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 *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law ("the Center") is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is the central issue in criminal justice today at all levels of government, there is a dearth of research on how prosecutors exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decisionmaking. The Center is dedicated to identifying the best prosecutorial practices and suggesting avenues of reform. The Center is developing a litigation practice that aims to use its empirical research and experience with criminal justice and prosecution practices to assist in important criminal justice cases at all levels, concentrating on cases in which exercises of prosecutorial discretion raise significant substantive legal issues.

SUMMARY OF ARGUMENT

The Court should grant the petition because the uncertainty surrounding Section 843(b) frustrates the responsible and ethical exercise of prosecutorial discretion and because the statutory

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

context and history provide compelling evidence that Section 843(b) does not – and was never intended to – reach purchasers of drugs for personal use. Section 843(b) is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which draws a sharp distinction between drug distribution, a felony subject to harsh penalties, and personal use of controlled substances, a misdemeanor for which Congress emphasized treatment and rehabilitation, rather than retributive punishment. The lower court's decision fundamentally undermines this pivotal distinction by improperly subjecting purchasers for personal use to harsh penalties reserved for drug traffickers and distributors.

Reading Section 843(b) to reach the drug purchases of simple users like Petitioner also conflicts with the extensive statutory history of Section 843(b), which demonstrates that the provision was intended solely to aid in the apprehension and prosecution of large-scale narcotics traffickers and distributors, whose use of the telephone enabled them to evade the law by avoiding contact with the ultimate buyer. Because buyers, on the other hand, could be more easily observed, apprehended and prosecuted, the extensive legislative record of the communication facility provision contains no reference at all to buyers. The complete statutory history of Section 843(b) – which was not considered by the courts below – thus provides compelling evidence that Congress never intended Section 843(b) to apply to purchasers for personal use.

The issue of whether Section 843(b) reaches purchasers of drugs solely for personal use has wide-

ranging consequences for enforcement of the federal drug laws. Because the telephone and other personal communications devices are a pervasive aspect of modern life and commerce, the lower court's reading of Section 843(b) would transform almost every purchase of drugs for personal use into a felony subject to severe punishment. That reading not only undermines Congress' clear emphasis on lowered penalties and rehabilitation for "simple possession" but, because Department of Justice guidelines direct prosecutors to charge the "most serious" offense applicable to a given case, it will divert prosecutorial resources from the express legislative priority of combating distribution and promotion, and may potentially lead to arbitrary and discriminatory enforcement. Moreover, the lower court's decision will have a staggering impact on the plea bargaining process, giving prosecutors unwarranted leverage to threaten "simple possessors" with lengthy prison sentences, and altering the basic calculus of an accused in deciding whether to proceed to trial.

In sum, the lower court's decision eviscerates the clear statutory distinction between distributors and purchasers, elides the basic concerns that gave rise to Section 843(b) in the first place, and will have a fundamental and unwarranted impact upon the exercise of prosecutorial discretion and the criminal justice process more generally. For these reasons, the Court should grant the petition for certiorari.

ARGUMENT

I. The Split Among the Courts of Appeals Leaves Prosecutors Without Guidance In Applying Section 843(b) and Creates A Vast Disparity In Prosecutions For Drug Possession.

Although the courts are the ultimate arbiters of a statute's meaning, prosecutors are called on daily to interpret the law and determine whether particular conduct falls within a statute's scope. *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The Justice Department, of course, has a very specific responsibility to determine for itself what [a] statute means, in order to decide when to prosecute . . . ."); *see also Wagner Seed Co. v. Bush*, 946 F.2d 918, 926 (D.C. Cir. 1991).

This Court has previously recognized that prosecutorial "discretion is an integral feature of the criminal justice system," *United States v. Labonte*, 520 U.S. 751, 762 (1997), and to this end, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)) (internal quotations omitted). This discretion is predicated not only on the assumption that prosecutors will fulfill their ethical duty to "seek justice," *Young v. United States*, 481 U.S. 787, 803 (1987) (quoting Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association (ABA)

Model Code of Professional Responsibility (1982)), but also on the notion that the laws they seek to enforce are clear and consistently interpreted. *Cf. McNally v. United States*, 483 U.S. 350, 360 (1987) (declining to "construe [a criminal] statute in a manner that leaves its outer boundaries ambiguous . . . .") (*superseded by statute on other grounds*). For prosecutors to fulfill their legal and ethical mandate to pursue justice, the laws they are entrusted to enforce must be clearly defined and consistently applied. This Court should therefore grant the petition in order to provide prosecutors with clearer guidance on the critically important question of whether to charge certain conduct as a felony or as a misdemeanor.

