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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The purchase of drugs for personal use constitutes only a misdemeanor. The government submits, however, that the misdemeanor becomes transformed into a felony whenever—as is utterly commonplace—the parties exchange a cellular phone call, e-mail, or text message about the transaction rather than conduct it entirely face-to-face. While two circuits now endorse that counterintuitive view, at least two circuits squarely reject it. The government makes no effort whatsoever to deny that its view converts virtually *any* misdemeanor drug purchase into a felony, or that the question presented therefore is of profound significance to the administration of the federal drug laws—particularly given the ever-increasing use of cellular telephones, e-mails, and text messages in drug transactions. The government also concedes the existence of a circuit conflict. And while the government attempts to raise questions about the conflict's scope and durability, those efforts are baseless: it is simply indisputable that the circuits are divided at least 2-2 on the issue, and that the conflict is firmly entrenched.

Rather than deny the sweeping implications of its view or the presence of a circuit conflict, the government principally contends that the decision below is correct. Br. in Opp. 5-12. The government's merits-based defense affords no basis for denying review, and in any event is wholly unpersuasive. Congress drew a fundamental distinction in the federal drug laws between misdemeanant users and felon distributors, and the decision below obliterates that distinction. This Court's review is warranted.

A. There is an entrenched circuit conflict on whether the use of a communications facility to buy drugs solely for personal use violates 21 U.S.C. § 843(b). In certain circuits, a drug user who makes a phone call to buy drugs commits a felony. In other circuits, the drug user would commit only a misdemeanor, and may avoid any conviction at all, 18 U.S.C. § 3607. That intolerable disparity in treatment warrants review.

1. The government concedes the circuit conflict, but contends that the Tenth Circuit stands alone in rejecting the Fourth and Seventh Circuits' support of its interpretation of Section 843(b). Br. in Opp. 13-16. It is clear, however, that at least the Ninth Circuit joins the Tenth Circuit in rejecting the government's reading of Section 843(b). The government suggests that the Ninth Circuit has held that the use of a communications device to purchase drugs for personal use fails to facilitate a *conspiracy* to distribute drugs, but has not conclusively settled whether it facilitates *distribution* itself. Br. in Opp. 13. Two controlling Ninth Circuit decisions, however, squarely resolve the latter issue.

In *United States v. Martin*, 599 F.2d 880 (9th Cir. 1979), the Ninth Circuit held that a "mere customer's contribution to the business he patronizes does not constitute the facilitation envisioned by Congress" in Section 843(b). *Id.* at 889. The court explained 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 th[e] statutory distinction" between "distributors and simple possessors." *Id.* Although the personal-use buyer had been charged with facilitating his dealer's conspiracy rather than

his dealer's distribution, *not one word* in *Martin* suggests that distinction could matter. To the contrary, the court explicitly rejected "the government's position that the *distribution* of drugs *or an agreement* to distribute drugs is 'facilitated' by a purchaser of the drugs." *Id.* at 888 (emphasis added). The court held that, as long as a person "merely buy[s] drugs for . . . personal use," he falls outside Section 843(b). *Id.* at 889.

Not surprisingly, other courts of appeals to address that issue correctly read *Martin* to hold that the Section 843(b) fails to encompass purchases for personal use. Pet. App. 9a (*Martin* "find[s] that when a communication facility is used to facilitate a drug sale for personal use, § 843(b) is not violated"); *United States v. Binkley*, 903 F.2d 1130, 1135 (7th Cir. 1990) (*Martin* "held that the purchase of cocaine for one's own use does not violate § 843(b)"); *United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1990) (*Martin* "held that one guilty of only a misdemeanor cannot be convicted under § 843(b)"). Indeed, the government itself described *Martin* in its brief below as having "held that the purchase of drugs for personal use did not violate [Section] 843(b)." Gov't C.A. Br. 24. The government's attempt to confine *Martin* to the conspiracy context is untenable.

