No. 08-192

IN THE
Supreme Court of the United States

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

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

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

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*

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

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

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

The Fourth Circuit's decision in this case holds that, although acquiring illicit drugs for personal use is ordinarily a misdemeanor under the federal drug laws, anyone who uses a cell phone (or any other "communication facility") to do so may be charged with a felony violation of 21 U.S.C. § 843(b)—facilitating the seller's commission of felony drug distribution. That ruling is of vital importance to NACDL and its members, who routinely represent criminal defendants facing federal drug charges. Given the increasingly pervasive use and extraordinary mobility of today's "communication facilit[ies]," the Fourth Circuit's construction threatens to turn almost any personal-use purchase into a felony offense. That does not merely contravene Congress's intent, which was to distinguish sharply between drug users and drug distributors. It also undermines efforts to ensure that drug users receive the treatment and opportunities that will maximize the likelihood of their rehabilitation and reintegration as useful members of society. NACDL thus has a unique perspective on, and a keen interest in ensuring, proper resolution of the question presented consistent with equitable and evenhanded administration of the federal drug laws.

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than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioner and respondent were notified of the intent to file this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

REASONS FOR GRANTING THE PETITION

The courts of appeals are now squarely divided on an issue of ever-increasing importance to defendants and the government alike: Whether an individual who acquires illegal narcotics for personal use—ordinarily a misdemeanor under federal law—can be charged with a federal felony offense under 21 U.S.C. § 843(b) if he uses a cellular phone, e-mail, or any other "communication facility" in doing so. Three courts of appeals (the Sixth, Ninth, and Tenth Circuits) have concluded that Section 843(b) does not reach purchases for personal use, while at least two others (the Seventh Circuit and the Fourth Circuit below) have drawn the opposite conclusion. That square conflict by itself justifies this Court's review. Defendants should not receive a different brand of federal justice depending on the happenstance of geography; Congress enacted a single Title 21 of the United States Code, and that Title should have a single meaning throughout the Nation.

The issue is, moreover, of great and ever-increasing significance. When Congress comprehensively revised the federal drug laws, it sought to distinguish between drug users or addicts on one hand and drug dealers on the other, deeming the former misdemeanants and the latter felons. That distinction serves important purposes. Perhaps most importantly, it distinguishes between defendants based on culpability. It also ensures that the harsh penalty of extensive incarceration that accompanies a felony conviction will not necessarily be meted out to drug users and addicts who have a greater chance of being rehabilitated if they are not incarcerated on felony charges. The decision below destroys the distinction Congress sought to draw, converting mere users from misdemeanants into federal felons whenever they happen to call, e-mail, or text-message their suppliers. Indeed, given the increasing ubiquity of cell phones, text

messages, e-mails, and other means of electronic communication in our daily lives, the Fourth Circuit's decision threatens to obliterate that distinction in virtually every case.

I. The Courts Of Appeals Are Squarely Divided On An Increasingly Important And Recurring Issue

A. The Courts Of Appeals Disagree On Whether Section 843(b) Extends To Use Of A Communication Facility For Personal-Use Purchases

Section 843(b) of Title 21 makes it a felony for "any person knowingly or intentionally to use any communication facility" (including traditional telephones, cellular phones, and e-mail) "in committing or in causing or facilitating the commission of any act or acts constituting a felony" under the federal drug laws. There can be no dispute that the courts of appeals are squarely divided on whether the purchase of drugs for personal use—itself a misdemeanor under federal law—"facilitates" the commission of a felony drug offense by the seller within the meaning of Section 843(b). The circuit conflict was expressly acknowledged by the Fourth Circuit below:

> We begin with the recognition that our sister circuits are divided on the issue facing us; some find that when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated. * * * In contrast, other circuits have concluded that [using a communication facility to acquire drugs] for personal use [is] covered by § 843(b).

