

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SALMAN KHADE ABUELHAWA, :

4 Petitioner :

5 v. : No. 08-192

6 UNITED STATES. :

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8 Washington, D.C.

9 Wednesday, March 4, 2009

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:07 a.m.

14 APPEARANCES:

15 SRI SRINIVASAN, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 ERIC D. MILLER, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	SRI SRINIVASAN, ESQ.	
4	On behalf of the Petitioner	3
5	ERIC D. MILLER, ESQ.	
6	On behalf of the Respondent	26
7	REBUTTAL ARGUMENT OF	
8	SRI SRINIVASAN, ESQ.	
9	On behalf of the Petitioner	53
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Case 08-192, Abuelhawa v. United States.
5 Mr. Srinivasan.

6 ORAL ARGUMENT OF SRI SRINIVASAN

7 ON BEHALF OF THE PETITIONER

8 MR. SRINIVASAN: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 A person who purchases a small quantity of
11 drugs for his own personal use commits a misdemeanor,
12 not a felony. The language of section 843(b) does not
13 transform that person into a felon if he uses a phone in
14 obtaining his drugs, rather than doing so strictly face
15 to face.

16 I would like to begin with the text of the
17 statute before turning to the textual history and the
18 statutory context. The language of section 843(b)
19 covers the use of the phone in committing, in
20 facilitating, or in causing a drug felony. That
21 language presupposes someone who is causing,
22 facilitating, or committing a drug felony, and with
23 respect to such a person, it makes them guilty of an
24 additional offense in the nature of an aggravated
25 offense if they use a phone in their committing,

1 facilitating, or causing a drug felony.

2 JUSTICE GINSBURG: Can you be specific about
3 who those persons would be? You say not a misdemeanor
4 drug user. So who would be caught in the 843(b)?

5 MR. SRINIVASAN: It would depend on which
6 prong you're referring to, Justice Ginsburg. The -- the
7 committing prong refers to persons who are committing
8 the underlying drug felony.

9 JUSTICE GINSBURG: Yes.

10 MR. SRINIVASAN: And the facilitating prong
11 would refer to persons who are aiding or abetting the
12 underlying drug felony.

13 JUSTICE KENNEDY: Well, suppose you had the
14 girlfriend phone and say: My boyfriend needs drugs;
15 meet him at the corner of 3rd and Main. What crime does
16 the girlfriend commit? It seems to me that it's pretty
17 clear that she's under 843(b) facilitating.

18 MR. SRINIVASAN: She -- she may --

19 JUSTICE KENNEDY: It seems to me that she
20 may then have committed a felony, and yet it seems to me
21 that her culpability is certainly no -- no greater, if
22 you're talking about your -- the polity of your statute,
23 than the man who uses the drugs.

24 MR. SRINIVASAN: Well, I think I'm speaking
25 first and foremost about the terms of the statute,

1 Justice Kennedy. And to the extent she fits within the
2 terms of the statute, it would be because she doesn't
3 benefit from the buyer-seller rule. The buyer-seller
4 rule establishes that buyers of drugs aren't aiders or
5 abettors of the distribution of drugs, and equivalently
6 they wouldn't be treated as facilitators of the
7 distribution of drugs. Now --

8 JUSTICE KENNEDY: Maybe Justice Ginsburg
9 would like some further illustration, but I thought that
10 that was one illustration in answer to her question.

11 JUSTICE GINSBURG: Yes, I would like to --
12 who does this target? The girlfriend is a good law
13 school exam type question, but in the real world who is
14 covered?

15 MR. SRINIVASAN: Well, I think the classic
16 case of somebody under the facilitating prong would be
17 the classic aider and abettor, for example a lookout.
18 If there were a lookout on the scene of a drug
19 transaction, and they used the communication facility to
20 communicate with the distributor to let them know that
21 buyers were arriving or that law enforcement was in the
22 neighborhood and the person ought to refrain from
23 engaging in the transaction for the time being. That
24 would be the sort of person that comes within 18 U.S.C.
25 2 as an aider or abettor of drug distribution and would

1 come within 843(b) as a facilitator of drug
2 distribution.

3 JUSTICE ALITO: The buyer -- seller rule
4 would prohibit the prosecution of a buyer on the theory
5 that the buyer aided and abetted, aided and abetted the
6 seller. But I don't see why it applies here. This is
7 not a situation like that. This is a different crime,
8 using a communications facility in facilitating the
9 commission of a felony.

10 MR. SRINIVASAN: Well, it deals with the use
11 of a communication facility only with respect to persons
12 that are committing, facilitating or causing a drug
13 felony.

14 JUSTICE SCALIA: What is the purpose -- what
15 is the purpose of saying who uses a communications
16 facility? Is that purely a jurisdictional hook?

17 MR. SRINIVASAN: No, I don't think it's a
18 jurisdictional hook. There would already be Federal
19 jurisdiction by virtue of the underlying felony, and so
20 what Congress was concerned with in penalizing the use
21 of a phone as in the nature of an aggravated offense is
22 that I think Congress thought that phones were being
23 used to make detection of drug trafficking more
24 difficult, and in particular at the level of someone who
25 was at top of the food chain in the architecture of a

1 drug distribution chain, that person was able to avoid
2 detection because they never came into physical contact
3 with drugs and they didn't come into physical contact
4 with the persons who were engaging in the transaction on
5 the street.

6 CHIEF JUSTICE ROBERTS: You keep talking
7 about phones and you began by saying this covers phones,
8 but this was -- language was added in 1970?

9 MR. SRINIVASAN: Right.

10 CHIEF JUSTICE ROBERTS: Well, there weren't
11 cell phones of the kind you have now. I think this was
12 directed at the beepers, right, when those were around
13 then, or land-based phones or something like that. And
14 the technology has so expanded that the reach of the
15 statute has so expanded in a way that brings in a lot
16 more casual users than was the case before, and I just
17 don't know how that issue of statutory interpretation is
18 supposed to be resolved. Assuming I'm right that the
19 technology has dramatically expanded the reach of the
20 statute, even if you think it's covered by its terms,
21 how is that issue addressed? What's the right answer
22 there? Is it because the terms still cover it, the
23 breadth has expanded, or because this is something new
24 technologically that the statute shouldn't be construed
25 that broadly?

1 MR. SRINIVASAN: No, I don't -- our argument
2 doesn't depend on assuming that cell phone usage was
3 significant in the 1970s. Even in 1970 the statute
4 would exclude from its sweep buyers of drugs.

5 CHIEF JUSTICE ROBERTS: Well, I know, but
6 let's assume I don't agree -- let's assume I agree with
7 that only in the context of the 1970s technology.

8 MR. SRINIVASAN: Uh-huh.

9 CHIEF JUSTICE ROBERTS: What's the answer
10 then?

11 MR. SRINIVASAN: Well, if you agree with it
12 --

13 CHIEF JUSTICE ROBERTS: It reminds me of
14 these old hypotheticals. You know, before you had
15 automobiles, you had to have someone with a lantern walk
16 in front of your carriage, and they don't change the law
17 and it still turns out to be the law when you're driving
18 your car and it doesn't make any sense.

19 Is there a case of ours that says what to do
20 in that case, in such a situation of statutory
21 construction?

22 MR. SRINIVASAN: I'm not aware of a case
23 that speaks directly to that question, Mr. Chief
24 Justice. But our argument doesn't depend on that logic,
25 because even in 1970 certainly land lines were well in

1 use, and in fact the indications are that that's what
2 Congress was principally concerned with in this statute.
3 And at that time we would make the argument, just as
4 now, a person who used the telephone in buying drugs for
5 personal use wouldn't come within the ambit of the
6 provision because the text of the provision goes to
7 someone who uses a phone in committing, in facilitating,
8 or in causing the commission of a drug felony. And so
9 if you're not someone who's facilitating the commission
10 of a drug felony in the first place, then you can't be
11 charged as using a phone in facilitating a drug felony.
12 The reason that a buyer for personal use, whether we're
13 talking about 1970 or now, wouldn't be considered a
14 person who is using a phone in facilitating a drug
15 felony is because of the buyer-seller rule. Buyers
16 aren't aiders and abettors of the felony distribution,
17 and by the same token they shouldn't be considered
18 facilitators of felony distribution.

19 JUSTICE SCALIA: Your argument sort of
20 assumes -- more than sort of assumes; it assumes -- that
21 facilitating is the same as aiding and abetting. If
22 they meant aiding and abetting, it's a classic criminal
23 law term, they could have said aiding and abetting.
24 They didn't. They used a different term, facilitating.
25 Why should I think facilitating means aiding and

1 abetting?

2 MR. SRINIVASAN: For several reasons, Your
3 Honor. First, their definitional equivalence. Black's
4 Law Dictionary defines "facilitating" as "an act of
5 aiding or helping or making easier," and it in turn
6 defines "aiding and abetting" as "to facilitate the
7 commission of the crime." So they mean the very same
8 thing.

9 And I don't think there's anything
10 talismanic about the particular formulation "aiding and
11 abetting" and in fact the Court established that in its
12 opinion in Gebardi. That dealt with the Mann Act, which
13 barred transporting a woman for purposes of engaging in
14 immoral acts or aiding or assisting in that
15 transportation or causing the transportation. So that
16 statute uses a different formulation --

17 CHIEF JUSTICE ROBERTS: Well, but I mean
18 it's natural to view the woman in that situation more as
19 a victim than as someone facilitating the crime.

20 MR. SRINIVASAN: Well --

21 CHIEF JUSTICE ROBERTS: I'm not sure that
22 would extend to your case.

23 MR. SRINIVASAN: Well, I don't know -- the
24 opinion doesn't stand on the rationale that the woman
25 would be a victim. It stands on the rationale that

1 Congress when it defined the primary offense, which is
2 transporting --

3 JUSTICE KENNEDY: Well, but that was the
4 same word. That was "transporting" in both instances.
5 Here you have "purchase," one, "facilitating" with a
6 telephone, two. That's different.

7 MR. SRINIVASAN: Well, it doesn't use the
8 word "purchase," with respect, Justice Kennedy. It uses
9 the words "commit, facilitate or cause." Those are the
10 three persons who come within section 843(b). And in
11 precisely parallel fashion, under 18 U.S.C. 2, a general
12 aider or abettor provision, that provision applies to
13 persons who commit the underlying offense, who aid or
14 abet the underlying offense or who cause the underlying
15 offense. And that precisely parallel structure
16 reinforces that facilitating in 843(b) serves the same
17 purpose and means the same thing as aiding or abetting
18 and the other words that apply in section --

19 JUSTICE KENNEDY: Well, I'll think about it,
20 but I think Gebardi does involve one statute, one act,
21 transportation. This involves two. The underlying
22 felony is the purchase or possession, and the second
23 statute is use of the telephone. So I don't -- I'll
24 think about it, but I don't think Gebardi works.

25 MR. SRINIVASAN: I don't think that's a

1 distinction that ultimately makes a difference, Justice
2 Kennedy, for the following reason. This statute does
3 deal both with someone who is involved in the underlying
4 felony and use of the phone on top of that, but it's in
5 the nature of an aggravated offense. It presupposes
6 somebody who is committing, causing or facilitating the
7 underlying drug offense, and then it makes them guilty
8 of an aggravated offense if they use a phone in the
9 course of doing so. So the first question you'd have to
10 ask is whether the person is committing, facilitating or
11 causing the drug felony in the first place.

12 And if I could use one hypothetical statute
13 to illustrate that. If this statute, instead of saying
14 facilitating, dealt by terms with use of a phone in
15 aiding or abetting a drug felony, you would still have
16 use of the phone in addition to the underlying drug
17 felony. But the first question I think one would ask in
18 looking at that provision is whether the person who's
19 accused of violating the law were aiding or abetting a
20 drug felony.

21 JUSTICE SCALIA: What -- this statute does
22 not just apply to facilitating a drug offense. It
23 applies to any of the felonies covered by subchapter 2
24 of the relevant chapter. I agree, it seems a little
25 strange to have what is a misdemeanor by a buyer

1 converted into a -- into a felony just by use of the
2 phone. What other situations under other felony
3 provisions would arise that create a similar oddity? Do
4 you have any in mind?

5 MR. SRINIVASAN: I don't know that there are
6 other provisions that would create a similar oddity. I
7 think this one is particularly anomalous, the use of a
8 statute to penalize somebody who otherwise would be a
9 misdemeanor, except that they use a phone in the course
10 of the purchase for personal use.

11 The classic situations in which the statute
12 does apply which aren't anomalous because they make
13 sense given what Congress had in mind, would be the use
14 of a phone to facilitate drug distribution, if someone
15 were a lookout again or if someone were a trafficker and
16 they instructed, for example, retail sellers where to go
17 to pick up stock, a stock house of drugs.