There is an additional yet related reason that prosecutors – and the public – would benefit from this Court's resolution of the legal issues presented by the petition. As a result of the split among the courts of appeals regarding Section 843(b), possessors are subject to misdemeanor charges and maximum one-year sentences in some jurisdictions, and felony charges and four-year sentences in others. Equally importantly, more than half of the courts of appeal have provided *no* guidance to prosecutors and the public within their jurisdictions. The combined effect of the competing interpretations among some courts of appeals, and the lack of interpretations from others, undermines the congressionally-mandated "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Indeed, under the present regime, two individuals with *identical* records who are found guilty under federal law of *identical*

conduct could, depending on where in the country they reside, face substantially different charges and sentences. The Court should grant the petition in order to eliminate these disparities and ensure consistent treatment between similarly-situated defendants.

II. Permitting Prosecutors to Charge Possessors Under Section 843(b) Is At Odds With The Structure of The Federal Drug Laws.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citation omitted). Section 843(b) is part of a carefully designed drug enforcement scheme, in which Congress drew a sharp distinction between drug distribution, subject to severe punishment, and "simple possession," for which the Act emphasizes rehabilitation and leniency. This statutory structure compels the conclusion that Section 843(b) was never intended to apply to purchasers of drugs solely for personal use.

Prior to 1970, the mere purchase or possession of drugs in small amounts for personal use could result in a felony conviction and harsh penalties. *See, e.g.*, Internal Revenue Code of 1954, Pub. L. No. 591 ch. 736 § 4704(a), 68A Stat. 550 (originally codified at 26 U.S.C. § 4704(a)); Narcotic Drugs Import and Export Act of 1909 ch. 100 § 2, Pub. L.

No. 221, 35 Stat 614 (originally codified at 21 U.S.C. § 174) (all repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 §§ 101(a)(2), (b)(3)(A), 84 Stat. 1236, 1291-92). Under this pre-1970 regime, small-time drug users were lumped together with narcotics traffickers and large-scale drug distributors; both could be convicted of felonies and punished severely.

In order to treat drug possessors less harshly, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Act"), which "draws a sharp distinction between drug offenses of a commercial nature and illicit personal use of controlled substances." *United States v. Swiderski*, 548 F.2d 445, 449 (2d Cir. 1977); *see also United States v. Martin, 599 F.2d 880, 889 (9th Cir. 1979)* (noting that "[t]he scheme of the Act shows that Congress intended to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties.").

To implement this pivotal policy distinction between distribution and personal drug use, the Act makes drug distribution a felony, punishable by a *minimum* five to ten years imprisonment and a maximum of fifteen years imprisonment, 21 U.S.C. § 841, while "simple possession" is a misdemeanor, punishable by not more than one year imprisonment. 21 U.S.C. § 844; *see also id.* ("First offenders convicted of simple possession may receive a conditional discharge . . . and upon fulfillment of any terms and conditions the court might impose, their record will be expunged"). This disparity in punishment reflects an unmistakable congressional

determination that drug distribution is a far greater evil than "simple possession," and a clear statutory purpose to treat distributors much more harshly than those who purchase drugs for personal use.

Applying Section 843(b) to one who purchases drugs in small quantity for personal use would turn this carefully drawn statutory distinction on its head by subjecting purchasers to penalties *far greater* than the maximum one year term of imprisonment Congress intended for "simple possession." Not only is a violation of Section 843(b) punishable by four years imprisonment – four times the maximum penalty for simple possession – but the statute also provides that "[e]ach separate use of a communication facility shall be a separate offense under this subsection." 21 U.S.C. § 843(b).