Pet. App. 9a-10a. The conflict has been recognized by the Seventh Circuit as well. *United States* v. *Binkley*, 903 F.2d 1130, 1135-1136 (7th Cir. 1990). And it has been repeatedly acknowledged by the district courts. See, *e.g.*, *United States* v. *Lewis*, 387 F. Supp. 2d 573, 579 (E.D. Va. 2005) ("[A] circuit split does exist on the reach of

section 843(b) * * * ."); *United States* v. *Colla*, No. 06-CR-336, 2008 WL 1969600, at *4 n.2 (E.D. Wis. May 3, 2008) ("There is a circuit split on this issue * * * .").

Those acknowledgements are clearly correct. The Fourth Circuit (in the decision below) and Seventh Circuit (in two earlier decisions) have now squarely held that, when a defendant uses a cellular telephone or other communication facility to acquire illegal narcotics for his own misdemeanor personal use, he may be charged with facilitating the seller's felony distribution under 21 U.S.C. § 843(b). For example, in *United States* v. *Kozinski*, 16 F.3d 795 (7th Cir. 1994), the Seventh Circuit held that whenever, "by use of their telephone, the [defendants] have made the distribution of the cocaine" by the sellers "easier, they have facilitated it and violated the statute." *Id.* at 807. Rejecting the claim that one who purchases for personal use does not "facilitate" the offense of the seller, the court declared that "[w]hat [the defendants] do with the cocaine after it is distributed is irrelevant to whether they facilitated distribution [to themselves]; the crime is complete long before they use or dispose of the cocaine." *Ibid.* "[T]he defendants' status as buyers or distributors is of no consequence regarding section 843(b); rather, their status as facilitators alone gives rise to criminal liability." *Ibid.*

The decision below reached the same result. The court of appeals stated that, because Section 843(b) "does not specify *whose* felony must be at issue," it applies so long as the purchaser's use of a phone or communication facility to acquire drugs for personal use makes the seller's felony "distribution easier." Pet. App. 11a. The court therefore upheld petitioner's felony conviction for using a cell phone to acquire a personal-use quantity of illegal narcotics, even though he would have been guilty at most of a misdemeanor absent use of the cell phone. See also *Binkley*, 903 F.2d at 1135-1136 (holding that the

defendant/purchaser's telephone conversations with the seller "facilitated" the seller's felony distribution, making him liable under Section 843(b), because the call "not only made [seller's] sale of cocaine (a felony under Title II of the Act) easier, it made the sale possible.").

By contrast, three other courts of appeals have held that the use of a telephone to purchase drugs for personal use does not constitute a violation of Section 843(b). See *United States* v. *Baggett*, 890 F.2d 1095, 1097-1098 (10th Cir. 1989); *United States* v. *Martin*, 599 F.2d 880, 888 (9th Cir. 1979); *United States* v. *Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) (per curiam). In *Baggett*, for example, the Tenth Circuit found that the federal drug enforcement scheme "clearly places mere 'customers' in the misdemeanor category" and rejected the government's argument that anyone who uses a telephone to obtain drugs for personal use is suddenly transformed into a felon. *Baggett*, 890 F.2d at 1097. Similarly, the Ninth Circuit has stated that, "[t]o hold that persons who merely buy drugs for their personal use are on equal footing with distributors by virtue of the facilitation statute would undermine [the statutory distinction between distributors and simple possessors]." *Martin*, 599 F.2d at 889. Finally, the Sixth Circuit, relying on the Ninth Circuit's opinion in *Martin*, has held that the use of a telephone to purchase drugs for personal use does not constitute facilitation of a drug distribution conspiracy. *Van Buren*, 804 F.2d at 892.[2]

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[2] While conceding the existence of a square circuit conflict, the decision below does not properly reflect the alignment of the circuits. As an initial matter, it states that the Sixth Circuit's decision in *Van Buren*, *supra*, is inapplicable because that decision addresses only whether the use of a telephone to purchase drugs for personal use facilitates a drug *conspiracy*, not drug distribution. Pet. App. 10a n.6. That is a distinction without a difference. The inquiry is whether the purchase of drugs for personal use, itself a mis-

That conflict itself is reason enough for this Court to grant review. Whether or not a defendant has committed a federal drug felony by purchasing a personal-use quantity of drugs using a cell phone should not depend on the happenstance of geography. The meaning of our Nation's criminal laws should not vary with whether the conduct occurs in Los Angeles or Chicago.