18 CHIEF JUSTICE ROBERTS: This really isn't
19 the transformation of a misdemeanor into a felony. It's
20 a separate, separate activity and an activity that
21 facilitates the commission of a crime. It's much easier
22 to carry out your drug distribution business if people
23 are calling you on their cell phones than if they have
24 to meet you in person or call from a land line.

25 MR. SRINIVASAN: Well, two steps to respond

1 to that question, Mr. Chief Justice. First, in terms of
2 whether it makes it easier, I think one could say the
3 very same thing in an aiding or abetting prosecution.
4 Aiding or abetting means the same thing as facilitating,
5 and so you could make the argument, I think, that buying
6 drugs and engaging in the sorts of actions that
7 naturally accompany the purchasing enterprise make the
8 sale easier, including directing where the sale is going
9 to occur and things like that. But we know already that
10 buyers of drugs aren't considered aiders and abettors of
11 drugs for purposes of liability under 18 U.S.C. 2. And
12 I think by the same token they shouldn't be considered
13 facilitators of drugs for purposes of section 843(b),
14 and with respect -- I'm sorry?

15 JUSTICE ALITO: What if the -- the defendant
16 -- what if the defendant who is a buyer of -- of a
17 quantity for personal use does more than simply purchase
18 the drugs? What if information is communicated in the
19 telephone conversation that makes it easier for the
20 transaction to take place or less likely -- less likely
21 that there is -- that the person is going to be
22 apprehended? Would that person fall within the statute?

23 MR. SRINIVASAN: I don't think so, Justice
24 Alito. I probably would have to know more about exactly
25 what they did, but if it is a -- if what they did is a

1 normal incident of purchasing, then I think it would
2 fall within the buyer-seller rule.

3 Otherwise, I think the government under an
4 18 U.S.C. 2 prosecution for aider and abettor liability
5 could make precisely the same sorts of arguments. The
6 government could argue, for example, that this person
7 didn't just buy drugs. They instigated the purchase
8 because they made the first phone call. They didn't
9 accept the first phone call. They made the first phone
10 call, and so that takes them outside the buyer-seller
11 rule.

12 But I don't that argument would work under
13 18 U.S.C. 2 because making the first phone call is a
14 normal incident of purchasing. And, of course, someone
15 who purchases drugs for personal use is going to want to
16 take measures to make sure that the purchase goes
17 through. Their ultimate objective is to get their hands
18 on the drugs. And so --

19 JUSTICE GINSBURG: This statute doesn't --
20 it doesn't differentiate between buyer and seller in
21 terms of who makes the call. I gather the purchaser for
22 his or her own use would be just as susceptible to this
23 statute if the dealer called and said: I've got a gram
24 of cocaine; I know you're interested in having it.

25 MR. SRINIVASAN: That's -- that's right,

1 Justice Ginsburg. It would apply equally in that
2 situation, and from our perspective that points up even
3 more of the anomaly in applying it to this factual
4 context. And that would equally be the case under 18
5 U.S.C. 2.

6 One could draw distinctions between who
7 makes the initial phone call and other sorts of normal
8 incidents of the purchasing enterprise. But I don't
9 think, Justice Alito, that because someone engages in a
10 drug -- in -- in a transaction in a way that makes it
11 particularly likely that the purchase is going to be
12 successful, that that alone would take you outside the
13 buyer-seller rule.

14 JUSTICE ALITO: What would happen in the
15 situation where the person who buys the drug is guilty
16 of -- of a felony? It's an instance of felony
17 possession. Wouldn't the application of your
18 understanding of the buyer-seller rule in that situation
19 lead to the conclusion that even that person could not
20 be convicted under this statute for facilitating the
21 commission of the felony of sale?

22 MR. SRINIVASAN: No, I don't think so,
23 because the buyer-seller rule deals with the
24 circumstance in which the way the person is -- is
25 associated with a felony is they're associated with the

1 distributor's felony. And so what the buyer-seller rule
2 says is that a buyer isn't an aider and abettor of the
3 seller's distribution, and I think by the same token
4 shouldn't be associated with the seller's facilitation.

5 But in your hypothetical, where the buyer
6 himself is committing a felony because his possession
7 because of certain characteristics associated with it
8 make it a felony, the buyer himself would be committing
9 a felony.

10 JUSTICE ALITO: Well, that may -- that may
11 be true, but the buyer there still could not under your
12 theory be convicted of facilitating the seller's felony
13 of selling the drugs.

14 MR. SRINIVASAN: Right, couldn't be
15 convicted of facilitating the seller's felony, but would
16 fall within the ambit of section 843(b) in any event
17 because they would have used the phone in connection
18 with their own felony.

19 CHIEF JUSTICE ROBERTS: Your gloss on this
20 statute makes -- gives rise to some difficult questions
21 of proof. What if it's -- I don't know -- ten pounds of
22 something, and the guy says, well, I was just buying in
23 bulk for personal use, like a Costco dealer.

24 (Laughter.)

25 MR. SRINIVASAN: I -- I don't know about

1 that, but -- but I think what I do know is it doesn't
2 create any greater problems of application than already
3 exist under Federal drug laws. Because the Federal drug
4 laws bar both possession for personal use under the
5 civil possession statute, section 844, and possession
6 with intent to distribute under 841.

7 And so courts and juries and the government
8 already have to make those sorts of decisions, and I
9 don't know that they've been particularly difficult to
10 make. They have to draw a distinction between the sorts
11 of quantities and other aspects of the offense that
12 bring it within the possession with intent to distribute
13 plan or whether the possession is of such a small
14 quantity, and there aren't other associated
15 characteristics of the offense that make it possession
16 for purposes of personal use.

17 That distinction is one that's already
18 embedded in the fabric of the drug laws, and we're just
19 applying the same distinction for purposes of this
20 statute. I don't think we're making it any more
21 complicated than it already is.

22 JUSTICE KENNEDY: If the government were to
23 prevail here, I assume that it would then as a result
24 have a much larger, more expansive discretion in
25 charging and plea bargaining and -- and et cetera.

1 Other than the rule of lenity, is there anything in our
2 cases that indicates that we should be cautious about
3 giving the government that authority so that that's an
4 aid in our interpretation or is that just all within the
5 rule of lenity?

6 MR. SRINIVASAN: Well, it's -- it's
7 definitely within the rule of lenity, and I think that's
8 the principal place that it's found.

9 JUSTICE KENNEDY: Other than --

10 MR. SRINIVASAN: And I don't -- I don't -- I
11 don't know of any background principle that one would
12 bring to bear on that other than the -- the normal tools
13 of statutory construction that I've already talked about
14 in the first place, which is you look at the text, and
15 you look at the statutory history, and you look at the
16 statutory context.

17 JUSTICE KENNEDY: No background principles
18 either way on granting the prosecutors vast discretion
19 in charging --

20 MR. SRINIVASAN: Well, I think as --

21 JUSTICE KENNEDY: -- as it applies to
22 statutory interpretation?

23 MR. SRINIVASAN: Well, I think as a general
24 rule we ought to be circumspect about doing that. My --
25 my understanding is that circumspection is given voice

1 through the rule of lenity. But a background principle
2 of particular applicability here is the statutory
3 history, is the statutory history. And I'm speaking now
4 in terms of the enacted statutory text; not legislative
5 history, but the history of the enacted statutory text.

6 And what that bears on is not the word
7 "facilitating," which is what the buyer-seller rule
8 particularly pertains to, but the word "felony," which
9 is another word in the text of the statute. And so
10 Congress could have barred the use of a phone in
11 connection with any drug offense, including a drug
12 misdemeanor, but Congress pointedly didn't do so. It
13 barred the use of a phone in connection only with a drug
14 felony. And because it chose to limit the offense to
15 the use of a phone in connection with a drug felony, the
16 effect is to exclude from the purview of the statute use
17 of a phone in connection with a drug misdemeanor. Now,
18 Petitioners --

19 JUSTICE GINSBURG: That was changed in 1970,
20 wasn't it? Wasn't the text "offense" originally, and
21 then Congress changed it to "felony"?

22 MR. SRINIVASAN: That's right, Justice
23 Ginsburg. Before the Controlled Substances Act, the
24 communication facility provision barred the use of a
25 phone in connection with any drug offense. And in 1970

1 in the Controlled Substances Act Congress narrowed its
2 reach to encompass only use of a phone in connection
3 with a drug felony.

4 So it excluded use of a phone in connection
5 with a drug misdemeanor, and that's significant in two
6 respects. One is, even without reference to the
7 statutory context of the 1970 Controlled Substances Act,
8 it's significant because Congress excluded use of a
9 phone in connection with a drug misdemeanor.

10 Petitioner used a phone in connection with
11 his misdemeanor simple possession. But under the
12 government's argument, the very same conduct by the very
13 same person would be brought back into the fold of the
14 statute. Even though Congress excluded it, it would be
15 brought back into the fold of the statute by recasting
16 it as facilitating the dealer's felony.

17 And the mode of analysis the Court used in
18 Gebardi and the mode of analysis that underlies the
19 buyer-seller rule to begin with would -- would lead us
20 not to infer that Congress would have intended that
21 result.

22 But in terms of the history and the
23 statutory context which you were alluding to, Justice
24 Ginsburg, it is significant for that reason, as well,
25 because the context in which Congress narrowed the reach

1 of section 843(b) so that it only encompasses
2 facilitation of a felony and not facilitation of a
3 misdemeanor is one in which Congress in the 1970 act
4 sought to extend leniency and afford a chance at
5 rehabilitation to drug users.

6 And that's manifested not in legislative
7 history but in the statutory text itself, because
8 Congress penalized simple possession for personal use as
9 a misdemeanor, whereas, the receipt of drugs previously
10 was a felony, regardless of the purpose of the
11 possession, whether it was for use or for distribution.

12 But Congress did more than that, because in
13 immediately adjacent provisions to the one in which it
14 narrowed simple possession to a misdemeanor, it also
15 enacted a provision which is now found in 18 U.S.C.
16 3607, which allowed a simple possessor who is a
17 first-time offender to avoid any conviction at all if
18 they successfully complete a period of probation.

19 And Congress went further still because it
20 also enacted in another adjacent provision further
21 relief for first-time simple possessors under the age of
22 21. With respect to that person, it allowed the person
23 to obtain a complete expungement of the criminal records
24 associated with the arrest.

25 CHIEF JUSTICE ROBERTS: So you would have

1 lost this case before 1970 because the incongruity on
2 which you rely --

3 MR. SRINIVASAN: Well, the basis --

4 CHIEF JUSTICE ROBERTS: -- didn't exist
5 then?

6 MR. SRINIVASAN: Yes. Before 1970 it would
7 have been a very difficult climb because -- not only
8 because the communication facility applied to any drug
9 offense, but because simple possession wasn't a
10 misdemeanor.

11 CHIEF JUSTICE ROBERTS: Right. So the scope
12 of this language was changed sub silentio?

13 MR. SRINIVASAN: It -- it wasn't sub
14 silentio. It was explicit.

15 CHIEF JUSTICE ROBERTS: I know, but this
16 language, "facilitating," covered purchasers using a
17 telephone in the period before 1970, but not after 1970,
18 because of the changes in some other sections?

19 MR. SRINIVASAN: No, well, it's in part
20 because of the changes in this section. This section
21 changed from "any offense" to "felony," so it's the text
22 of this section itself. And the buyer-seller rule
23 equally applied in -- before 1970. It's just that
24 before 1970 you wouldn't have had to show that the buyer
25 was associated with the seller's felony, because the

1 buyer was associated with his own offense and that was
2 enough, because at that point the buyer's offense was a
3 felony. And then the law, section 843(b), didn't care
4 whether it was a felony because it applied to any drug
5 offense.

6 It's only after 1970 that this distinction
7 becomes important, because after 1970 it's clear that
8 the buyer for personal use doesn't use a phone in
9 committing a drug felony. What he's committing is a
10 drug misdemeanor. So you have to find some way, if
11 you're the government, to make him associated with the
12 drug felony. And to say that --

13 CHIEF JUSTICE ROBERTS: That question goes
14 to whether or not the distribution was a felony.

15 MR. SRINIVASAN: Right, which is the only
16 avenue available after 1970. There was a different
17 avenue available before 1970, because before 1970 a
18 purchaser of drugs would, if they used a phone in
19 connection with their purchase, would have used a phone
20 in connection with a drug offense, and now the statute
21 is different in two respects. One, it only covers use
22 of a phone in connection with a drug felony; and two, in
23 another provision, Congress narrowed the simple
24 possession offense from a mis -- from a felony to a
25 misdemeanor.

1 And Congress did so with respect to the
2 historical context in immediately adjacent provision.
3 It narrowed 843(b) in an immediately adjacent provision
4 to the one in which it provided that the simple
5 possessor could avoid any conviction at all and the one
6 in which it provided that a youthful offender could
7 obtain a complete expungement of its records. And --

8 JUSTICE GINSBURG: You didn't -- I haven't
9 heard you question so far the government's rationale,
10 the reason Congress did this is it's more difficult to
11 detect a drug deal when it's by telephone than if it
12 were an encounter on the street or in an apartment. You
13 have not questioned that?