The government asserts that the Ninth Circuit has not confronted "the issue presented here . . . in the 30 years since *Martin*." Br. in Opp. 14. But that is because *Martin* firmly resolved the issue against the government, preventing the government from thereafter applying Section 843(b) to a personal-use buyer in that circuit. In any event, the Ninth Circuit *has* confronted the issue since *Martin*, albeit when it

was raised by a defendant rather than the government.

In particular, in *United States v. Brown*, 761 F.2d 1272 (9th Cir. 1985), the Ninth Circuit again held that Section 843(b) fails to reach purchases for use. Brown, who had been convicted under Section 843(b) of facilitating distribution to third parties, claimed entitlement to a lesser-included offense instruction asking whether he used a telephone to order "cocaine for . . . personal consumption." *Id.* at 1278. The Ninth Circuit disagreed, holding that "use of a telephone to order cocaine for personal use is . . . not a lesser-included offense; indeed, it is no offense at all." *Id.* "Section 843(b) condemns the use of a telephone in facilitating the commission of certain felonies," but the "[p]ossession of cocaine for personal use is only a misdemeanor." *Id.* The court's rejection of Brown's lesser-included offense instruction thus necessarily turned on its holding that Section 843(b) fails to encompass the purchase of drugs for personal use. The government plainly errs in contending (Br. in Opp. 14 n.4) that *Brown* failed to confront that issue.

While the Ninth Circuit has (twice) squarely resolved the issue, it is a closer question whether the Sixth Circuit did so in *United States v. Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) (per curiam). Significantly, the Tenth Circuit in *Baggett*, 890 F.2d at 1097-98—which the government agrees held Section 843(b) inapplicable to purchases for personal use—regarded itself as "agree[ing] with" the Sixth Circuit's decision in *Van Buren*. But whether the circuits ultimately are divided 3-2 or 2-2, the disagreement merits review.

2. Although conceding that the decision below conflicts with *Baggett*, the government suggests (Br. in Opp. 16) that the Tenth Circuit might revisit *Baggett* in light of the decision's supposed tension with *United States v. Watson*, 594 F.2d 1330 (10th Cir. 1979), and *United States v. Small*, 423 F.3d 1164 (10th Cir. 2005). That suggestion is remarkable—and thoroughly baseless—because the Tenth Circuit already has *expressly* reconciled *Baggett* with both *Wilson* and *Small*.

In *Baggett* itself, the government argued that *Wilson* supported application of Section 843(b) to a purchaser for personal use. Rejecting that argument, the court explained that *Watson* had "upheld a conviction for use of a telephone to facilitate distribution of narcotics, but only after concluding that 'there was proof that the appellants, *as street dealers*, were using the telephone to obtain [drugs] *for resale*.'" 890 F.2d at 1098 (emphasis in *Baggett*) (quoting *Watson*, 594 F.3d at 1343). Because "*Watson* involved defendants whose underlying crime was a felony, not a misdemeanor, . . . it bears little relation to the present case," *i.e.*, *Baggett*. *Id.*

The Tenth Circuit likewise has explicitly reconciled *Baggett* and *Small*. In *Small*, Jones encouraged a dealer to distribute more than five grams of crack cocaine to a third party for resale, but the third party consumed the drugs. Jones argued that, because the third party used the drugs, *Baggett* precluded his conviction under Section 843(b). The court disagreed, explaining that "the holding in *Baggett* . . . was predicated on the fact that the drug possession facilitated in that case" was a "misdemeanor." *Small*, 423 F.3d at 1186. "In contrast, possession of more than five grams of crack cocaine

is . . . a drug felony." *Id.*; *see* 21 U.S.C. § 844(a) (excepting possession of five more grams of crack cocaine from general rule that possession for use is misdemeanor). *Small* thus not only harmonized its holding with *Baggett*, but also expressly reaffirmed *Baggett*. *Baggett*, in short, is firmly entrenched in the Tenth Circuit, confirming that there is at least a 2-2 conflict on the question presented.