B. The Conflict Has Ever-Increasing Importance

The issue, moreover, is exceedingly important and has increasing ramifications (even apart from its impact on Congress's goals, as discussed below). As this case and the others cited above make clear, the aggressive use of Section 843(b) to pursue drug users (as opposed to distributors) cannot be dismissed as a lark: It is a practice that is now endorsed by at least two circuits. Further, the available cases necessarily understate the magnitude of the problem because they do not and cannot reflect the instances in which personal-use defendants, threatened with a felony charge under Section 843(b), plead guilty to lesser charges to avoid that possible consequence. There is no reason why some defendants should confront the threat of felony criminal

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demeanor, can facilitate the commission of a felony by the seller. With respect to that issue, the Sixth Circuit clearly held that the purchaser *does not* facilitate the commission of the felony. *Van Buren*, 804 F.2d at 892. There is, moreover, simply no textual or other basis for distinguishing between the alleged facilitation of distribution and the alleged facilitation of conspiracy to possess with intent to distribute. And the Sixth Circuit's decision in *United States* v. *McLernon*, 746 F.2d 1098 (6th Cir. 1984), invoked by the decision below, is inapposite. In *McLernon*, the Sixth Circuit held that Section 843(b) applied to a drug *dealer* who facilitated the purchase of drugs for *distribution*. *Id.* at 1106-1107. For present purposes, however, any debate concerning the state of the law in the Sixth Circuit (or the Fifth and Eleventh) is beside the point. Whether the line-up is three to two, two to two, or two to five, the circuits are clearly divided.

liability in some circuits while defendants engaging in identical conduct in other circuits do not.

The importance of the issue is also increasing. In today's mobile and digital society, electronic communications—cellular phones, e-mail, text messages, and instant messaging—are rapidly displacing in-person communications for almost every sort of interaction. In the last five years, the number of mobile wireless telephone subscribers grew by almost 100 million.[3] E-mail proliferates. Internet usage is ubiquitous as well.[4]

Perhaps most significantly, text-messaging has shown astronomical growth over the past few years. Just 10 years ago, text-messaging was virtually unheard of in this country. According to the Cellular Telephone Industry Association (CTIA), Americans sent 57.2 billion text messages in 2005, and now send more than ten times that amount—about 600.5 billion text messages—a year. See CTIA Wireless Quick Facts, http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (last visited Sept. 15,

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[3] Compare Fed. Commc'n. Comm'n., Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Chart 11.1 (2008) (241,834,000 subscribers per Form 502) (*avail.* at http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0828/DOC-284932A1.pdf), with Fed. Commc'n. Comm'n., Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Table 11.1 (2003) (141,776,000 subscribers per Form 502) (*avail.* at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend803.pdf).

[4] On average, Americans now spend 26 hours and 26 minutes per month using the Internet. Gary Holmes, The Nielsen Company, *Press Release, Nielsen Reports TV, Internet and Mobile Usage Among Americans*, July 8, 2008 (*avail.* at http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnextoid=fe63c9769fcfa110VgnVCM100000ac0a260aRCRD).

2008).[5] Most of that growth is among America's youth.[6] Indeed, among high school youth, the text message has virtually replaced the whisper as the preferred means of communicating during class.[7] The court of appeals' theory in this case, however, could convert one student's text-messaged inquiry about his neighbor's willingness to bring his ecstasy to a party and share it—"R U able to brng X to prty tnite" or "can U bring?"—into a potential

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[5] By contrast, in 2000, the total number of text messages sent in the United States was less than .003 percent of that total, or about 14.4 million. MarketWatch, *Text Messaging Use in South Carolina Soars by Nearly 500 Percent*, July 23, 2008 (*avail.* at http://www.marketwatch.com/news/story/text-messaging-use-south-carolina/story.aspx?guid=%7BE2BEF5B9-0D18-4ED1-A5FC-84E5917503F5%7D&dist=hppr).