14 MR. SRINIVASAN: No, we don't question that,
15 Your Honor, but I would like to make two points with
16 respect to that. First of all, it may be more
17 difficult -- the use of the telephone may be more
18 difficult, and that may be the animating purpose that
19 Congress sought to address through this provision. But
20 that purpose is substantially served even in the context
21 of this case, because --

22 JUSTICE SCALIA: I don't understand what
23 you're saying. The use of a phone may be more
24 difficult?

25 MR. SRINIVASAN: Use of a phone may make

1 detection more difficult, and that may be the animating
2 purpose -- excuse me. That may have been the animating
3 purpose behind the enactment of this provision. But
4 that purpose is substantially served, even if you accept
5 our understanding of the statute on the facts of this
6 case, because the seller comes squarely within the terms
7 of section 843(b). So because the seller comes within
8 the terms of section 843(b), the statute is already
9 operating against the seller's use of a telephone.

10 The question in our case is whether the
11 buyer also comes within the ambit of section 843(b).
12 And because section 843(b) presupposes someone who is
13 committing, facilitating or committing a drug felony,
14 the buyer doesn't come within the reach of section
15 843(b) because he's not committing, causing or
16 facilitating a drug felony in the first place. The
17 seller may be, but the buyer is not. The statutory
18 purposes are still served by virtue of penalizing the
19 seller.

20 If the Court has no further questions, I
21 would like to reserve the balance of my time for
22 rebuttal.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Miller.

25 ORAL ARGUMENT OF ERIC D. MILLER

1 ON BEHALF OF THE RESPONDENT

2 MR. MILLER: Mr. Chief Justice, and may it
3 please the Court:

4 Section 843(b) prohibits the use of a
5 communication facility in causing or facilitating the
6 commission of any act constituting a felony under the
7 Controlled Substances Act. The court of appeals
8 correctly held that the statute is violated when a
9 person uses a communication facility such as a telephone
10 to purchase controlled substances unlawfully. A call to
11 order drugs both causes and facilitates a felony
12 distribution of drugs.

13 There's no basis in the statute for creating
14 an exemption for people who facilitate or cause felony
15 distributions by purchasing drugs for their own personal
16 use.

17 CHIEF JUSTICE ROBERTS: So two people across
18 the park, they know there's a drug dealer on the other
19 side, the one waves and the dealer comes over, the other
20 calls on the cell phone and the dealer comes over; the
21 other gets four more years? The phone user gets four
22 more years?

23 MR. MILLER: The phone -- the phone user is
24 exposed to four more years. There's no mandatory
25 minimum --

1 CHIEF JUSTICE ROBERTS: Suppose he calls
2 three times. He's exposed to 12 more years, right?

3 MR. MILLER: That's right. Congress -- I
4 mean, those two cases are different and Congress made
5 the judgment.

6 JUSTICE SCALIA: Not just that, he gets a
7 felony on his record. Before that he would have had
8 just a misdemeanor; right?

9 MR. MILLER: That's right.

10 JUSTICE KENNEDY: The call -- does the call
11 have to be completed -- I mean, if he gets an answer
12 saying "Your call is important to us, but we're serving
13 someone else"?

14 (Laughter.)

15 MR. MILLER: If the call -- the statute
16 requires that the communication facility be used. And
17 if the call doesn't actually go through, it would be
18 difficult to see how you would use the --

19 JUSTICE GINSBURG: But if he leaves a
20 message?

21 MR. MILLER: If he leaves the message and
22 the message in some way causes or facilitates a felony
23 drug distribution, then, yes, he has used the
24 communication facility.

25 JUSTICE GINSBURG: In this case we have two

1 separate episodes, each involving one gram of cocaine?

2 MR. MILLER: That's correct.

3 JUSTICE GINSBURG: And there were a total of
4 seven phone calls?

5 MR. MILLER: There were six. The government
6 dismissed one of the counts. It was six counts that
7 went to trial, six phone calls.

8 JUSTICE GINSBURG: So that would be an
9 exposure --

10 MR. MILLER: Of 24 years.

11 JUSTICE GINSBURG: 24 years for the one gram
12 of cocaine on two occasions.

13 Do you agree that it doesn't make any
14 difference who initiates the call? That is, if the
15 seller says -- seller calls the buyer, and says, I
16 understand that you are in the market for one gram of
17 cocaine, I'll sell it to you, is the buyer similarly
18 subject to this statute?

19 MR. MILLER: Just getting that call by
20 itself wouldn't subject someone to the statute. But if
21 you get the call and then engage in a conversation --

22 JUDGE GINSBURG: Yes.

23 MR. MILLER: -- with the dealer where you
24 are using the telephone to cause --

25 JUSTICE GINSBURG: Yes, we are assuming the

1 purchase is made in either case.

2 MR. MILLER: Yes.

3 JUSTICE GINSBURG: So what you're saying is
4 it doesn't matter who initiates the call?

5 MR. MILLER: That's right.

6 JUSTICE SCALIA: Counsel, what do you do --
7 this case that I find pretty close to what we have here
8 is *Rewis v. United States*, which involved a statute that
9 prohibited interstate travel with the intent to, quote,
10 "promote, manage, establish, carry on or facilitate"
11 certain kinds of illegal activities, one of which would
12 have been gambling.

13 And we said the ordinary meaning of this
14 language suggests that the traveler's purpose must
15 involve more than the desire to patronize the illegal
16 activity. So it wouldn't have been facilitating a
17 gambling operation simply to be engaging in interstate
18 travel for the purpose of playing the tables.

19 MR. MILLER: I think there are a couple
20 answers to that, Your Honor. First, *Rewis*, as you say,
21 was construing the Travel Act. It didn't focus on the
22 word "facilitate," and it certainly didn't set out a
23 general --

24 JUSTICE SCALIA: Oh, it certainly focused on
25 the word "facilitate." That was the whole purpose of

1 that passage. It said -- it quoted "promote, manage,
2 establish, carry on or facilitate," and the ordinary
3 meaning of this language suggests the traveler's purpose
4 must involve more than the desire to patronize the
5 illegal activity.

6 MR. MILLER: That's right, and -- and as --
7 as indicated by the passage you've just quoted, the
8 focus of the Court there was on the traveler's purpose.
9 The Travel Act requires intent. Section 843(b) is
10 different in that it's satisfied by knowingly or
11 intentionally using the phone.

12 So the Court in Rewis said, quite
13 reasonably, that someone whose only purpose is to be a
14 customer of an unlawful enterprise doesn't have the
15 intent to facilitate -- and significantly, although the
16 Court's quotation of the statute ends at "facilitate,"
17 it's not just to facilitate any unlawful activity; it's
18 to facilitate the promotion, management --

19 JUSTICE SCALIA: Don't you think that the
20 "knowingly" in this statute also requires that you are
21 knowingly facilitating?

22 MR. MILLER: It does require.

23 JUSTICE SCALIA: Okay. So this is the same
24 thing here.

25 MR. MILLER: But it doesn't have to be -- it

1 doesn't have to be that you have the purpose of
2 facilitating the seller. It's sufficient that you know
3 that the seller's --

4 JUSTICE SCALIA: Well, this didn't
5 mention -- this statute didn't mention purpose, either,
6 did it?

7 MR. MILLER: It -- it said "intent." It
8 does not include the word "knowledge," and the Court in
9 the passage you just read construed that to require an
10 inquiry into the traveler's purpose.

11 It's also significant --

12 JUSTICE SCALIA: I find it pretty close, I
13 really do.

14 MR. MILLER: Well, one other difference,
15 then, Your Honor, is that the facilitation that has to
16 take place under the Travel Act is facilitation of the
17 promotion, management, establishment or carrying on of
18 unlawful activity, which is defined not as a discrete
19 crime but as a business enterprise involving gambling.
20 So you have a statute that's focused on sort of
21 management or direction of an ongoing enterprise,
22 whereas here under 843(b), it's sufficient to facilitate
23 a discrete act.

24 JUSTICE BREYER: Why are you going through
25 all this sort of parsing, I mean, looking at the

1 legislative history as well as the statute in 1970?
2 What is your answer to the last point that they made,
3 that what Congress wanted to do was to make simple
4 possession a misdemeanor, that's why they changed the
5 word, which -- "offense" to "felony." That's why they
6 changed the word "felony" to "misdemeanor."

7 And I can't imagine why else they amended
8 the statute, and just because I was curious I looked it
9 up, and that's why they amended it, right. So -- so the
10 legislative history makes that clear.

11 So what you've done is figure out a way --
12 the government's figured out a way to do the opposite of
13 what they want, to take people who simply possess and
14 transform it into a felony. Now, what justification is
15 there in the law for doing that?

16 MR. MILLER: Well, I think there are a
17 couple of answers to that. First is that section 843(b)
18 doesn't apply to people who simply possess. It applies
19 to people who possess by using a phone to facilitate a
20 felony distribution. And Congress -- I mean, the very
21 existence of the statute demonstrates that Congress
22 thought that the use of a phone is a separate element
23 that introduces a distinct evil that Congress wanted to
24 combat. And as to the change in the felony language --

25 JUSTICE BREYER: As to the first, I said

1 subset. I didn't say you undermined the entire statute.
2 I said you took a subset of people who simply possessed
3 and that subset you transformed into felons. Now, your
4 response I guess is just what you said.

5 MR. MILLER: Well, yes --

6 JUSTICE BREYER: -- second.

7 MR. MILLER: -- and also that the reason for
8 the -- as you know, as you know, the predecessor to
9 843(b), which was section 1403, referred to causing or
10 facilitating any offense. All of the enumerated
11 offenses were felonies. In 1970 they changed the word
12 "offense" to the word "felony." But that's part of the
13 reason for that. There is no legislative history
14 specifically addressing the reason for that change. But
15 part of the reason we can infer is that the 1970 statute
16 created a whole host of misdemeanors, of misdemeanor
17 regulatory offenses under the Controlled Substances Act.
18 So one good example is section 829, which prohibits
19 distributing a controlled substance without a
20 prescription, and that's an offense -- that's a
21 misdemeanor, and that could easily be caused or
22 facilitated over the phone, if somebody called a
23 pharmacist.

24 And so, where both parties to the
25 transaction are only engaging in a misdemeanor, that's

1 something that 843(b) would not apply to.

2 JUSTICE GINSBURG: But we do know that --
3 that Congress drew a line it hadn't drawn before between
4 the own-purpose users and people who were in the
5 trafficking business, and it expressed sympathy for
6 the -- or leniency, a policy of leniency.

7 But the difference between the
8 classification felony and misdemeanor is huge in terms
9 of consequences for a person's life. So let's take the
10 defendant in this case. If he becomes a felon rather
11 than a misdemeanant, even if it's his first time and
12 it's only one gram, he loses a lot of rights, doesn't
13 he?

14 MR. MILLER: Yes. Yes, that's right. But I
15 -- and I think -- but one other change that Congress
16 made to 843(b) in 1970 that's significant is that it
17 eliminated the mandatory minimum. There was under the
18 predecessor --

19 JUSTICE GINSBURG: Yes, but I'm speaking
20 about the post consequences.

21 MR. MILLER: Yes. Yes. It --

22 JUSTICE GINSBURG: Like -- let's take a
23 young person. It has an effect on student loans,
24 government loans?

25 MR. MILLER: Yes.

1 JUSTICE GINSBURG: And it may be that in
2 certain States voting rights are removed, and there is
3 on this person's record forever that he is a felon. It
4 just seems odd that Congress would have at one and the
5 same time, the same statute, say, we want these -- to
6 give these people a chance and if they are in a
7 rehabilitation program and they make it they won't even
8 get any charge, not even a misdemeanor charge, and then
9 say, but a whole group of them are going to be treated
10 just like traffickers if they use a telephone.

11 It's hard -- these two would seem to be
12 working at odds with each other. So mustn't the Court
13 then try to reach some accommodation, some harmonization
14 of these two provisions? And it's suggested that we do
15 that by saying facilitation, causing in this context
16 means the same thing as aiding and abetting, then we
17 have the buyer-seller rule for the aider and abettor,
18 and then we have made these two provisions harmonious.

19 MR. MILLER: I think the buyer-seller
20 principle and the limitation on aiding and abetting and
21 accessory liability, as this Court recognized in
22 *Gebardi*, doesn't apply here; because the principle that
23 the Court set out in that case, and it has been
24 recognized in subsequent cases, is that -- is that when
25 Congress criminalizes or punishes one party to a

1 transaction, that inevitably involves a second party.
2 The second party who is left unpunished by the statute
3 doesn't get swept back in under section 2 as an aider
4 and abettor.