Under the lower court's interpretation, a purchaser who, as a matter of pure happenstance, makes several phone calls to arrange a single purchase is guilty – not of a single misdemeanor punishable by one year imprisonment as provided in Section 844 – but of *multiple felonies*, each punishable by *four* years imprisonment. *Id.* Indeed, this case exemplifies how reading Section 843(b) to reach purchasers for personal use is incompatible with treating drug users more leniently than distributors. Petitioner was charged with *seven* counts of violating Section 843(b) for using a telephone to arrange at most *two* meetings to purchase drugs. (JA at 10-15; App. at 17a). Thus, instead of the maximum two years imprisonment he would have faced on two misdemeanor counts of "simple possession" under Section 844, he was

instead subject to seven felony convictions totaling a potential maximum 28 years imprisonment.

Such a result is at war with the clear intent of Congress, as reflected in the text and structure of the Act, which was to moderate the punishment imposed on drug users, and instead focus on treatment and rehabilitation. *See, e.g.,* H.R. Rep. No. 1444 at 10, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4575 ("[T]he rehabilitation of the individual [drug abuser], rather than retributive punishments should be the major objective."); *id.* at 11, 1970 U.S.C.C.A.N. at 4576 ("[P]ossession for personal use . . . involves the least severe penalties of all."); S. Rep. No. 91-613 (1969) at 2 (noting that "the increasingly longer sentences that had been legislated in the past [for drug abuse] had not shown the expected overall reduction in drug law violations"). The Court should therefore grant the petition and clarify that Section 843(b) should be read within the context of the statute in which it is found.

III. The Statutory History Of Section 843(b) Demonstrates That It Was Never Intended To Be Applied To Purchasers Of Drugs For Personal Use.

Section 843(b)'s statutory history further demonstrates that it was directed solely toward drug traffickers and large-scale distributors, and not personal drug users. The communication facility provision was originally enacted – in substantially identical form to Section 843(b) – as part of the Narcotic Control Act of 1956 ("NCA"), Pub. L. No. 84-728 § 1403, 70 Stat. 567 at 573, *repealed by*

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 § 1101(b)(1), 84 Stat. 1236, 1292.[2] The targets of this provision are unmistakable: "*big-time traffickers* [who] are seldom caught and convicted, because . . . [t]heir operations are almost entirely limited to the telephone." S. Rep. No. 84-1997 at 9 (1956) (emphasis added).

Congress has long been concerned with the use of communications facilities by narcotics traffickers and large-scale distributors to evade the law. In the early 1950s – well before Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510 *et seq.*, authorized the use of

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[2] Section 1403 of the Narcotic Control Act of 1956, titled "Use of communications facilities-penalties," stated:

> (a) Whoever uses 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 [certain enumerated drug felonies] shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.
>
> (b) For purposes of this section, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication.

Pub. L. No. 84-728, § 1403, 70 Stat. 567, 573 (codified at 18 U.S.C. § 1403).

wiretapping in criminal investigations – the inability of prosecutors to obtain admissible evidence against large-scale drug traffickers and distributors was stifling law enforcement efforts to enforce the drug laws. *See* S. Rep. No. 84-1997 (1956). Federal and state law enforcement simply could not obtain convictions of large-scale drug traffickers and distributors whose "operations [were] almost entirely limited to the telephone," and who were therefore able to evade the law by "avoid[ing] all direct contact with the peddlers and ultimate buyers . . . ." *Id.* at 9. To study the problem, Congress convened a Judiciary Subcommittee on Improvements In the Federal Criminal Code, *see* S. Res. 67, 84th Cong. (1955), chaired by Senator Price Daniel.

After extensive hearings, the Daniel Subcommittee initially proposed to address the problem through a limited wiretapping law, *see* S. 3760, 84th Cong. § 1407 (1956) (titled Narcotic Control Act of 1956), but, when confronted with severe opposition from those concerned with its impact on civil liberties, *see* 102 Cong. Rec. 9,031-9,047, 9,302 (1956), Congress substituted the present "communication facility" provision as a compromise. *See* 102 Cong. Rec. at 9,302 (statement of Senator Wayne Morse) (communication facility provision aimed at "the drug traffic"); *see also United States v. Butler*, 204 F. Supp. 339, 343 (S.D.N.Y. 1962) (noting that the communication facility provision "was inserted *in lieu of* a wiretapping provision originally contained in the bill") (emphasis added).