[6] Teens send, on average, 455 text messages and receive 467 messages each month; they thus send and receive about 15 or 16 text messages a day. Reuters, *Text Messaging Improves Parent-Teen Relationship*, April 16, 2008 (*avail.* at http://www.reuters.com/article/pressRelease/idUS117578+16-Apr-2008+BW20080416). Consumers most likely to send and receive text messages are those between 13 and 24 years old. Margaret Webb Pressler, *For Texting Teens, an OMG Moment When the Phone Bill Arrives*, Wash. Post, May 20, 2007, at A1. As of 2006, 65% of people ages 18-29 used their cell phones for text messaging, compared with 37% of people ages 30-49, 13% of people ages 50-64, and 8% of people 65 and older. Lee Rainie, *PEW Internet & American Life Project, PEW Internet Project Data Memo* 6 (2006) (*avail.* at http://www.pewinternet.org/pdfs/PIP_Cell_phone_study.pdf). About 85 percent of teens ages 12-17 engage in some form of electronic communication, including text messaging, sending email, or instant messages. Amanda Lenhart *et al.*, *Pew Internet & American Life Project, Writing, Technology and Teens* 3 (2008) (*avail.* at http://www.pewinternet.org/pdfs/PIP_Writing_Report_FINAL3.pdf).

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

federal felony.[8] It is hard to see why the individual who obtains a personal-use quantity of drugs by whispering an inquiry about its availability to his neighbor in class should be guilty of a misdemeanor, while the person who texts the same inquiry to the same neighbor should be guilty of a felony. See pp. 17-19, *infra*. More fundamentally, the utter breadth of the government's theory amply evidences the importance of the issue and the need for this Court to resolve it.

The Fourth and Seventh Circuits' position on this issue also has ramifications well beyond Section 843(b). In essence, those courts reason that a purchaser uses a cell phone to "facilitate" his supplier's felony sale of narcotics if he uses that phone to contact the supplier. In their words, the use of the phone does not merely make the seller's "distribution easier"; "it ma[kes] the sale possible." Pet. App. 11a (quoting *Binkley*, 903 F.2d at 1136). But that same rationale could threaten to convert virtually *any* purchaser of personal-use narcotics into a federal felon, even if the purchaser does *not* use a cell phone.

The federal aiding-and-abetting statute, 18 U.S.C. § 2(a), provides anyone who "aids and abets" or "procures" another's commission of "an offense against the United States" is "punishable as a principal." Under the Fourth and Seventh Circuits' reasoning, personal-use purchasers might be accused of "aiding and abetting" or "procuring" the seller's felony act of distributing the

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

drug to them. The purchaser's act of showing up to make the purchase, for example, does not merely make the seller's "distribution easier"; "it ma[kes] the sale possible." Pet. App. 11a (quoting *Binkley*, 903 F.2d at 1136). The notion that every purchaser of drugs is liable as a principal for felony distribution, because his making a purchase aids and abets the seller's felony sale, should be promptly dismissed as absurd. The fact that the Fourth and Seventh Circuits' reasoning could threaten that ridiculous over-expansion of federal felony liability likewise weighs in favor of granting review.

II. The Fourth Circuit's Expansion Of Section 843(b) Threatens Profoundly Negative Consequences For The Administration Of Federal Drug Laws And The Goal Of Rehabilitation

This case is also important because of its potential impact on individual defendants and society at large. When Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, Congress sought to distinguish between drug users and drug distributors. The decision below effectively guts that distinction and, in the process, guts the policy goals Congress sought to achieve.