5 That principle doesn't apply here because
6 although the existence of a purchaser or a receiver of
7 drugs is an inevitable incident of a distribution, the
8 existence of a purchaser who uses a phone is not. The
9 whole point of this statute is that the use of a phone
10 is a separate and distinct element that introduces a
11 different evil and that Congress wanted to combat that.
12 The other -- the other reason that aiding and
13 abetting --

14 JUSTICE SCALIA: Except that the use of a
15 phone in this statute is applied to the seller as well
16 as to the buyer. I mean, it seems to me it is parallel:
17 use of a phone to commit the offense by the seller, and
18 you want us to similarly sweep in the facilitating of
19 the offense by the use of the phone by the buyer. It
20 seems to me pretty parallel to what we've done in the
21 buyer-seller rule.

22 MR. MILLER: The -- the statute -- but by
23 its terms makes clear that the person using the phone
24 and the person committing the felony don't have to be
25 the same person, and I think -- I understood Petitioner

1 to acknowledge that. The statute doesn't say knowingly
2 or intentionally use a communication facility in causing
3 or facilitating his or her commission of a felony.

4 JUSTICE BREYER: Is there another example in
5 the law, anywhere in the law, where -- and there may be,
6 I'm asking -- which you've come across, where we have an
7 illegal business and there is a customer; and all the
8 customer does is be a customer; and is there an example
9 where just because he's a customer in a statutory
10 provision that normally has a lesser penalty -- all
11 right; imagine those circumstances -- you still can
12 punish him as if he -- as if he ran the business?

13 MR. MILLER: I'm not aware of any, and I
14 don't think --

15 JUSTICE BREYER: I'm not aware, and why
16 should this be the first?

17 MR. MILLER: But this -- this isn't one,
18 Because this isn't a case that punishes people just for
19 being a customer. It's a case -- it's a statute that
20 punishes people for being a customer -- and using a
21 phone.

22 JUSTICE BREYER: The way they're a customer
23 -- the way they're a customer is they use the telephone,
24 and I guess one side thinks that's not a big deal, and
25 the other side thinks that, anyway, in terms of what

1 Congress thought, it's a tremendously big deal because
2 Congress was really worried about telephones. Okay,
3 that's possible.

4 So can you get a parallel that's like that?

5 MR. MILLER: There are -- there's a whole
6 host of statutes that punish --

7 JUSTICE BREYER: What one comes to mind?

8 MR. MILLER: I mean, the wire fraud statute
9 punishes conduct that might not be a Federal offense at
10 all, but for the fact that somebody used --

11 JUSTICE BREYER: That's jurisdictional.

12 What I'm looking for is there's a business and a
13 customer, the statute punishes the business worse than
14 the customer. Now, we get the customer as if he were a
15 business participant. That's what I'm looking for,
16 where it's the way he does it -- i.e., whether he uses a
17 telephone or whether he uses a telegram or semaphore
18 signals or -- where the -- where the means of
19 communication here or something like that suddenly
20 transform him?

21 Anything else that comes to mind? I didn't
22 expect there to be, but I just thought maybe you would
23 think of an analogy, which would be helpful.

24 MR. MILLER: Well, I mean, if -- we
25 identified on page 25 of our brief, a number of statutes

1 where the use of a communication facility is an element
2 of the offense, and the conduct covered by those
3 statutes in many cases might not be a Federal offense at
4 all.

5 JUSTICE KENNEDY: Carry -- carrying a
6 weapon. A lot of statutes punish more severely for
7 carrying weapons.

8 MR. MILLER: Right. And I think, to be
9 clear, this is not -- this is not a statute that
10 punishes people, punishes customers as if they were
11 distributors or that aggravates an underlying felony.
12 This is a separate offense; it has its own penalty; it
13 put the --

14 JUSTICE KENNEDY: But it -- can you tell me,
15 how does it work? The district -- the United States
16 Attorney in one State, one district, has a case like
17 this where there are four different phone calls; and he
18 doesn't like the looks of the defendant, or for some
19 reason he can charge him, and in the neighboring
20 jurisdiction the United States Attorney does not. Are
21 there guidelines? Does the Department of Justice
22 control this in each case? Is there some manual where
23 we could see what the rules are for charging? Is it all
24 at the discretion of the United States Attorney?

25 MR. MILLER: Yeah. I'm not aware of

1 anything in the U.S. Attorney's Manual that specifically
2 addresses this statute, but of course the Court
3 recognized in Batchelder that prosecutors legitimately
4 have discretion when there are different criminal
5 statutes that cover the conduct, and --

6 JUSTICE GINSBURG: What about the -- the
7 statement that in the manual -- maybe this is
8 incorrect -- but that the charging policy of the
9 Department of Justice instructs prosecutors to charge
10 the most serious offense supported by the facts? And if
11 that's true, then the Assistant U.S. Attorney would have
12 no choice. The most serious offense is not misdemeanor
13 simple possession, but it is the violation of 843(b).

14 MR. MILLER: That's if they bring charges at
15 all, and of course that policy doesn't require
16 prosecutors to -- to bring charges.

17 JUSTICE GINSBURG: Ordinarily --

18 JUSTICE SOUTER: I think we know from this
19 case they're likely to bring charges.

20 MR. MILLER: Well, I mean --

21 JUSTICE GINSBURG: Is that the policy, first
22 of all? It says that they're supposed to charge the
23 most serious offense supported by the facts?

24 MR. MILLER: Yes, and -- and a --

25 JUSTICE GINSBURG: So that means in every

1 one of these cases, whether the dealer picks up the
2 phone or the buyer picks up the phone for a transaction
3 for one gram of cocaine, the prosecutor has no choice
4 but to indict under 843(b)?

5 MR. MILLER: Well, again, if -- if there is
6 to be an indictment at all. There's no requirement that
7 --

8 JUSTICE GINSBURG: I'm talking about the
9 choice between misdemeanor, simple possession
10 misdemeanor, or 843 -- adding on this 843(b). The
11 prosecutor -- if what I read is correct -- has no
12 discretion, has to if he makes the charge. He cannot
13 make a simple misdemeanor charge. He has to charge the
14 felony.

15 MR. MILLER: That's my understanding of the
16 policy, but, you know, this Court has recognized that,
17 you know, that sort of charging decision is a legitimate
18 aspect of the system as long as it's not exercised for
19 unconstitutional reasons.

20 JUSTICE SOUTER: No, but there's -- there's
21 a difference here, and that is, as these cases
22 illustrate, three phone calls for one trifling sale, two
23 for another, this gives a kind of multiplier effect
24 which it's -- it's hard to find a parallel for in the
25 law. We go from a misdemeanor to 12 years, depending on

1 the fact that there were -- there were a couple of cell
2 phone calls.

3 That is -- maybe -- maybe that is exactly
4 what Congress intended, and maybe that's good law
5 enforcement policy, but those are not sort of two
6 intuitively obvious positions.

7 MR. MILLER: I think the -- the text of the
8 statute and the fact that it covers any act constituting
9 a felony does demonstrate that that's what Congress
10 intended as well --

11 JUSTICE SOUTER: Well, what about the
12 question?

13 JUSTICE SCALIA: Let's feel sorry for this
14 -- for the felon who is selling this stuff, too. I
15 mean, the same thing is true of him, isn't it? Every
16 time he makes another phone call he gets socked with
17 another how many years?

18 MR. MILLER: The -- the statutory maximum is
19 four, but again --

20 JUSTICE SCALIA: Yes, so four times four
21 times four every time he makes a phone call.

22 MR. MILLER: Right, and I think that --

23 JUSTICE SCALIA: We should feel sorry for
24 him, too.

25 JUSTICE SOUTER: He knows -- the difference,

1 that -- he knows that he's committing a felony, and the
2 possessor of a gram or less doesn't.

3 MR. MILLER: The possessor who purchases the
4 drugs using his phone knows that he is causing the
5 felony. The reason he calls the drug dealer is because
6 he wants to cause the dealer to send him drugs.

7 JUSTICE BREYER: Well, what about the
8 legislative history? Because I would read it -- and in
9 fact what it seems to me that you're suggesting, when
10 you read the statute, is using a telephone is -- because
11 Justice Kennedy came up with a good example of what I
12 was thinking of. If the buyer sits there with a gun,
13 well, that's different, he shouldn't have the gun, and
14 it's not surprising that he gets a higher sentence. And
15 you're saying by reading the text you've discovered
16 Congress thinks that cell phones are sort of like guns.
17 Okay. I grant you somebody might have thought that.
18 Justice Souter thinks it's not intuitively obvious, but
19 is there any legislative history that suggests that that
20 indeed is what people in Congress thought when they
21 passed this statute? I'll read it if there is.

22 MR. MILLER: Yes, and it --

23 JUSTICE BREYER: And what should I read and
24 where exactly --

25 MR. MILLER: I mean, beyond -- first of all,

1 the -- the Congress has a traditional interest in
2 keeping the channels of commerce and communication free
3 from --

4 JUSTICE BREYER: Normally, where that is
5 involved, I've learned, it's called what Justice Scalia
6 called it "a jurisdictional hook." They don't think the
7 underlying behavior is worse, but they believe there has
8 to be a basis and should be a basis for federal
9 prosecution. I started out where he was. I thought
10 this is just a jurisdictional hook, but now you say no,
11 it isn't; it's much worse than that. It's like carrying
12 a gun, not quite as bad as that, but on that -- in that
13 direction. So I'm asking you what would I read in this
14 history to show that what you're claiming is right?

15 MR. MILLER: The legislative history of the
16 1956 act, which is the -- where the predecessor statute,
17 1403, was enacted, shows that Congress was concerned
18 with the ability of drug traffickers and people engaging
19 in drug transactions to avoid detection by using the
20 phone --

21 JUSTICE BREYER: And that's what -- you've
22 cited that in the brief so I can find it?

23 MR. MILLER: Yes. And the initial proposal
24 in the initial Senate bill would have allowed
25 wiretapping in connection with drug investigations of

1 certain enumerated offenses that covered both purchasers
2 and sellers. That was replaced with the provision that
3 became 1403, which also -- which applied "causing or
4 facilitating" enumerated offenses, and again applied to
5 both buyers and sellers. And that statute was applied
6 to buyers in a number of reported decisions before 1970,
7 and there is nothing in the 1970 legislative history
8 that Congress intended to change that aspect.

9 JUSTICE GINSBURG: How does it work? I
10 mean, I know your overall rationale about the ease of
11 detection -- easier to detect face to face encounter on
12 the streets. But here, I mean, we know that the
13 government tapped the dealer's phone, and that's how the
14 government got the list of the people who bought from
15 the dealer. How common is it that -- the either the
16 buyer or the seller is the subject of a telephone tap?

17 MR. MILLER: I don't -- I don't know the
18 statistics on that, but certainly a wiretap is only
19 possible when demanding standards under Title III are
20 met, and -- whereas a face-to-face meeting can be
21 observed by anybody who happens to be there.

22 JUSTICE GINSBURG: But what had to be met in
23 this case in order to put this tap on the dealer's
24 phone?

25 MR. MILLER: Well, among other things, I

1 believe the statute requires some showing that it's not
2 possible to obtain evidence in some other less intrusive
3 way. So in this case there was a wiretap on the
4 dealer's phone, but in a lot of cases there's not going
5 to be that. And certainly Congress, when it enacted the
6 statute, viewed keeping people from using the phones to
7 conceal their drug transactions as one way of minimizing
8 the need for more intrusive measures like wiretapping.

9 JUSTICE GINSBURG: Well, you would interpret
10 Congress -- now we're getting away from '56, when simple
11 possession was a felony, to '70, when simple possession
12 becomes a misdemeanor. And you're saying that Congress
13 meant to relegate the simple possessor to misdemeanor
14 status, but only if the encounter was face to face. So
15 you're reading into the -- what Congress did to sharply
16 distinguish between traffickers and users, and say but
17 that was only taking 843(b) into account. That benefit
18 -- that you're not going to be a felon; you're going to
19 be a misdemeanant -- is only for face-to-face
20 transactions.

21 MR. MILLER: For -- it's -- I mean, it
22 doesn't apply when -- when a communication facility is
23 used. It also doesn't apply, I mean, in a number of
24 other contexts that Petitioner acknowledges. But --

25 JUSTICE GINSBURG: But I'm talking about

1 this context, the purchase of one gram of cocaine on one
2 occasion, nothing more.

3 MR. MILLER: As a first offense. I mean,
4 that --

5 JUSTICE GINSBURG: So Congress's design was
6 we treat as a less grave offender the buyer for his own
7 use, but only if he buys in a face-to-face encounter.
8 That's what -- what you would have to read -- you would
9 have to limit the line Congress drew between
10 traffickers, on the one hand, and possessors for their
11 own use, on the other, that it applies only to drugs
12 purchased in face-to-face encounters.

13 MR. MILLER: Yes, although I wouldn't
14 describe it as an issue of a less grave offense or a
15 more grave offense in the sense that the use of the
16 phone aggravates the offense of possession.