B. Because the interpretation of Section 843(b) adopted below—and pressed by the government—dramatically expands the federal drug laws, the question presented is highly important. The decision below converts the misdemeanor purchase of drugs for personal use into a felony anytime the buyer uses a communications device. It thus has the sweeping effect of transforming virtually *any* misdemeanant user into a felon. Any high school student who text messages another student requesting a small quantity of drugs for use would commit a felony, even though the same student who makes the same request face-to-face would commit only a misdemeanor. NACDL Br. 9-10. And if the student sends four messages in connection with a single request, he would face four felony counts and up to 16 years of imprisonment. Pet. 16.

The government makes no effort to deny the sweeping implications of the decision below for the federal drug laws. Rather, the government affirms its full support of prosecuting as a felon any user who makes a phone call in obtaining drugs for use. Indeed, the government goes as far as to embrace the position that, unless it can continue to apply Section 843(b) against buyers for personal use, the statute would we be "denude[d]" of any "practical effect" and rendered "all but superfluous." Br. in Opp. 8-9.

There could be no clearer confirmation of the significance of the question presented than the government's considered view that it *must* prosecute drug users as felons under Section 843(b) to preserve the provision's practical significance.

What is more, as the Center on the Administration of Criminal Law (Center) explains, the Department of Justice's charging policy directs prosecutors to "charge and pursue the most serious, readily provable offense . . . supported by the facts." Center Br. 17-18 (internal quotation marks omitted). That governing policy would require the government to charge as a felon virtually every person who obtains a small quantity of drugs for personal use. The government also does not deny that its interpretation dramatically affects plea bargaining in drug cases, giving prosecutors extraordinary—and unwarranted—leverage in plea negotiations. Center Br. 19-21; NACDL Br. 7-8; Pet. 15.

The government's sole argument against the need for this Court's review instead is its inexplicable suggestion that supposed tension in the Tenth Circuit's decisions could lead that court to come into line with the Fourth and Seventh Circuits. Br. in Opp. 16. That argument is baseless for the reasons explained, and the government's silence otherwise concerning the sweeping effect of its views on the Nation's drug laws only fortifies the need for review.

C. The government's principal argument for denying review is that the Fourth Circuit correctly decided the merits. Br. in Opp. 5-12. Even assuming the government's merits-based arguments afforded a basis for denying review, its arguments are wholly unpersuasive.

Relying on a dictionary definition of "facilitate," the government contends that use of a communications device to purchase drugs for personal use facilitates a "felony" within the meaning of Section 843(b). Br. in Opp. 6-7. But the purchase of drugs for personal use is a misdemeanor, not a "felony." In the government's view, the use of a phone to facilitate a misdemeanor purchase for personal use simultaneously facilitates the dealer's felonious sale. That rationale, however, conflicts with three overriding considerations that establish the inapplicability of Section 843(b) in the circumstances of this case.

1. First, it is an established principle, reflected in the Model Penal Code (MPC) that "a person is not an accomplice in an offense committed by another person if . . . the offense is so defined that his conduct is inevitably incident to its commission." MPC § 2.06. A "purchaser [thus] is not a party to the crime of illegal sale." 2 Wayne R. LaFave, Substantive Criminal Law, § 13.3(e), at 371 (2d ed. 2003). Accordingly, the same principle that bars the government from treating a purchaser of drugs for personal use as an aider and abettor of the distribution to himself, *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977), also bars the government from treating the drug user as a "facilitator" of the "felony" of distribution to himself under Section 843(b).

Indeed, the definition of "aid and abet" is "to facilitate." Black's Law Dictionary 76 (8th ed. 2004). The Government's sole response is that, while "aid or abet" may mean "facilitate," "facilitate" does not necessarily mean "aid or abet." Br. in Opp. 7. But a definition does not run in only one direction; it is a statement of equivalence. Consequently, just as buyers of drugs for personal use may not be con-

victed of aiding and abetting a distribution under 18 U.S.C. § 2, they also may not be convicted of facilitating a distribution under Section 843(b).