A. The Fourth Circuit's Opinion Circumvents The Distinction Between Drug Felonies And Misdemeanors

When Congress crafted the Comprehensive Drug Abuse Prevention and Control Act—including Section 843(b)—Congress sought "to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *Martin*, 599 F.2d at 889. Congress adopted the philosophy of the President's Advisory Committee on Narcotic and Drug Abuse (the "Prettyman Commission"), established by President Kennedy in 1963. See H.R. Rep. No. 91-1444, at 8-10 (1970) (*reprinted* 1970

U.S.C.C.A.N. 4566, 4574-4575). Although the Prettyman Commission proposed strident measures to combat drug trafficking, it advocated lesser penalties for individual drug abusers in order to promote rehabilitation. *Id.* at 10 (*reprinted* 1970 U.S.C.C.A.N. at 4575). As a result, simple possession, or possession for personal use, is classified as a misdemeanor while possession with intent to distribute is a felony. *Id.* at 11 (*reprinted* 1970 U.S.C.C.A.N. at 4577).

The decisions of the Fourth and Seventh Circuits, however, eradicate that distinction whenever the drug user employs *any* communication facility in acquiring his drugs. Under those precedents, Congress's careful distinction simply becomes irrelevant once a phone becomes involved. The potential impact of such a rule was broad two decades ago, when the Sixth Circuit observed that "the use of a telephone by those engaged in narcotics transactions is very common." *United States* v. *Dotson*, 871 F.2d 1318, 1326 (6th Cir. 1989). But, in the modern era of electronic- and network-driven communications, those rulings could convert almost every misdemeanor acquisition of personal-use drugs into a felony.

That has serious consequences for individual defendants. While possession of a personal-use quantity of drugs is a misdemeanor punishable by a maximum sentence of one year of imprisonment, a minimum $1,000 fine, or both, 21 U.S.C. § 844(a), felons face the prospect of serious time in prison. A felony conviction under Section 843(b) is punishable by up to four years of incarceration, a fine under Title 18, or both. 21 U.S.C. § 843(d). For some individuals, that felony offense could have serious collateral consequences as well. As discussed in the petition, it could become a predicate crime for certain recidivism-based sentencing enhancements, and can result in deportation for resident aliens such as petitioner in this case. See Pet. 16.

A felony conviction under Section 843(b) also has significant collateral consequences for some of the most important rights a citizen can have in our republican form of government. Criminal disenfranchisement laws routinely deny those convicted of felonies the right to vote. In 46 States and the District of Columbia, citizens who are incarcerated lose the right to vote. Jamie Fellner & Marc Mauer, *Losing the Vote, the Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project, Table 1 (1998) (*avail.* at http://www.hrw.org/reports98/vote/usvot98o.htm). Felons on parole are disenfranchised in 32 States, while 29 States disenfranchise those on probation. *Ibid.* Another 14 States disenfranchise former felons even after their sentences are served, with ten States disenfranchising felons permanently. *Ibid.*

Conviction of a crime punishable by imprisonment for more than one year—including a violation of Section 843(b)—also disqualifies citizens from serving on a federal jury indefinitely (absent a restoration of civil rights). See 28 U.S.C. § 1865(b)(5). "The only method currently provided by federal law to restore civil rights is a pardon." Office of the Pardon Attorney, *Federal Statutes Imposing Collateral Consequences Upon Conviction* 1 (2000).

Finally, a felony conviction or imprisonment can have a devastating impact on an individual's ability to earn a living and financial well-being. For example, a convicted felon may not be able to serve his country by enlisting in the armed forces, 10 U.S.C. § 504(a), or be permitted to be a pilot or flight instructor, 14 C.F.R. § 61.15(c), (d). Although a felony conviction does not disqualify a person from federal employment, it "is a factor in determining suitability for it." Office of the Pardon Attorney, *supra*, at 3. A felony conviction, moreover, may cost the convicted individual not merely his job but also his home and