17 JUSTICE GINSBURG: But I mean, practically
18 --

19 MR. MILLER: But the use of a phone is the
20 difference --

21 JUSTICE GINSBURG: -- the difference between
22 being labeled a misdemeanor and being labeled a felon
23 is an enormous difference.

24 MR. MILLER: That -- that's right. But
25 Congress, again, did recognize that there could be a

1 range of levels of culpability associated with the
2 843(b) offense, which is part of the reason that it
3 eliminated the mandatory minimum when it amended the
4 statute in 1970, suggesting that there could be
5 different kinds of conduct that would satisfy it.

6 JUSTICE SOUTER: Mr. Miller, in answer to
7 one of Justice Breyer's earlier questions, he -- the
8 premise of his question was the effect of the twin
9 amendments from offense to felony and from felony to
10 misdemeanor for possession of small quantities. And he
11 said, well, in effect, is that combination of amendments
12 really being rendered nugatory by the view that you take
13 of the statute? And you said not necessarily, and you
14 said there may be some drug transactions in which it is
15 a misdemeanor on both sides, so that the statute would
16 apply there.

17 Are there any other -- are there many
18 examples of that? I thought not. And are there any
19 other examples of misdemeanor-misdemeanor cases that the
20 -- that the statute would apply to so that -- so that
21 the anomaly wouldn't be quite so obvious?

22 MR. MILLER: Well, I mean, if you're asking
23 other misdemeanor offenses under the Controlled
24 Substances Act --

25 JUSTICE SOUTER: Yes.

1 MR. MILLER: I mean there is the --

2 JUSTICE SOUTER: In other words, how
3 important is this? It looks to us -- I mean, I think it
4 was the premise of the question and it was -- it was my
5 assumption coming in that your view of the statute
6 largely renders those two amendments, or the combined
7 effect of those two amendments, virtually nugatory.

8 And you said, well, not necessarily because
9 there may be misdemeanor cases. And I want to know how
10 many of them there are. Is that really a significant
11 area for the application or nonapplication of this
12 statute?

13 MR. MILLER: I -- I don't know how many
14 prosecutions are brought under those statutes. I
15 imagine that, in part because they are misdemeanors, not
16 a lot of prosecutions.

17 JUSTICE SOUTER: How many separate -- how
18 many misdemeanor-misdemeanor combined offenses are there
19 under the -- under the code?

20 MR. MILLER: 842, section 842, enumerates I
21 think it is on the order of a dozen or so, and then we
22 cite a couple of them in our brief. So distributing a
23 -- a controlled -- a prescription drug without a
24 prescription would probably be one of the most common
25 that someone would engage in.

1 JUSTICE SOUTER: You -- you don't have any
2 figures on the number of actual prosecutions under --
3 under the -- in the misdemeanor-misdemeanor combination
4 cases?

5 MR. MILLER: No. I mean, again, because --
6 because they're misdemeanors and prosecutorial resources
7 are probably concentrated on the more serious felony
8 violations of the Controlled Substances Act, I suspect
9 there aren't a lot of prosecutions.

10 JUSTICE SOUTER: So -- well, then, I guess
11 that leads to my last question, and that is: Isn't it
12 probably true that if we accept your view of the
13 statute, then the effect of those two combined
14 amendments, offense to -- to felony, felony to
15 misdemeanor for small quantities, the -- the combined
16 effect of -- of those two statutes is, in effect,
17 rendered worthless in -- in most cases? In a
18 substantial number of cases to which the -- the
19 communication facility statute would be applied, it --
20 it would render those -- those two amendments, in
21 effect, worthless?

22 MR. MILLER: Well, I think the -- the
23 relevant inquiry is: What -- what did Congress intend
24 in 1970 when it changed the statute?

25 JUSTICE SOUTER: That may be a legitimate

1 inquiry, but what about my irrelevant inquiry?

2 MR. MILLER: Well, I --

3 (Laughter.)

4 JUSTICE SOUTER: It's going to -- your --
5 your view of the statute is going to render those two
6 amendments virtually dead letters?

7 MR. MILLER: I mean I -- I think -- I think
8 from the perspective of -- of Congress, that there was
9 no -- they wouldn't have anticipated that the amendment
10 would not have any consequence. I mean the fact that --
11 that they created this whole set of misdemeanors, the
12 fact that they aren't violated very often --

13 JUSTICE SOUTER: As you said, you -- you
14 don't have figures on the number of prosecutions. And
15 the number of prosecutions under those misdemeanors, as
16 distinct from the number of applications of the
17 communications statute to conventional buyer/seller
18 transactions is probably the difference between a very
19 small set and a very large set of cases. And in the
20 very large set of cases the two amendments are being
21 rendered, in effect, worthless; isn't that true?

22 MR. MILLER: If I -- if I may answer, my
23 understanding is that the number of prosecutions under
24 843(b) is -- is also relatively small, but I don't have
25 precise figures on -- on the comparative numbers.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Four minutes, Mr. Srinivasan.

3 REBUTTAL ARGUMENT OF SRI SRINIVASAN
4 ON BEHALF OF THE PETITIONER

5 MR. SRINIVASAN: Thank you, Mr. Chief
6 Justice.

7 The only point I would make in closing,
8 unless the Court has further questions for us, is that
9 we think the statutory text, the statutory history, and
10 the context all weigh in favor of our reading. But even
11 if there is any ambiguity on the matter, principles of
12 lenity would squarely apply in foreclosing an
13 interpretation that converts someone who is a
14 misdemeanor into someone who is exposed to multiple
15 felony counts carrying substantial criminal
16 consequences.

17 JUSTICE STEVENS: May I ask this question as
18 just a matter of history? Is it perfectly clear? I
19 think you said that the -- the presence of the use of
20 the telephone was not just a jurisdictional hook.
21 Because back in 1970 the Federal Government really
22 wasn't in the criminal law business the way it has
23 become in the last 30 or 40 years.

24 At that time there was a lot of concern, the
25 Travel Act and other statutes, about exactly what the

1 Federal justification for -- justification for Federal
2 participation existed. And I -- I always had the
3 impression that that was really what was behind the
4 telephone aspect of this statute.

5 MR. SRINIVASAN: I don't think so, Justice
6 Stevens, because as of 1970 there were already
7 underlying drug laws that barred distribution, that
8 barred receipt of drugs, and that barred most of the
9 activities that are now prohibited under the drug laws.
10 And the telephone law presupposes that one of those
11 underlying acts is already going on.

12 And so to the extent that there was
13 jurisdiction over those underlying acts, which
14 presumably there was since the statutes are on the
15 books, the Telephone Act wasn't necessary to create
16 jurisdiction.

17 JUSTICE ALITO: Could I ask you this
18 question? I -- I understand your argument regarding
19 statutory history and the harsh consequences of this.
20 But as far as the buyer/seller rule -- Gebardi and Rewis
21 are concerned, what if the statute said -- made it a
22 crime for -- for a person to use a machine gun in
23 facilitating the commission of a felony? Would you say
24 -- you would have to say that the buyer/seller rule and
25 those authorities would mean that that person could not

1 be prosecuted if they were using the machine gun to
2 facilitate a -- a purchase for personal use; would you
3 not?

4 MR. SRINIVASAN: Well, I think the -- the
5 use of the machine gun wouldn't come within the
6 buyer/seller rule because what the buyer/seller rule
7 deals with is a substantive prohibition on distribution.
8 And the -- the presumption is that when Congress
9 prohibits distribution, it knows that there is also a
10 receiver of the banned substance. And by virtue of
11 excluding that receiver from the distribution
12 prohibition, it wouldn't have wanted to bring that
13 receiver back within the fold of the statute.

14 JUSTICE ALITO: Right, but --

15 MR. SRINIVASAN: That wouldn't apply --

16 JUSTICE ALITO: I'm sorry. Go ahead.

17 MR. SRINIVASAN: I was just going to say I
18 don't think that would apply with somebody who is using
19 a machine gun because the person who is using a machine
20 gun isn't necessarily part of the distribution offense
21 to begin with. And so the buyer/seller principle would
22 apply with respect to the underlying purchase of drugs
23 if that were at issue. But if you tack on use of a
24 machine gun, I don't think the buyer/seller principle
25 would speak directly to that.

1 JUSTICE ALITO: Well, I don't -- I don't see
2 the difference between use of a phone to facilitate --
3 use of a phone in facilitating, use of -- of a firearm
4 in facilitating, unless you can say that the -- the use
5 of a communication facility in effecting the purchase is
6 such a -- a virtually indispensable element of the
7 purchase that it -- it -- it's swept up within it.

8 MR. SRINIVASAN: Oh, no, I'm sorry, Justice
9 Alito. If the hypothetical statute barred use of a
10 phone in facilitating a drug felony, if it was precisely
11 parallel to this one, then we make the same argument.
12 But it's not because the use of a machine gun falls
13 within the buyer/seller principle. It's because the
14 underlying act of purchasing drugs falls within the
15 buyer/seller principle. And if the prohibition is on
16 use of a machine gun in some underlying act, then you
17 have to look at the underlying act. And the underlying
18 act is governed by the buyer/ seller principle, and
19 buyers fall outside of it. And so the use of a machine
20 gun by someone who is already outside of the act
21 wouldn't bring the buyer back into the fold of the
22 statute.

23 JUSTICE ALITO: So the answer is that this
24 -- it would be the same.

25 MR. SRINIVASAN: It would be the same --

1 JUSTICE ALITO: The buyer/seller rule would
2 apply in your view in exactly the same way.

3 MR. SRINIVASAN: If the -- if the statute --
4 if I understand your hypothetical correctly, if the
5 statute were use of a phone in facilitating a drug
6 felony, then the --

7 JUSTICE GINSBURG: But it could be a -- a
8 separate crime, the use of a machine gun in facilitating
9 -- in facilitating a crime, any crime. That could be --

10 MR. SRINIVASAN: Sure. If that were the
11 case, then it would be different. My -- if I could just
12 finish for a minute, Mr. Chief Justice.

13 My -- my only point is that if the theory of
14 prosecution were that a person comes within the fold of
15 the statute because they're buying drugs and that buying
16 of drugs facilitates the sale of drugs and, therefore,
17 they are someone who uses a machine gun in facilitating
18 the sale of drugs, well, then the buyer/seller rule
19 would kick in. Because the initial predicate of that
20 theory, which is that the person is facilitating the
21 sale by buying, wouldn't work. They would fall outside
22 of the statute at that stage.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.