2. That conclusion comports with the firm distinction drawn by Congress in the federal drug laws between drug dealers and drug users. Congress made drug dealing a felony but made possession for personal use a misdemeanor, reflecting a determination that rehabilitation presents the preferred means of addressing drug use and addiction. Pet. 21; NACDL Br. 11-12, 14-16. The government's interpretation of Section 843(b) would obliterate Congress's approach to drug use, exposing virtually every drug user to a felony prosecution and four years of imprisonment.

The government dismisses that consequence as "immaterial" to the proper construction of Section 843(b). Br. in Opp. 11. It is a fundamental rule of statutory construction, however, 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 Treasury*, 489 U.S. 803, 809 (1989). The government's interpretation transgresses that rule by interpreting Section 843(b) in a manner that undermines a central policy reflected in the federal drug statutes.

3. The statutory history confirms that Section 843(b) fails to reach drug purchases for personal use. At the same time Congress amended the federal drug laws to make possession for personal use a misdemeanor, it simultaneously—in the neighboring provision—narrowed the prohibition against facilitation of a drug "offense" to facilitation of a drug "felony." Pet. 23-24. Those simultaneous changes re-

flect Congress's coordinated intention to downgrade the personal use of drugs to a misdemeanor, and to exempt misdemeanor drug users from treatment as a felon under the facilitation statute. Strikingly, the government fails whatsoever to address those coordinated changes, much less propose any alternative explanation.

4. The government's remaining arguments are insubstantial.

a. The government submits that excluding buyers for personal use from Section 843(b) would create difficulties in administration by requiring determination of whether a buyer obtained drugs for personal use or instead for resale. Br. in Opp. 9-10. The drug laws, however, already draw a basic distinction between possession for personal use, 21 U.S.C. § 844(a), and possession with intent to distribute, 21 U.S.C. § 841(b)—entirely without regard to Section 843(b). The government thus routinely must prove that a defendant possessed drugs for resale rather than use whenever it charges possession with intent to distribute, and juries readily make that determination based on considerations such as the quantity of drugs and the defendant's statements. *See Swiderski*, 548 F.2d at 450.

b. The government suggests that a person who purchases drugs for personal use "causes" the seller's felony and therefore violates Section 843(b). Br. in Opp. 6-7. The Fourth Circuit below, however, explicitly grounded its decision solely on the basis that the purchaser of drugs for personal use "facilitates" the seller's "felony." Pet. App. 9a. Because that was the court's sole basis for affirming petitioner's conviction, the case comes to this Court solely as a facilita-

tion case. The other court of appeals to support the application of Section 843(b) to purchases for personal use—the Seventh Circuit, in a decision on which the government heavily relies—likewise based its decision solely on the term "facilitate." *Binkley*, 903 F.2d at 1135-36.

At any rate, the government's reliance on the word "cause" is if anything less persuasive than its reliance on the word "facilitate." Indeed, the government makes no attempt to identify even *a single* argument that could sustain petitioner's conviction on the basis of the word "cause" if the court of appeals' reliance on the word "facilitate" were rejected. Nor could it. The very same arguments that demonstrate that a purchase for personal use fails to "facilitate" a "felony" also show that it fails to "cause" a "felony."

In particular, the background principle that a purchaser is not a party to a seller's offense would preclude liability based on the word "cause" no less than it precludes liability based on "facilitate." Indeed, "cause" liability is simply another form of accessory liability in the aiding and abetting statute. 18 U.S.C. § 2. ("Whoever willfully *causes* an act to be done . . . is punishable as a principal.") (emphasis added). Similarly, reliance on "cause" to support the application of Section 843(b) to personal-use buyers would obliterate Congress's distinction between drug dealers and users no less than reliance on "facilitate." And just as with "facilitate," reliance on "cause" could not be reconciled with the narrowing of Section 843(b) from reaching any drug "offense" to reaching only a drug "felony." Thus, if the Court rejects the government's "facilitate" theory, its "cause"

theory would necessarily fall with it. The government gives no reason to conclude otherwise.

CONCLUSION

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

Respectfully submitted,

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