safety net. Those convicted of an offense punishable by more than one year of incarceration, such as Section 843(b), may find their property forfeited under 21 U.S.C. § 881(a)(7). They can be evicted from public housing under 42 U.S.C. § 1437f(d)(1)(B)(iii). And they may lose federal benefits as well. For example, federal law denies a $1500 tax credit to students and their families if the student has been convicted of a drug felony. Robin Levi & Judith Appel, Office of Legal Affairs, *Collateral Consequences: Denial of Basic Social Services Based Upon Drug Use* 4 (2003). Those individuals with felony drug convictions are also permanently barred from receiving food stamps and cash benefits funded under part A of Title IV of the Social Security Act. *Id.* at 4-5 (citing 21 U.S.C. § 862a).

B. The Fourth Circuit's Opinion Undermines The Goal Of Rehabilitating Drug Abusers

One of the policies served by the distinction between drug users and drug dealers is rehabilitation. See H.R. Rep. No. 91-1444, at 8-10, 18-19 (*reprinted* 1970 U.S.C.C.A.N. at 4574-75, 4584-85). That makes sense. While substance-abuse treatment programs are often available in federal prisons, those convicted of an offense are more likely to receive treatment or participate in a substance-abuse program while on probation or parole, rather than in prison or jail. Bureau of Justice Statistics, *Substance Dependence, Abuse, and Treatment of Jail Inmates* 8 (2002). Incarceration, moreover, often prolongs the road to recovery or simply exacerbates preexisting addiction. As a result, many have come to the conclusion that "jail sanctions are not a recognized part of any medically accepted approach for the treatment of

alcohol or drug addiction, or as a medically appropriate response to alcohol or drug relapse * * * ."[9]

By conflating the drug user with the drug seller, the Fourth and Seventh Circuits play havoc with Congress's effort to rehabilitate the former. Surrounding drug users in prison with hardened criminals and drug traffickers for a potentially extended period of time is simply counterproductive where the goal is reformation and reintegration into society.[10] Yet that is precisely the approach that the Fourth and Seventh Circuits would impose.

The impact, moreover, extends beyond incarceration itself. Increasingly, modern criminology has recognized that rehabilitation and reform can require the offender to create or renew a "pro-social" identity, a process called "desistance." Stephen Farrall & Shadd Maruna, *Desistance-Focused Criminal Justice Policy Research: Introduction to a Special Issue on Desistance from Crime and Public Policy*, 42 How. J. of Crim. Just. 358, 358-359 (2004). Permanently branding the offender as a "felon" —and denying him the myriad rights described above— can have a devastating effect on that process: It can reinforce the offender's criminal identity and make it more

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

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

difficult for him build a new, civic-minded one.[11] By choosing to treat drug users as misdemeanants, Congress maximized their chances at rehabilitation by shedding their identity as criminals. By permanently branding those same individuals as felons (for having "facilitated" their source's felony of selling to them), the Fourth and Seventh Circuits undermine that goal.

C. The Court of Appeal's Contrary Analysis Is Fundamentally Mistaken

The court of appeals did not seriously dispute the above analysis. It did not deny that Congress carefully distinguished between drug users and drug sellers, deeming the former misdemeanants and the latter felons. Nor did it dispute that allowing mere purchasers of personal-use quantities to be prosecuted as felons whenever they use a phone effectively eviscerates that careful distinction. Instead, the court relied on what it thought was the import of Section 843(b)'s plain text and its own notions of the statute's underlying policies.

1. With respect to text, the Fourth Circuit simply ignored a critical background principle—that one cannot be guilty of aiding and abetting a "sale" merely by participating in the sale as a purchaser. See Pet. 18-19. As petitioner explains in detail, common-law principles, the Model Penal Code, and this Court's cases have all long made clear that one does not "facilitate" illegal activity within the meaning of federal law merely by "patroniz[ing]" it as a customer. *Id.* at 18-20. Congress was presumably aware of those principles when it enacted Sec-

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

tion 843(b). The contrary view, moreover, could render virtually *every* purchaser a potential felon, even if he does not use a phone, since showing up to make a purchase in some sense could be said to facilitate the seller's felony distribution. See pp. 10-11, *supra*. Congress clearly did not intend that result: "If the abuser is to be penalized, he should not be penalized in the spirit of distribution." H.R. Rep. No. 1444, at 9 (*reprinted* 1970 U.S.C.C.A.N. at 4575).

