be detected while negotiating a transaction. Petitioner describes (Br. 33) that possibility as speculative, but the facts of this case provide a good illustration of it. After traveling to an agreed-upon rendezvous point where he was to meet his dealer, petitioner discovered that there were other people there. Pet. App. 5a. Rather than proceed with the cocaine purchase in front of potential witnesses, petitioner drove to a different location and then used a cell phone to call his dealer and inform him of the change of plans. *Ibid.*

Many courts have observed that participants in drug transactions recognize the advantages offered by cell phones. See, *e.g.*, *United States* v. *Burkley*, 513 F.3d 1183, 1189 (10th Cir.) (expert testified that "possess[ing] more than one cell phone" is "a common practice in the drug trade"), cert. denied, 128 S. Ct. 2979 (2008); *United States* v. *Bailey*, 510 F.3d 562, 567 (6th Cir. 2007) (expert testified "that dealers often carry *two* cell phones—one to contact customers and one to contact suppliers—so that if police trace the call records of their customers it will not lead to their suppliers"). And when cell phones were less common, devices such as beepers and pagers offered similar advantages. See, *e.g.*, *United States* v. *Tapia-Ortiz*, 23 F.3d 738, 741 (2d Cir.) (expert "explain[ed] that drug traffickers employ certain techniques, such as using beepers * * * in order to avoid detection"), cert. denied, 513 U.S. 877, and 513 U.S. 912 (1994); *United States* v. *Jefferson*, 925 F.2d 1242, 1252 (10th Cir. 1991) (same); *United States* v. *Solis*, 923 F.2d

548, 549-550 (7th Cir. 1991) (expert testified that beepers "permit drug traffickers to be anonymous and mobile"); see also *United States* v. *Rogers*, 918 F.2d 207, 212-213 (D.C. Cir. 1990). It is therefore hardly surprising that Congress decided to treat the use of a communication facility in a drug transaction as a significant act warranting additional punishment.

Amicus NACDL notes (Br. 15-19) that the growth in the use of cell phones and text messaging to arrange for the distribution of drugs gives Section 843(b) greater applicability than Congress might originally have contemplated. But Congress deliberately wrote the statutory definition of "communication facility" in broad terms, including not only "mail, telephone, wire, [and] radio," but also "all other means of communication." The statute's scope should not be judicially narrowed simply because of changes in communication technology. As this Court has recognized, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007) (citation omitted).

Amicus also asserts (NACDL Br. 23) that participants in drug transactions do not have a good reason to use communication facilities, since the use of such facilities increases the risk of detection because telephone calls and emails can be intercepted by the police. That argument fares no better. The risk of interception exists only when the police have reason to suspect one of the parties to the transaction, and can meet the necessity standards to obtain a wiretap, see Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, whereas a face-to-face meeting always poses some risk of detection. Even though some kind of meet-

ing will often be necessary to complete the transaction, that meeting will be shorter and less likely to attract attention if the terms of the transaction and the parties' conduct when they meet have already been arranged through the use of a communication facility.

Finally, petitioner contends (Br. 21) that there is a special "discord between the court of appeals' interpretation of Section 843(b) and Congress's objectives" when the person initiating the telephone call is the drug dealer and the buyer uses that telephone call to facilitate the drug distribution. But the potential buyer is not liable simply because he receives a call; liability attaches under Section 843(b) only if he uses the call to participate in a drug transaction. If a potential buyer does use the drug dealer's telephone call to facilitate the distribution of drugs to him, there is no reason in logic or policy why he should be immune from prosecution under Section 843(b).

4. Contrary to petitioner's suggestion, Section 843(b) is hardly unique in providing felony punishment for the use of a communication facility to facilitate another unlawful activity, even when the defendant's role in the activity would otherwise constitute only a misdemeanor. Indeed, there are several statutes under which activity that otherwise would not be a federal offense at all becomes a felony if it is conducted through the use of communication facilities. See, *e.g.*, 18 U.S.C. 1084 (transmission of wagering information); 18 U.S.C. 1343 (wire fraud); 18 U.S.C. 1468 (distributing obscene material by cable or satellite television). While some of those activities would be punishable under state law, they would not necessarily be felonies. See, *e.g.*, *Perrin* v. *United States*, 444 U.S. 37 (1979) (holding that the Travel Act prohibits the use of the facilities of interstate

commerce to commit a state misdemeanor commercial-bribery offense). In short, there is nothing anomalous about subjecting drug purchasers to higher penalties if they use communication facilities to carry out their unlawful transactions.