The communication facility provision, like the previously-proposed wiretapping legislation, was thus enacted not because use of a communication

facility makes facilitation of a drug felony inherently more culpable, but rather to aid law enforcement efforts against large-scale drug traffickers and distributors, who could evade detection and prosecution by conducting their illicit activities entirely by phone:

> Although the telephone is the major means of contact between *top narcotic traffickers*, Federal agencies are not permitted, under any circumstances to intercept and divulge messages between the traffickers even though it might produce evidence which would lead to their arrest and conviction . . . .
>
> As a consequence, the United States Government is unwittingly giving narcotics violators, especially the *large racketeers and wholesalers*, a great advantage over Federal law-enforcement officers in their efforts to keep pace with and stamp out the illicit narcotics traffic.

S. Rep. No. 84-1997 at 9 (emphasis added).

Congress focused on narcotics traffickers and large-scale distributors – rather than personal drug users – because it was the large traffickers and suppliers who were able to evade prosecution through their use of the telephone to conduct their illicit trade while staying at a distance from the drugs. By contrast, the drug-addicted purchaser on the street, who could be visually observed purchasing from his dealer and found to be in actual possession

of the drugs, presented little problem for law enforcement.

Indeed, this focus upon the traffickers and distributors was echoed by the Department of Justice itself. In subcommittee testimony cited in the Senate report, Assistant Attorney General Warren Olney III testified:

> Because of the covert nature of the narcotics traffic wherein the *big supplier* avoids all possible contact with the ultimate buyer and with the petty pusher or peddler, distribution is usually effected through a conspiratorial network through many intermediaries . . . . In making these arrangements, the telephone is an essential tool which lends itself to clandestine operation . . . .

S. Rep. No. 84-1997 at 9 (emphasis added).

Judge J. Edward Lumbard likewise told the subcommittee that the inability to target large-scale drug distributors through their use of the telephone put law enforcement at a severe disadvantage:

> The narcotics traffic is run by *people who operate on an international scale*, and in this country on an interstate scale. They are *professional criminals*. They have lots of money. They have powerful allies. They have expert knowledge as to how to evade the law and to escape detection. *They are not*

> *themselves addicts. In fact, they seldom handle any drugs . . . .*
>
> Now to get evidence sufficient to convict a *big operator*, as you can see, is very difficult at best. We are dealing with people who operate secretly. They have at their disposal all of the means of modern science and invention and transportation. They use the telephone extensively, and it helps to conceal their identity.

S. Rep. No. 84-1997 at 10 (emphases added).

The NCA's communication facility provision was re-enacted as Section 843(b) fourteen years later and, because there was neither an intent nor effort to change its substance, there is very little contemporaneous statutory history. *See, e.g., United States v. Pierorazio*, 578 F.2d 48, 51 (3d Cir. 1978) (noting the sparse history of Section 843(b)); *see also* S. Rep. No. 91-613, at 3 (explaining that one of the Act's main purposes was to simply "collect the diverse drug control and enforcement laws under one piece of legislation" as a follow-up to the reorganization of drug control agencies carried out under the Johnson Administration in 1968); Drug Abuse Control Amendments – 1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the H. Comm. on Interstate and Foreign Commerce, 81st Cong. 709 (1970) ("[T]his [communication facility provision] is the exact law that is on the books presently . . . . We are trying to codify that law, pull it out of title 18 and put it in this law. *All this is cosmetic.*") (statement

of Michael Sonnenreich, Deputy Chief Counsel, Bureau of Narcotics and Dangerous Drugs, Department of Justice) (emphasis added).

Congressional silence upon reenacting the communication facility provision is strong evidence that Congress endorsed and incorporated the provision's prior legislative history into Section 843(b). *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (rejecting statutory construction because "if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it . . ."); *cf. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1541 (2007) (interpreting statutory language consistently with pre-enactment regulations because Congress enacted the legislation "without comment or clarification").