Finally, as petitioner explains, the Fourth Circuit's decision is difficult to reconcile with Congress's deliberate decision to restrict Section 843(b) to conduct that facilitates a drug "felony," excluding the misdemeanors. Pet. 23. The Fourth Circuit's decision in this case brings the most significant category of misdemeanor offenses—*i.e.*, personal-use offenses—within Section 843(b)'s scope. That is not merely clearly contrary to Congress's intent. Pet. 23. It is also contrary to the settled rules of statutory construction. This Court will not adopt a proposed construction that "would render" a critical term superfluous or "insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); see also *Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879) (a statute "ought * * * to be so construed" if possible so that "no clause, sentence, or word shall be superfluous, void, or insignificant"). The Fourth Circuit's approach has precisely that effect. Congress carefully chose to insert the word "felony" into Section 843(b) so as to limit its reach to uses of communication facilities that facilitate *felony* offenses. By sweeping the most significant misdemeanor offense within Section 843(b)'s scope, the Fourth Circuit's decision renders Congress's use of the word "felony" utterly insignificant.

2. Nor does the Fourth Circuit's analysis of the policy underlying Section 843(b) make sense. According to the Fourth Circuit, Congress might have had good reason to make the transaction at issue here a misdemeanor

if conducted in person, but a felony once the purchaser used a phone. Using communication facilities, the court of appeals stated, "makes it easier for criminals to engage in skullduggery, and Congress may reasonably have desired to increase criminal penalties for those who use such means to evade detection by law enforcement." Pet. App. 12a. That proves too much. If Congress's goal was to increase the penalty whenever someone uses a cell phone—because it putatively makes detection more difficult or because Congress sought to protect communications networks from misuse—there would have been no reason for Congress to limit Section 843(b) to use of a communication facility to facilitate a "felony" drug offense; it would have drafted the provision to address use of a communication facility to facilitate *any* drug offense. Nor is it sensible to suggest that using a communication facility makes detection more difficult. E-mail, text-messaging, and faxing all leave an electronic or physical paper trail where whispers in an alley will not.

In any event, it is nonsensical to suggest that Congress somehow had a preference for in-person transactions in open-air drug markets. Those markets often operate in a specific, geographically defined area at identifiable times so that buyers and sellers are able to locate one another with ease. See Alex Harocopos & Mike Hough, Community Oriented Policing Services, *Drug Dealing in Open-Air Markets* 1 (2005). Such street dealing has numerous societal impacts affecting people other than the purchaser and seller. Open-air drug markets blight inner-city neighborhoods, reducing economic, educational, and social opportunities available to law-abiding adults and children. Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 Conn. L. Rev. 571, 584 (1995). Street dealing increases violent crime, with dealers routinely battling for territory to sling their wares, endangering innocent bystanders and law enforce-

ment personnel. *Ibid.*; see also *Cotton* v. *State of Maryland*, 872 A.2d 87, 92-93 (Md. 2005).[12] And open-air drug markets have a disparate impact on those who occupy inner-city areas and neighborhoods. National Drug Intelligence Center, *Washington/Baltimore High Intensity Drug Trafficking Area Drug Market Analysis* 9 (2008). Whatever might be said about Congress's chosen policies for combating illegal drug use and distribution, favoring street-dealing over electronic communications is not among them.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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[12] Simply arresting buyers and sellers in open-air markets is unlikely to have a significant impact on the size of the market, as new dealers spring up to take the place of those that have been taken off the streets. Harocopos & Hough, *supra*, at 2.