25 (Whereupon, at 11:08 a.m., the case in the

1 above-entitled matter was submitted.)
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<p>A</p> <p>abet 11:14</p> <p>abetted 6:5,5</p> <p>abettors 9:16</p> <p>abetting 4:11 9:21,22,23 10:1,6,11 11:17 12:15,19 14:3,4 36:16 36:20 37:13</p> <p>abettor 5:17,25 11:12 15:4 17:2 36:17 37:4</p> <p>abettors 5:5 14:10</p> <p>ability 45:18</p> <p>able 7:1</p> <p>above-entitled 1:11 58:1</p> <p>Abuelhawa 1:3 3:4</p> <p>accept 15:9 26:4 51:12</p> <p>accessory 36:21</p> <p>accommodation 36:13</p> <p>accompany 14:7</p> <p>account 47:17</p> <p>accused 12:19</p> <p>acknowledge 38:1</p> <p>acknowledges 47:24</p> <p>act 10:4,12 11:20 20:23 21:1,7 22:3 27:6,7 30:21 31:9 32:16,23 34:17 43:8 45:16 49:24 51:8 53:25 54:15 56:14,16 56:17,18,20</p> <p>actions 14:6</p> <p>activities 30:11 54:9</p>	<p>activity 13:20,20 30:16 31:5,17 32:18</p> <p>acts 10:14 54:11 54:13</p> <p>actual 51:2</p> <p>added 7:8</p> <p>adding 42:10</p> <p>addition 12:16</p> <p>additional 3:24</p> <p>address 25:19</p> <p>addressed 7:21</p> <p>addresses 41:2</p> <p>addressing 34:14</p> <p>adjacent 22:13 22:20 25:2,3</p> <p>afford 22:4</p> <p>age 22:21</p> <p>aggravated 3:24 6:21 12:5,8</p> <p>aggravates 40:11 48:16</p> <p>agree 8:6,6,11 12:24 29:13</p> <p>ahead 55:16</p> <p>aid 11:13 19:4</p> <p>aided 6:5,5</p> <p>aider 5:17,25 11:12 15:4 17:2 36:17 37:3</p> <p>aiders 5:4 9:16 14:10</p> <p>aiding 4:11 9:21 9:22,23,25 10:5,6,10,14 11:17 12:15,19 14:3,4 36:16 36:20 37:12</p> <p>Alito 6:3 14:15 14:24 16:9,14 17:10 54:17 55:14,16 56:1 56:9,23 57:1</p> <p>allowed 22:16 22:22 45:24</p>	<p>alluding 21:23</p> <p>ambiguity 53:11</p> <p>ambit 9:5 17:16 26:11</p> <p>amended 33:7,9 49:3</p> <p>amendment 52:9</p> <p>amendments 49:9,11 50:6,7 51:14,20 52:6 52:20</p> <p>analogy 39:23</p> <p>analysis 21:17 21:18</p> <p>animating 25:18 26:1,2</p> <p>anomalous 13:7 13:12</p> <p>anomaly 16:3 49:21</p> <p>answer 5:10 7:21 8:9 28:11 33:2 49:6 52:22 56:23</p> <p>answers 30:20 33:17</p> <p>anticipated 52:9</p> <p>anybody 46:21</p> <p>anyway 38:25</p> <p>apartment 25:12</p> <p>appeals 27:7</p> <p>APPEARAN... 1:14</p> <p>applicability 20:2</p> <p>application 16:17 18:2 50:11</p> <p>applications 52:16</p> <p>applied 23:8,23 24:4 37:15 46:3,4,5 51:19</p> <p>applies 6:6 11:12 12:23</p>	<p>19:21 33:18 48:11</p> <p>apply 11:18 12:22 13:12 16:1 33:18 35:1 36:22 37:5 47:22,23 49:16,20 53:12 55:15,18,22 57:2</p> <p>applying 16:3 18:19</p> <p>apprehended 14:22</p> <p>architecture 6:25</p> <p>area 50:11</p> <p>argue 15:6</p> <p>argument 1:12 2:2,7 3:3,6 8:1 8:24 9:3,19 14:5 15:12 21:12 26:25 53:3 54:18 56:11</p> <p>arguments 15:5</p> <p>arrest 22:24</p> <p>arriving 5:21</p> <p>asking 38:6 45:13 49:22</p> <p>aspect 42:18 46:8 54:4</p> <p>aspects 18:11</p> <p>Assistant 1:17 41:11</p> <p>assisting 10:14</p> <p>associated 16:25 16:25 17:4,7 18:14 22:24 23:25 24:1,11 49:1</p> <p>assume 8:6,6 18:23</p> <p>assumes 9:20,20 9:20</p> <p>assuming 7:18 8:2 29:25</p>	<p>assumption 50:5</p> <p>Attorney 40:16 40:20,24 41:11</p> <p>Attorney's 41:1</p> <p>authorities 54:25</p> <p>authority 19:3</p> <p>automobiles 8:15</p> <p>available 24:16 24:17</p> <p>avenue 24:16,17</p> <p>avoid 7:1 22:17 25:5 45:19</p> <p>aware 8:22 38:13,15 40:25</p> <p>a.m 1:13 3:2 57:25</p> <hr/> <p>B</p> <p>back 21:13,15 37:3 53:21 55:13 56:21</p> <p>background 19:11,17 20:1</p> <p>bad 45:12</p> <p>balance 26:21</p> <p>banned 55:10</p> <p>bar 18:4</p> <p>bargaining 18:25</p> <p>barred 10:13 20:10,13,24 54:7,8,8 56:9</p> <p>basis 23:3 27:13 45:8,8</p> <p>Batchelder 41:3</p> <p>bear 19:12</p> <p>bears 20:6</p> <p>beepers 7:12</p> <p>began 7:7</p> <p>behalf 1:15,19 2:4,6,9 3:7 27:1 53:4</p> <p>behavior 45:7</p> <p>believe 45:7 47:1</p>
--	---	---	---	---

benefit 5:3 47:17 beyond 44:25 big 38:24 39:1 bill 45:24 Black's 10:3 books 54:15 bought 46:14 boyfriend 4:14 breadth 7:23 BREYER 32:24 33:25 34:6 38:4,15,22 39:7,11 44:7 44:23 45:4,21 Breyer's 49:7 brief 39:25 45:22 50:22 bring 18:12 19:12 41:14,16 41:19 55:12 56:21 brings 7:15 broadly 7:25 brought 21:13 21:15 50:14 bulk 17:23 business 13:22 32:19 35:5 38:7,12 39:12 39:13,15 53:22 buy 15:7 buyer 6:3,4,5 9:12 12:25 14:16 15:20 17:2,5,8,11 23:24 24:1,8 26:11,14,17 29:15,17 37:16 37:19 42:2 44:12 46:16 48:6 56:18,21 buyers 5:4,21 8:4 9:15 14:10 46:5,6 56:19 buyer's 24:2 buyer-seller 5:3	5:3 9:15 15:2 15:10 16:13,18 16:23 17:1 20:7 21:19 23:22 36:17,19 37:21 buyer/seller 52:17 54:20,24 55:6,6,21,24 56:13,15 57:1 57:18 buying 9:4 14:5 17:22 57:15,15 57:21 buys 16:15 48:7 <hr/> C C 2:1 3:1 call 13:24 15:8,9 15:10,13,21 16:7 27:10 28:10,10,12,15 28:17 29:14,19 29:21 30:4 43:16,21 called 15:23 34:22 45:5,6 calling 13:23 calls 27:20 28:1 29:4,7,15 40:17 42:22 43:2 44:5 car 8:18 care 24:3 carriage 8:16 carry 13:22 30:10 31:2 40:5 carrying 32:17 40:5,7 45:11 53:15 case 3:4 5:16 7:16 8:19,20 8:22 10:22 16:4 23:1 25:21 26:6,10 28:25 30:1,7	35:10 36:23 38:18,19 40:16 40:22 41:19 46:23 47:3 57:11,24,25 cases 19:2 28:4 36:24 40:3 42:1,21 47:4 49:19 50:9 51:4,17,18 52:19,20 casual 7:16 caught 4:4 cause 11:9,14 27:14 29:24 44:6 caused 34:21 causes 27:11 28:22 causing 3:20,21 4:1 6:12 9:8 10:15 12:6,11 26:15 27:5 34:9 36:15 38:2 44:4 46:3 cautious 19:2 cell 7:11 8:2 13:23 27:20 43:1 44:16 certain 17:7 30:11 36:2 46:1 certainly 4:21 8:25 30:22,24 46:18 47:5 cetera 18:25 chain 6:25 7:1 chance 22:4 36:6 change 8:16 33:24 34:14 35:15 46:8 changed 20:19 20:21 23:12,21 33:4,6 34:11 51:24 changes 23:18	23:20 channels 45:2 chapter 12:24 characteristics 17:7 18:15 charge 36:8,8 40:19 41:9,22 42:12,13,13 charged 9:11 charges 41:14 41:16,19 charging 18:25 19:19 40:23 41:8 42:17 Chief 3:3,8 7:6 7:10 8:5,9,13 8:23 10:17,21 13:18 14:1 17:19 22:25 23:4,11,15 24:13 26:23 27:2,17 28:1 53:1,5 57:12 57:23 choice 41:12 42:3,9 chose 20:14 circumspect 19:24 circumspection 19:25 circumstance 16:24 circumstances 38:11 cite 50:22 cited 45:22 civil 18:5 claiming 45:14 classic 5:15,17 9:22 13:11 classification 35:8 clear 4:17 24:7 33:10 37:23 40:9 53:18 climb 23:7	close 30:7 32:12 closing 53:7 cocaine 15:24 29:1,12,17 42:3 48:1 code 50:19 combat 33:24 37:11 combination 49:11 51:3 combined 50:6 50:18 51:13,15 come 6:1 7:3 9:5 11:10 26:14 38:6 55:5 comes 5:24 26:6 26:7,11 27:19 27:20 39:7,21 57:14 coming 50:5 commerce 45:2 commission 6:9 9:8,9 10:7 13:21 16:21 27:6 38:3 54:23 commit 4:16 11:9,13 37:17 commits 3:11 committed 4:20 committing 3:19 3:22,25 4:7,7 6:12 9:7 12:6 12:10 17:6,8 24:9,9 26:13 26:13,15 37:24 44:1 common 46:15 50:24 communicate 5:20 communicated 14:18 communication 5:19 6:11 20:24 23:8 27:5,9 28:16
--	---	---	--	--

28:24 38:2 39:19 40:1 45:2 47:22 51:19 56:5 communicatio... 6:8,15 52:17 comparative 52:25 complete 22:18 22:23 25:7 completed 28:11 complicated 18:21 conceal 47:7 concentrated 51:7 concern 53:24 concerned 6:20 9:2 45:17 54:21 conclusion 16:19 conduct 21:12 39:9 40:2 41:5 49:5 Congress 6:20 6:22 9:2 11:1 13:13 20:10,12 20:21 21:1,8 21:14,20,25 22:3,8,12,19 24:23 25:1,10 25:19 28:3,4 33:3,20,21,23 35:3,15 36:4 36:25 37:11 39:1,2 43:4,9 44:16,20 45:1 45:17 46:8 47:5,10,12,15 48:9,25 51:23 52:8 55:8 Congress's 48:5 connection 17:17 20:11,13 20:15,17,25 21:2,4,9,10	24:19,20,22 45:25 consequence 52:10 consequences 35:9,20 53:16 54:19 considered 9:13 9:17 14:10,12 constituting 27:6 43:8 construction 8:21 19:13 construed 7:24 32:9 construing 30:21 contact 7:2,3 context 3:18 8:7 16:4 19:16 21:7,23,25 25:2,20 36:15 48:1 53:10 contexts 47:24 control 40:22 controlled 20:23 21:1,7 27:7,10 34:17,19 49:23 50:23 51:8 conventional 52:17 conversation 14:19 29:21 converted 13:1 converts 53:13 convicted 16:20 17:12,15 conviction 22:17 25:5 corner 4:15 correct 29:2 42:11 correctly 27:8 57:4 Costco 17:23 counsel 26:23 30:6 53:1	57:23 counts 29:6,6 53:15 couple 30:19 33:17 43:1 50:22 course 12:9 13:9 15:14 41:2,15 court 1:1,12 3:9 10:11 21:17 26:20 27:3,7 31:8,12 32:8 36:12,21,23 41:2 42:16 53:8 courts 18:7 Court's 31:16 cover 7:22 41:5 covered 5:14 7:20 12:23 23:16 40:2 46:1 covers 3:19 7:7 24:21 43:8 create 13:3,6 18:2 54:15 created 34:16 52:11 creating 27:13 crime 4:15 6:7 10:7,19 13:21 32:19 54:22 57:8,9,9 criminal 9:22 22:23 41:4 53:15,22 criminalizes 36:25 culpability 4:21 49:1 curious 33:8 customer 31:14 38:7,8,8,9,19 38:20,22,23 39:13,14,14 customers 40:10	D D 1:17 2:5 3:1 26:25 dead 52:6 deal 12:3 25:11 38:24 39:1 dealer 15:23 17:23 27:18,19 27:20 29:23 42:1 44:5,6 46:15 dealer's 21:16 46:13,23 47:4 deals 6:10 16:23 55:7 dealt 10:12 12:14 decision 42:17 decisions 18:8 46:6 defendant 14:15 14:16 35:10 40:18 defined 11:1 32:18 defines 10:4,6 definitely 19:7 definitional 10:3 demanding 46:19 demonstrate 43:9 demonstrates 33:21 Department 1:18 40:21 41:9 depend 4:5 8:2 8:24 depending 42:25 describe 48:14 design 48:5 desire 30:15 31:4 detect 25:11 46:11	detection 6:23 7:2 26:1 45:19 46:11 Dictionary 10:4 difference 12:1 29:14 32:14 35:7 42:21 43:25 48:20,21 48:23 52:18 56:2 different 6:7 9:24 10:16 11:6 24:16,21 28:4 31:10 37:11 40:17 41:4 44:13 49:5 57:11 differentiate 15:20 difficult 6:24 17:20 18:9 23:7 25:10,17 25:18,24 26:1 28:18 directed 7:12 directing 14:8 direction 32:21 45:13 directly 8:23 55:25 discovered 44:15 discrete 32:18 32:23 discretion 18:24 19:18 40:24 41:4 42:12 dismissed 29:6 distinct 33:23 37:10 52:16 distinction 12:1 18:10,17,19 24:6 distinctions 16:6 distinguish 47:16 distribute 18:6
---	---	---	---	--