D. The Legislative History Of Section 843(b) Does Not Warrant A Different Result

Because the language of Section 843(b) is clear, there is no need for recourse to the legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). In any event, petitioner's arguments (Br. 15-18, 23-25) based on the legislative history are unpersuasive, and the legislative history offers no reason to doubt that Section 843(b) applies to the use of communication facilities by drug purchasers.

1. Section 843(b) is derived from 18 U.S.C. 1403 (1964), which was enacted as part of the Narcotic Control Act of 1956, ch. 629, § 201, 70 Stat. 573. That statute provided up to five years of imprisonment, with a mandatory minimum of two years of imprisonment, for any person who "use[d] any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in" specified statutes pertaining to controlled substances. 18 U.S.C. 1403(a) (1964). Those offenses included the receipt of narcotics. See 21 U.S.C. 174 (1964).

When the bill that became the Narcotic Control Act was introduced in the Senate, it did not contain the communication-facility provision. S. 3760, 84th Cong., 2d

Sess. (1956). It did, however, authorize federal agents to intercept "any telephonic communication in the course of any investigation to detect or prevent" certain narcotics violations. *Narcotic Control Act of 1956: Hearing on S. 3760 Before the Subcomm. on Improvement in the Federal Criminal Code of the Senate Comm. on the Judiciary*, 84th Cong., 2d Sess. 4 (1956) (quoting S. 3760 § 1407). As the Senate Committee Report explained, that provision was necessary because drug traffickers "use the telephone extensively, and it helps to conceal their identity." S. Rep. No. 1997, 84th Cong., 2d Sess. 10 (1956); see 102 Cong. Rec. 9016 (1956) (statement of Sen. Daniel) (noting that drug traffickers "are protected in their use of the telephone"). Although the discussion of the wiretapping section focused on dealers and traffickers, perhaps because they represented the most obvious example of the need for the provision, the scope of wiretapping authority was not so limited, and it would have extended to investigations of purchasers.

The wiretapping provision faced significant opposition on constitutional grounds, see, *e.g.*, 102 Cong. Rec. at 9036-9042 (statement of Sen. Morse), and the provision that became Section 1403 was proposed as a substitute, see *id.* at 9042 (statement of Sen. Daniel); *id.* at 9302 (amendment offered by Sen. Morse); *id.* at 9304 (statement of Sen. Daniel). As noted above, the substitute provision made it unlawful to use communication facilities to cause or facilitate the receipt of narcotics. And as petitioner recognizes (Br. 23), Section 1403 was in fact applied to the use of a communication facility to purchase small quantities of drugs. See *United States* v. *Alvarado*, 321 F.2d 336, 336-337 (2d Cir. 1963) (letter to order $80 of marijuana), cert. denied, 375 U.S. 987 (1964); *United States* v. *Norton*, 310 F.2d 718, 718-719

(2d Cir. 1962) (purchase of heroin); *United States* v. *Butler*, 204 F. Supp. 339, 340-341 (S.D.N.Y. 1962) (telephone calls to purchase half ounce of drugs); *United States* v. *Robles*, 185 F. Supp. 82, 85 (N.D. Cal. 1960) (letter to purchase heroin). Indeed, nowhere in the case law was there any suggestion that Section 1403 applied to the use of communication facilities by the distributor, but not by the purchaser.

2. When it enacted the CSA in 1970, Congress moved the communication-facility provision from Title 18 to Title 21. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 403(b), 84 Stat. 1263 (21 U.S.C. 843(b)). In keeping with a general approach of eliminating mandatory minimum sentences for most drug offenses, see S. Rep. No. 613, 91st Cong., 1st Sess. 2 (1969), Congress removed the two-year minimum for the communication-facility offense, and it also lowered the maximum penalty from five years to four years.

Petitioner points out (Br. 15) that the 1970 statute reduced simple possession of a controlled substance to a misdemeanor rather than a felony. From that fact, he infers that Congress intended to give a free pass to those who facilitate a felony distribution when they are on the receiving end rather than the supplying end. Section 843(b)'s limited legislative history discloses no such intent to undermine Congress's "comprehensive regime to combat the * * * traffic in illicit drugs." *Gonzales* v. *Raich*, 545 U.S. 1, 12 (2005).

Petitioner emphasizes (Br. 15-18) that Congress intended to distinguish between distributors and simple possessors. That is true but beside the point. The distinction is embodied in Sections 841 and 844, which respectively prohibit distribution and possession. But the

distinction is immaterial under the text of Section 843(b), which prohibits neither distribution nor possession as such but instead proscribes a third and wholly separate category of conduct: using a communication facility in causing or facilitating a drug felony. The House Report and the floor statement on which petitioner relies do not aid him, because they relate only to the distribution-possession dichotomy of Sections 841 and 844, not to causation or facilitation under Section 843(b). See H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 11 (1970) (distinguishing possession with intent to distribute under Section 841 from "possession for one's own use," under Section 844); see also *id.* at 46, 48-49; 116 Cong. Rec. 33,316 (1970) (statement of Rep. Boland) (discussing Section 844).