Indeed, there is nothing at all in the history of the Act to suggest that Section 843(b) was intended to apply to drug users. To the contrary, as described above, other provisions of the Act significantly *lowered* the penalties for personal drug use – from felony to misdemeanor status – with a strong legislative emphasis instead upon treatment and rehabilitation. *See* H.R. Rep. No. 1444 at 10, *supra*, 1970 U.S.C.C.A.N. at 4575 ("[T]he rehabilitation of the individual [drug user], rather than retributive punishments should be the major objective."); 21 U.S.C. § 844 ("First offenders convicted of simple possession may receive a conditional discharge . . . and upon fulfillment of any terms and conditions the court might impose, their record will be expunged"). Plainly, the same 1970 Congress that passed the Act did not intend to undermine this important policy by

imposing harsh penalties on users through the back door of the communication facility provision which, as demonstrated above, was never intended to apply to users.

Moreover, use of the telephone by purchasers simply does not present the same concerns that motivated Section 843(b). Unlike the large-scale distributors for whom Section 843(b) was intended, purchasers can, without difficulty, be observed handling drugs, searched and then prosecuted based upon physical evidence recovered from their person. And Congress would not have intended to give prosecutors the leverage of felony charges against buyers to induce buyers to cooperate in the government's effort to disrupt the distribution networks targeted by the communication facilities statute. Buyers and addicts are typically less equipped than sellers to aid the government in investigating drug distribution networks and prosecuting high-level distributors because buyers do not interact with individuals high on the distribution chain. *See supra*, S. Rep. No. 84-1997 at 9-10. Section 843(b) was and remains an unnecessary and unwarranted device in the prosecution of purchasers for personal use.

This statutory history conclusively demonstrates that the communication facility provision – first enacted in the NCA and later copied almost verbatim into Section 843(b) of the Act – was intended solely to target large-scale drug traffickers. It was specifically those traffickers and distributors whose use of telephonic communications enabled them to avoid prosecution and detection and it was that challenge to law enforcement that the

communication facility provision was enacted to address. Because Congress did not intend for Section 843(b) to apply to purchasers of drugs for personal use and because such application is at odds with the structure of the statute as a whole, the Court should grant the petition and reverse the lower court's ruling to the contrary.

IV. The Lower Court's Decision Will Affect Nearly Every Prosecution For Drug Possession And Give Prosecutors Power In Excess Of That Intended By The Statute.

The lower court's decision – which, as demonstrated by the context and history of Section 843(b), incorrectly makes available to prosecutors a felony charge not provided for by Congress – has wide-ranging implications for both the exercise of prosecutorial discretion and the public at large. This Court should grant the petition, so as to provide guidance and uniformity regarding both the types of criminal cases that may be brought against possessors, and how those cases are resolved.

A. The Lower Court's Decision, In Combination With Department of Justice Charging Policy, Will Eviscerate The Statutory Distinction Between Sellers And Buyers And May Lead To Arbitrary And Discriminatory Enforcement.

The Department of Justice's charging policy directs prosecutors, *inter alia*, to "charge and pursue the most serious, readily provable offense or offenses

that are supported by the facts of the case . . . ." Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors at 2 (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm. This policy is firm and well established and, if applied rigidly, requires a federal prosecutor seeking to charge something other than the most serious, readily provable offense to both demonstrate that the case falls within one of a handful of "Limited Exceptions," *id.*,[3] and to obtain approval from an Assistant Attorney General, United States Attorney, or designated supervisory attorney.

As of 2006, there were in excess of 233,000,000 cellular telephone subscribers in the United States. U.S. Census Bureau, *Statistical Abstract of the United States*, t. 1120 (2008), *available at* http://www.census.gov/compendia/statab/2008edition.html. Given the proliferation of cellular telephones and other "communication facilit[ies]" since the enactment of Section 843(b), virtually every possessor will, in connection with his or her purchase of the drugs (as well in virtually all other aspects of life), use some type of communication facility. Thus, notwithstanding the firm line Congress drew between drug possessors and distributors, *see Section II, supra*, the Department of Justice's charging policy will likely cause federal prosecutors to bring felony