18:12 distributing 34:19 50:22 distribution 5:5 5:7,25 6:2 7:1 9:16,18 13:14 13:22 17:3 22:11 24:14 27:12 28:23 33:20 37:7 54:7 55:7,9,11 55:20 distributions 27:15 distributor 5:20 distributors 40:11 distributor's 17:1 district 40:15,16 doing 3:14 12:9 19:24 33:15 dozen 50:21 dramatically 7:19 draw 16:6 18:10 drawn 35:3 drew 35:3 48:9 driving 8:17 drug 3:20,22 4:1 4:4,8,12 5:18 5:25 6:1,12,23 7:1 9:8,10,11 9:14 12:7,11 12:15,16,20,22 13:14,22 16:10 16:15 18:3,3 18:18 20:11,11 20:13,15,17,25 21:3,5,9 22:5 23:8 24:4,9,10 24:12,20,22 25:11 26:13,16 27:18 28:23 44:5 45:18,19 45:25 47:7 49:14 50:23	54:7,9 56:10 57:5 drugs 3:11,14 4:14,23 5:4,5,7 7:3 8:4 9:4 13:17 14:6,10 14:11,13,18 15:7,15,18 17:13 22:9 24:18 27:11,12 27:15 37:7 44:4,6 48:11 54:8 55:22 56:14 57:15,16 57:16,18 D.C 1:8,15,18 <hr/> E E 2:1 3:1,1 earlier 49:7 ease 46:10 easier 10:5 13:21 14:2,8 14:19 46:11 easily 34:21 effect 20:16 35:23 42:23 49:8,11 50:7 51:13,16,16,21 52:21 effecting 56:5 either 19:18 30:1 32:5 46:15 element 33:22 37:10 40:1 56:6 eliminated 35:17 49:3 embedded 18:18 enacted 20:4,5 22:15,20 45:17 47:5 enactment 26:3 encompass 21:2 encompasses 22:1	encounter 25:12 46:11 47:14 48:7 encounters 48:12 ends 31:16 enforcement 5:21 43:5 engage 29:21 50:25 engages 16:9 engaging 5:23 7:4 10:13 14:6 30:17 34:25 45:18 enormous 48:23 enterprise 14:7 16:8 31:14 32:19,21 entire 34:1 enumerated 34:10 46:1,4 enumerates 50:20 episodes 29:1 equally 16:1,4 23:23 equivalence 10:3 equivalently 5:5 ERIC 1:17 2:5 26:25 ESQ 1:15,17 2:3 2:5,8 establish 30:10 31:2 established 10:11 establishes 5:4 establishment 32:17 et 18:25 event 17:16 evidence 47:2 evil 33:23 37:11 exactly 14:24 43:3 44:24	53:25 57:2 exam 5:13 example 5:17 13:16 15:6 34:18 38:4,8 44:11 examples 49:18 49:19 exclude 8:4 20:16 excluded 21:4,8 21:14 excluding 55:11 excuse 26:2 exemption 27:14 exercised 42:18 exist 18:3 23:4 existed 54:2 existence 33:21 37:6,8 expanded 7:14 7:15,19,23 expansive 18:24 expect 39:22 explicit 23:14 exposed 27:24 28:2 53:14 exposure 29:9 expressed 35:5 expungement 22:23 25:7 extend 10:22 22:4 extent 5:1 54:12 <hr/> F fabric 18:18 face 3:14,15 46:11,11 47:14 47:14 face-to-face 46:20 47:19 48:7,12 facilitate 10:6 11:9 13:14 27:14 30:10,22	30:25 31:2,15 31:16,17,18 32:22 33:19 55:2 56:2 facilitated 34:22 facilitates 13:21 27:11 28:22 57:16 facilitating 3:20 3:22 4:1,10,17 5:16 6:8,12 9:7 9:9,11,14,21 9:24,25 10:4 10:19 11:5,16 12:6,10,14,22 14:4 16:20 17:12,15 20:7 21:16 23:16 26:13,16 27:5 30:16 31:21 32:2 34:10 37:18 38:3 46:4 54:23 56:3,4,10 57:5 57:8,9,17,20 facilitation 17:4 22:2,2 32:15 32:16 36:15 facilitator 6:1 facilitators 5:6 9:18 14:13 facility 5:19 6:8 6:11,16 20:24 23:8 27:5,9 28:16,24 38:2 40:1 47:22 51:19 56:5 fact 9:1 10:11 39:10 43:1,8 44:9 52:10,12 facts 26:5 41:10 41:23 factual 16:3 fall 14:22 15:2 17:16 56:19 57:21 falls 56:12,14
---	--	---	---	--

far 25:9 54:20 fashion 11:11 favor 53:10 federal 6:18 18:3,3 39:9 40:3 45:8 53:21 54:1,1 feel 43:13,23 felon 3:13 35:10 36:3 43:14 47:18 48:22 felonies 12:23 34:11 felons 34:3 felony 3:12,20 3:22 4:1,8,12 4:20 6:9,13,19 9:8,10,11,15 9:16,18 11:22 12:4,11,15,17 12:20 13:1,2 13:19 16:16,16 16:21,25 17:1 17:6,8,9,12,15 17:18 20:8,14 20:15,21 21:3 21:16 22:2,10 23:21,25 24:3 24:4,9,12,14 24:22,24 26:13 26:16 27:6,11 27:14 28:7,22 33:5,6,14,20 33:24 34:12 35:8 37:24 38:3 40:11 42:14 43:9 44:1,5 47:11 49:9,9 51:7,14 51:14 53:15 54:23 56:10 57:6 figure 33:11 figured 33:12 figures 51:2 52:14,25 find 24:10 30:7	32:12 42:24 45:22 finish 57:12 firearm 56:3 first 3:4 4:25 9:10 10:3 12:9 12:11,17 14:1 15:8,9,9,13 19:14 25:16 26:16 30:20 33:17,25 35:11 38:16 41:21 44:25 48:3 first-time 22:17 22:21 fits 5:1 focus 30:21 31:8 focused 30:24 32:20 fold 21:13,15 55:13 56:21 57:14 following 12:2 food 6:25 foreclosing 53:12 foremost 4:25 forever 36:3 formulation 10:10,16 found 19:8 22:15 four 27:21,21,24 40:17 43:19,20 43:20,21 53:2 fraud 39:8 free 45:2 front 8:16 further 5:9 22:19,20 26:20 53:8	Gebardi 10:12 11:20,24 21:18 36:22 54:20 general 1:18 11:11 19:23 30:23 getting 29:19 47:10 Ginsburg 4:2,6 4:9 5:8,11 15:19 16:1 20:19,23 21:24 25:8 28:19,25 29:3,8,11,22 29:25 30:3 35:2,19,22 36:1 41:6,17 41:21,25 42:8 46:9,22 47:9 47:25 48:5,17 48:21 57:7 girlfriend 4:14 4:16 5:12 give 36:6 given 13:13 19:25 gives 17:20 42:23 giving 19:3 gloss 17:19 go 13:16 28:17 42:25 55:16 goes 9:6 15:16 24:13 going 14:8,21 15:15 16:11 32:24 36:9 47:4,18,18 52:4,5 54:11 55:17 good 5:12 34:18 43:4 44:11 governed 56:18 government 15:3,6 18:7,22 19:3 24:11 29:5 35:24	46:13,14 53:21 government's 21:12 25:9 33:12 gram 15:23 29:1 29:11,16 35:12 42:3 44:2 48:1 grant 44:17 granting 19:18 grave 48:6,14,15 greater 4:21 18:2 group 36:9 guess 34:4 38:24 51:10 guidelines 40:21 guilty 3:23 12:7 16:15 gun 44:12,13 45:12 54:22 55:1,5,19,20 55:24 56:12,16 56:20 57:8,17 guns 44:16 guy 17:22	20:5 21:22 22:7 33:1,10 34:13 44:8,19 45:14,15 46:7 53:9,18 54:19 Honor 10:3 25:15 30:20 32:15 hook 6:16,18 45:6,10 53:20 host 34:16 39:6 house 13:17 huge 35:8 hypothetical 12:12 17:5 56:9 57:4 hypotheticals 8:14
				I identified 39:25 III 46:19 illegal 30:11,15 31:5 38:7 illustrate 12:13 42:22 illustration 5:9 5:10 imagine 33:7 38:11 50:15 immediately 22:13 25:2,3 immoral 10:14 important 24:7 28:12 50:3 impression 54:3 incident 15:1,14 37:7 incidents 16:8 include 32:8 including 14:8 20:11 incongruity 23:1 incorrect 41:8 indicated 31:7 indicates 19:2

indications 9:1	involved 12:3	38:22 39:7,11	38:1	35:22 43:13
indict 42:4	30:8 45:5	40:5,14,21	knowledge 32:8	level 6:24
indictment 42:6	involves 11:21	41:6,9,17,18	knows 43:25	levels 49:1
indispensable	37:1	41:21,25 42:8	44:1,4 55:9	liability 14:11
56:6	involving 29:1	42:20 43:11,13	<hr/> L <hr/>	15:4 36:21
inevitable 37:7	32:19	43:20,23,25	labeled 48:22,22	life 35:9
inevitably 37:1	irrelevant 52:1	44:7,11,18,23	land 8:25 13:24	limit 20:14 48:9
infer 21:20	issue 7:17,21	45:4,5,21 46:9	land-based 7:13	limitation 36:20
34:15	48:14 55:23	46:22 47:9,25	language 3:12	line 13:24 35:3
information	i.e 39:16	48:5,17,21	3:18,21 7:8	48:9
14:18	<hr/> J <hr/>	49:6,7,25 50:2	23:12,16 30:14	lines 8:25
initial 16:7	JUDGE 29:22	50:17 51:1,10	31:3 33:24	list 46:14
45:23,24 57:19	judgment 28:5	51:25 52:4,13	lantern 8:15	little 12:24
initiates 29:14	juries 18:7	53:1,6,17 54:5	large 52:19,20	loans 35:23,24
30:4	jurisdiction	54:17 55:14,16	largely 50:6	logic 8:24
inquiry 32:10	6:19 40:20	56:1,8,23 57:1	larger 18:24	long 42:18
51:23 52:1,1	54:13,16	57:7,12,23	Laughter 17:24	look 19:14,15,15
instance 16:16	jurisdictional	justification	28:14 52:3	56:17
instances 11:4	6:16,18 39:11	33:14 54:1,1	law 5:12,21 8:16	looked 33:8
instigated 15:7	45:6,10 53:20	<hr/> K <hr/>	8:17 9:23 10:4	looking 12:18
instructed 13:16	Justice 1:18 3:3	keep 7:6	12:19 24:3	32:25 39:12,15
instructs 41:9	3:9 4:2,6,9,13	keeping 45:2	33:15 38:5,5	lookout 5:17,18
intend 51:23	4:19 5:1,8,8,11	47:6	42:25 43:4	13:15
intended 21:20	6:3,14 7:6,10	Kennedy 4:13	53:22 54:10	looks 40:18 50:3
43:4,10 46:8	8:5,9,13,24	4:19 5:1,8 11:3	laws 18:3,4,18	loses 35:12
intent 18:6,12	9:19 10:17,21	11:8,19 12:2	54:7,9	lost 23:1
30:9 31:9,15	11:3,8,19 12:1	18:22 19:9,17	lead 16:19 21:19	lot 7:15 35:12
32:7	12:21 13:18	19:21 28:10	leads 51:11	40:6 47:4
intentionally	14:1,15,23	40:5,14 44:11	learned 45:5	50:16 51:9
31:11 38:2	15:19 16:1,9	KHADE 1:3	leaves 28:19,21	53:24
interest 45:1	16:14 17:10,19	kick 57:19	left 37:2	<hr/> M <hr/>
interested 15:24	18:22 19:9,17	kind 7:11 42:23	legislative 20:4	machine 54:22
interpret 47:9	19:21 20:19,22	kinds 30:11 49:5	22:6 33:1,10	55:1,5,19,19
interpretation	21:23 22:25	know 5:20 7:17	34:13 44:8,19	55:24 56:12,16
7:17 19:4,22	23:4,11,15	8:5,14 10:23	45:15 46:7	56:19 57:8,17
53:13	24:13 25:8,22	13:5 14:9,24	legitimate 42:17	Main 4:15
interstate 30:9	26:23 27:2,17	15:24 17:21,25	51:25	making 10:5
30:17	28:1,6,10,19	18:1,9 19:11	legitimately	15:13 18:20
introduces	28:25 29:3,8	23:15 27:18	41:3	man 4:23
33:23 37:10	29:11,25 30:3	32:2 34:8,8	leniency 22:4	manage 30:10
intrusive 47:2,8	30:6,24 31:19	35:2 41:18	35:6,6	31:1
intuitively 43:6	31:23 32:4,12	42:16,17 46:10	lenity 19:1,5,7	management
44:18	32:24 33:25	46:12,17 50:9	20:1 53:12	31:18 32:17,21
investigations	34:6 35:2,19	50:13	lesser 38:10	mandatory
45:25	35:22 36:1	knowingly	letters 52:6	27:24 35:17
involve 11:20	37:14 38:4,15	31:10,20,21	let's 8:6,6 35:9	49:3
30:15 31:4				