Had Congress meant to provide an exception for those who cause or facilitate a felony distribution of drugs to themselves as opposed to someone else, it could have done so explicitly, but it did not. The omission is significant for two reasons. First, as petitioner does not dispute, Section 843(b) plainly does cover a defendant's use of a communication facility to buy a personal-use amount of drugs where the defendant's simple possession is itself a felony—for example, because the defendant possesses cocaine base, or because he has prior drug convictions. 21 U.S.C. 844(a); see *United States* v. *Williams*, 176 F.3d 714, 717 n.3 (3d Cir. 1999) (Alito, J.) (observing that "a defendant could be convicted under [Section] 843(b)" even in a case of "mere possession," and noting the "example" of where, under Section 844(a), the defendant commits a felony by possessing a controlled substance "after a prior conviction"). Second, as discussed above, Section 1403(a) unquestionably reached purchasers who used communication facilities.

Had Congress intended to eliminate that coverage, not only would it have been expected to do so explicitly in the new provision, but it also would have been expected to mention its intention in the legislative history. In fact, despite extensive discussion of the lower penalties for possession under Section 844, there was almost no mention at all of Section 843(b) in the legislative history, let alone any suggestion that its scope would be different in this respect from that of Section 1403(a). See, *e.g.*, 116 Cong. Rec. at 33,314 (statement of Rep. Bush) ("There are many other crimes provided for in the prohibited acts portion of this bill, such as * * * unlawful use of a communication facility to facilitate the commission of a felony under the act."). The lack of any discussion of the change that petitioner believes took place "can be likened to the dog that did not bark," and it strongly suggests that the change did not occur. *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991).

3. Petitioner emphasizes (Br. 22-25) that the former Section 1403 applied to the facilitation of "an offense" under certain provisions, whereas Section 843(b) specifically applies to the facilitation of "a felony" under the CSA. The amendment does not appear to have been discussed in the legislative history, but according to petitioner, the only reason Congress would have employed the term "a felony" was to avoid imposing Section 843(b) liability on persons who used a communication facility to purchase drugs for their own consumption.

Petitioner is incorrect, because there are other reasons why Congress would have specified the "felony" limitation. The CSA created many misdemeanor regulatory offenses, such as mislabeling a controlled substance, failing to keep records relating to controlled substances, or unlawfully distributing a schedule V con-

trolled substance. See, *e.g.*, 21 U.S.C. 842(a)(1)-(14) (defining offenses); 21 U.S.C. 842(c)(2)(a) (misdemeanor punishment for knowing violations); 21 U.S.C. 841(b)(3) (distribution of schedule V controlled substance). Congress could reasonably have determined that the use of a communication facility to facilitate *only* misdemeanor offenses—by both the recipient of the call and the caller—did not warrant felony punishment. Here, too, the change in the language of the communication-facility provision does not demonstrate an intent to narrow its scope.

E. The Rule Of Lenity Does Not Apply

Finally, petitioner's reliance (Br. 40-41) on the rule of lenity is misplaced. The rule applies only when the statute contains a "grievous ambiguity or uncertainty." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994)). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity [is] sufficient to warrant application of [the] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted). Given the plain language of the statute and the common meanings of "causing" and "facilitating," Section 843(b) contains no such "grievous ambiguity."

In addition, the fundamental concern of the rule of lenity is ensuring that individuals have fair warning of what conduct is prohibited. See *Liparota* v. *United States*, 471 U.S. 419, 427 (1985). That concern is attenuated where, as here, the statute in question does not

draw a line between innocent and culpable conduct but instead applies only to conduct that is already unlawful. Cf. *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-704 (2005) (discussing the situation in which "the act underlying the conviction * * * is by itself innocuous" and "not inherently malign"). Application of the rule of lenity would not serve an innocence-protecting purpose in this case, because petitioner was hardly required to speculate as to whether his purchases of cocaine were lawful.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 2 provides:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * * * *

3. 21 U.S.C. 843 provides in pertinent part:

Prohibited acts C

* * * * *

(b) Communication facility

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * * * *

(d) Penalties

(1) Except as provided in paragraph (2), any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine under Title 18, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant

substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine under Title 18, or both.

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4. 21 U.S.C. 844 provides in pertinent part:

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both,

except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as other-

wise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

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