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[3] The exceptions are: (1) cases in which the sentence would not be affected; (2) cases subject to "Fast Track" treatment; (3) post-indictment reassessment that the most serious offense is not readily provable; (4) substantial assistance by the defendant; (5) selected circumstances in which a prosecutor need not seek a statutory enhancement; and (6) other rare and exceptional circumstances. *Id.*

charges under Section 843(b) against many simple possessors of illegal narcotics, thereby eviscerating the distinction between such offenders that is embedded in the statute intended by Congress. On the other hand, if the large number of possessors swept within a broadened Section 843(b) leads federal prosecutors to disregard the Ashcroft Memorandum, Section 843(b) may be applied haphazardly, arbitrarily, and possibly discriminatorily. The Court should grant the petition so that it can determine whether the lower court's theory is a proper interpretation of the statute.

B. Prosecutors Will Wield Unwarranted Power in the Plea Bargaining Process.

It is a truism that the overwhelming majority of federal criminal proceedings are resolved via a guilty plea. *Compendium of Federal Justice Statistics, 2004*, U.S. Department of Justice, Office of Justice Programs, *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs04.htm (reporting that 96% of convicted defendants in federal criminal proceedings pleaded guilty). In nearly every federal criminal proceeding, then, the plea bargain plays a crucial role in determining the punishment ultimately imposed. *See Wright v. Van Patten*, 552 U.S. __, 128 S. Ct. 743, 748 (2008) (Stevens, J. concurring) (acknowledging that "plea bargaining [is] the norm and trial the exception").

It is a well recognized fact that plea bargaining does not occur in a vacuum, but instead "takes place in the shadow of (*i.e.*, with an eye

toward the hypothetical result of) a potential trial." *United States v. Booker*, 543 U.S. 220, 254 (2005) (Breyer, J.). In other words, the outcome of a plea bargain reflects, among other things, the views of both prosecutor and defendant regarding the likelihood and severity of a negative result should a trial occur. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992) (explaining that going to "trial means . . . tak[ing] the risk of conviction or acquittal; risk-averse persons prefer a certain but small punishment to a chancy but large one."); *see also* Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1920 (1992) (discussing the impact on plea bargaining when there is a "large differential between post-trial and post-plea sentences").

Notwithstanding Congress' express intention to treat drug use as a misdemeanor, the lower court has placed the specter of a felony conviction and a substantially lengthier term of incarceration over a drug possessor's head, and thereby given prosecutors an enormous and unwarranted amount of leverage in plea negotiations with defendants charged with possessing drugs for their own use. Specifically, the lower court's interpretation of Section 843(b) increases the maximum term of imprisonment facing the typical possessor by 400%. By drastically increasing the potential maximum penalty, the lower court has fundamentally altered the calculus that must be performed by an accused, and in so doing, has given prosecutors unwarranted leverage in plea negotiations.

The impact on plea negotiations resulting from the lower court's ruling is significant. Under the congressionally-imposed scheme – in which it established different punishments for possessors and distributors – it is not difficult to imagine a possessor who would be willing to exercise his or her constitutional rights, and require the prosecution to prove its case beyond a reasonable doubt at trial. Such a defendant might, after consulting with counsel and evaluating the evidence, deem the prosecution's case to be sufficiently weak such that the benefits of trial outweigh the perceived risk of a loss. And in some number of these cases, the defendant would prove successful – *i.e.* the jury would find that the government had not met its burden, and it would acquit the defendant.

Under the scheme imposed by the lower court, it is not difficult to imagine that same defendant – presented with the same underlying facts but faced with a 400% harsher punishment upon a loss at trial – opting to plead guilty. This defendant might do so notwithstanding the fact that, in at least some instances, he or she would have been acquitted at trial. Of course, this risk exists whenever a defendant pleads guilty, but the dramatically higher penalty facing a possessor under the lower court's interpretation of Section 843(b) increases this risk and places a thumb on the scale in favor of a plea. Any decision that has the potential to alter fundamentally the plea bargaining process – and thus virtually every federal criminal case involving possession of narcotics – by giving prosecutors the power to prosecute crimes beyond what Congress intended and provided should be addressed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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