manifested 22:6	40:25 41:14,20	N	odd 36:4	overall 46:10
Mann 10:12	41:24 42:5,15	N 2:1,1 3:1	oddity 13:3,6	own-purpose
manual 40:22	43:7,18,22	narrowed 21:1	odds 36:12	35:4
41:1,7	44:3,22,25	21:25 22:14	offender 22:17	
March 1:9	45:15,23 46:17	24:23 25:3	25:6 48:6	P
market 29:16	46:25 47:21	natural 10:18	offense 3:24,25	P 3:1
matter 1:11 30:4	48:3,13,19,24	naturally 14:7	6:21 11:1,13	page 2:2 39:25
53:11,18 58:1	49:6,22 50:1	nature 3:24 6:21	11:14,15 12:5	parallel 11:11
maximum 43:18	50:13,20 51:5	12:5	12:7,8,22	11:15 37:16,20
mean 10:7,17	51:22 52:2,7	necessarily	18:11,15 20:11	39:4 42:24
28:4,11 32:25	52:22	49:13 50:8	20:14,20,25	56:11
33:20 37:16	mind 13:4,13	55:20	23:9,21 24:1,2	park 27:18
39:8,24 41:20	39:7,21	necessary 54:15	24:5,20,24	parsing 32:25
43:15 44:25	minimizing 47:7	need 47:8	33:5 34:10,12	part 23:19 34:12
46:10,12 47:21	minimum 27:25	needs 4:14	34:20 37:17,19	34:15 49:2
47:23 48:3,17	35:17 49:3	neighborhood	39:9 40:2,3,12	50:15 55:20
49:22 50:1,3	minute 57:12	5:22	41:10,12,23	participant
51:5 52:7,10	minutes 53:2	neighboring	48:3,14,15,16	39:15
54:25	mis 24:24	40:19	49:2,9 51:14	participation
meaning 30:13	misdemeanant	never 7:2	55:20	54:2
31:3	4:3 13:9 35:11	new 7:23	offenses 34:11	particular 6:24
means 9:25	47:19 48:22	nonapplication	34:17 46:1,4	10:10 20:2
11:17 14:4	53:14	50:11	49:23 50:18	particularly
36:16 39:18	misdemeanor	normal 15:1,14	Oh 30:24 56:8	13:7 16:11
41:25	3:11 12:25	16:7 19:12	Okay 31:23 39:2	18:9 20:8
meant 9:22	13:19 20:12,17	normally 38:10	44:17	parties 34:24
47:13	21:5,9,11 22:3	45:4	old 8:14	party 36:25 37:1
measures 15:16	22:9,14 23:10	nugatory 49:12	ongoing 32:21	37:2
47:8	24:10,25 28:8	50:7	operating 26:9	passage 31:1,7
meet 4:15 13:24	33:4,6 34:16	number 39:25	operation 30:17	32:9
meeting 46:20	34:21,25 35:8	46:6 47:23	opinion 10:12	passed 44:21
mention 32:5,5	36:8 41:12	51:2,18 52:14	10:24	patronize 30:15
message 28:20	42:9,10,13,25	52:15,16,23	opposite 33:12	31:4
28:21,22	47:12,13 49:10	numbers 52:25	oral 1:11 2:2 3:6	penalize 13:8
met 46:20,22	49:15,23 50:9		26:25	penalized 22:8
Miller 1:17 2:5	51:15	O	order 27:11	penalizing 6:20
26:24,25 27:2	misdemeanors	O 2:1 3:1	46:23 50:21	26:18
27:23 28:3,9	34:16 50:15	objective 15:17	Ordinarily	penalty 38:10
28:15,21 29:2	51:6 52:11,15	observed 46:21	41:17	40:12
29:5,10,19,23	misdemeanor-...	obtain 22:23	ordinary 30:13	people 13:22
30:2,5,19 31:6	49:19 50:18	25:7 47:2	31:2	27:14,17 33:13
31:22,25 32:7	51:3	obtaining 3:14	originally 20:20	33:18,19 34:2
32:14 33:16	mode 21:17,18	obvious 43:6	ought 5:22	35:4 36:6
34:5,7 35:14	multiple 53:14	44:18 49:21	19:24	38:18,20 40:10
35:21,25 36:19	multiplier 42:23	occasion 48:2	outside 15:10	44:20 45:18
37:22 38:13,17	mustn't 36:12	occasions 29:12	16:12 56:19,20	46:14 47:6
39:5,8,24 40:8		occur 14:9	57:21	perfectly 53:18

period 22:18 23:17	29:4,7 31:11 33:19,22 34:22 37:8,9,15,17 37:19,23 38:21 40:17 42:2,2 42:22 43:2,16 43:21 44:4 45:20 46:13,24 47:4 48:16,19 56:2,3,10 57:5	possessor 22:16 25:5 44:2,3 47:13	probation 22:18	39:13 40:10,10
person 3:10,13 3:23 5:22,24 7:1 9:4,14 12:10,18 13:24 14:21,22 15:6 16:15,19,24 21:13 22:22,22 27:9 35:23 37:23,24,25 54:22,25 55:19 57:14,20	phones 6:22 7:7 7:7,11,13 13:23 44:16 47:6	possessors 22:21 48:10	problems 18:2	purchase 11:5,8 11:22 13:10 14:17 15:7,16 16:11 24:19 27:10 30:1 48:1 55:2,22 56:5,7
personal 3:11 9:5,12 13:10 14:17 15:15 17:23 18:4,16 22:8 24:8 27:15 55:2	physical 7:2,3	possible 39:3 46:19 47:2	prohibit 6:4	purchased 48:12
persons 4:3,7,11 6:11 7:4 11:10 11:13	pick 13:17	post 35:20	prohibited 30:9 54:9	purchaser 15:21 24:18 37:6,8
person's 35:9 36:3	picks 42:1,2	pounds 17:21	prohibits 27:4 34:18 55:9	purchasers 23:16 46:1
perspective 16:2 52:8	place 9:10 12:11 14:20 19:8,14 26:16 32:16	practically 48:17	promote 30:10 31:1	purchases 3:10 15:15 44:3
pertains 20:8	plan 18:13	precise 52:25	promotion 31:18 32:17	purchasing 14:7 15:1,14 16:8 27:15 56:14
Petitioner 1:4 1:16 2:4,9 3:7 21:10 37:25 47:24 53:4	playing 30:18	predecessor 34:8 35:18 45:16	prong 4:6,7,10 5:16	purely 6:16
Petitioners 20:18	plea 18:25	predicate 57:19	proof 17:21	purpose 6:14,15 11:17 22:10 25:18,20 26:2 26:3,4 30:14 30:18,25 31:3 31:8,13 32:1,5 32:10
pharmacist 34:23	point 24:2 33:2 37:9 53:7 57:13	premise 49:8 50:4	proposal 45:23	purposes 10:13 14:11,13 18:16 18:19 26:18
phone 3:13,19 3:25 4:14 6:21 8:2 9:7,11,14 12:4,8,14,16 13:2,9,14 15:8 15:9,9,13 16:7 17:17 20:10,13 20:15,17,25 21:2,4,9,10 24:8,18,19,22 25:23,25 27:20 27:21,23,23	policy 35:6 41:8 41:15,21 42:16 43:5	prescription 34:20 50:23,24	prosecuted 55:1	purview 20:16
	polity 4:22	presence 53:19	prosecution 6:4 14:3 15:4 45:9 57:14	put 40:13 46:23
	points 16:2 25:15	presumably 54:14	prosecutor 42:3 42:11	
	pointedly 20:12	presumption 55:8	prosecutions 50:14,16 51:2 51:9 52:14,15 52:23	Q
	points 16:2 25:15	presupposes 3:21 12:5 26:12 54:10	prosecutorial 51:6	quantities 18:11 49:10 51:15
	policy 35:6 41:8 41:15,21 42:16 43:5	pretty 4:16 30:7 32:12 37:20	prosecutors 19:18 41:3,9 41:16	quantity 3:10 14:17 18:14
	polity 4:22	prevail 18:23	provided 25:4,6	question 5:10,13 8:23 12:9,17 14:1 24:13 25:9,14 26:10 43:12 49:8 50:4 51:11 53:17 54:18
	positions 43:6	previously 22:9	provision 9:6,6 11:12,12 12:18 20:24 22:15,20 24:23 25:2,3 25:19 26:3 38:10 46:2	questioned 25:13
	possess 33:13,18 33:19	primary 11:1	provisions 13:3 13:6 22:13 36:14,18	
	possessed 34:2	principal 19:8	punish 38:12 39:6 40:6	
	possession 11:22 16:17 17:6 18:4,5,5,12,13 18:15 21:11 22:8,11,14 23:9 24:24 33:4 41:13 42:9 47:11,11 48:16 49:10	principally 9:2	punishes 36:25 38:18,20 39:9	
		principle 19:11 20:1 36:20,22 37:5 55:21,24 56:13,15,18		
		principles 19:17 53:11		
		probably 14:24 50:24 51:7,12 52:18		

questions 17:20 26:20 49:7 53:8	36:21,24 41:3 42:16	24:21	SALMAN 1:3	26:9 32:3
quite 31:12 45:12 49:21	record 28:7 36:3	respond 13:25	satisfied 31:10	selling 17:13
quotation 31:16	records 22:23	Respondent	satisfy 49:5	43:14
quote 30:9	25:7	1:19 2:6 27:1	saying 6:15 7:7	semaphore
quoted 31:1,7	refer 4:11	response 34:4	12:13 25:23	39:17
<hr/> R <hr/>	reference 21:6	result 18:23	28:12 30:3	Senate 45:24
R 3:1	referred 34:9	21:21	36:15 44:15	send 44:6
ran 38:12	referring 4:6	retail 13:16	47:12	sense 8:18 13:13
range 49:1	refers 4:7	Rewis 30:8,20	says 8:19 17:2	48:15
rationale 10:24	refrain 5:22	31:12 54:20	17:22 29:15,15	sentence 44:14
10:25 25:9	regarding 54:18	right 7:9,12,18	41:22	separate 13:20
46:10	regardless 22:10	7:21 15:25	Scalia 6:14 9:19	13:20 29:1
reach 7:14,19	regulatory	17:14 20:22	12:21 25:22	33:22 37:10
21:2,25 26:14	34:17	23:11 24:15	28:6 30:6,24	40:12 50:17
36:13	rehabilitation	28:2,3,8,9 30:5	31:19,23 32:4	57:8
read 32:9 42:11	22:5 36:7	31:6 33:9	32:12 37:14	serious 41:10,12
44:8,10,21,23	reinforces 11:16	35:14 38:11	43:13,20,23	41:23 51:7
45:13 48:8	relatively 52:24	40:8 43:22	45:5	served 25:20
reading 44:15	relegate 47:13	45:14 48:24	scene 5:18	26:4,18
47:15 53:10	relevant 12:24	55:14	school 5:13	serves 11:16
real 5:13	51:23	rights 35:12	scope 23:11	serving 28:12
really 13:18	relief 22:21	36:2	second 11:22	set 30:22 36:23
32:13 39:2	rely 23:2	rise 17:20	34:6 37:1,2	52:11,19,19,20
49:12 50:10	reminds 8:13	ROBERTS 3:3	section 3:12,18	seven 29:4
53:21 54:3	removed 36:2	7:6,10 8:5,9,13	11:10,18 14:13	severely 40:6
reason 9:12 12:2	render 51:20	10:17,21 13:18	17:16 18:5	sharply 47:15
21:24 25:10	52:5	17:19 22:25	22:1 23:20,20	show 23:24
34:7,13,14,15	rendered 49:12	23:4,11,15	23:22 24:3	45:14
37:12 40:19	51:17 52:21	24:13 26:23	26:7,8,11,12	showing 47:1
44:5 49:2	renders 50:6	27:17 28:1	26:14 27:4	shows 45:17
reasonably	replaced 46:2	53:1 57:23	31:9 33:17	side 27:19 38:24
31:13	reported 46:6	rule 5:3,4 6:3	34:9,18 37:3	38:25
reasons 10:2	require 31:22	9:15 15:2,11	50:20	sides 49:15
42:19	32:9 41:15	16:13,18,23	sections 23:18	signals 39:18
rebuttal 2:7	requirement	17:1 19:1,5,7	see 6:6 28:18	significant 8:3
26:22 53:3	42:6	19:24 20:1,7	40:23 56:1	21:5,8,24
recasting 21:15	requires 28:16	21:19 23:22	sell 29:17	32:11 35:16
receipt 22:9	31:9,20 47:1	36:17 37:21	seller 6:3,6	50:10
54:8	reserve 26:21	54:20,24 55:6	15:20 26:6,7	significantly
receiver 37:6	resolved 7:18	55:6 57:1,18	26:17,19 29:15	31:15
55:10,11,13	resources 51:6	rules 40:23	29:15 32:2	silentio 23:12,14
recognize 48:25	respect 3:23	<hr/> S <hr/>	37:15,17 46:16	similar 13:3,6
recognized	6:11 11:8	S 2:1 3:1	56:18	similarly 29:17
	14:14 22:22	sale 14:8,8 16:21	sellers 13:16	37:18
	25:1,16 55:22	42:22 57:16,18	46:2,5	simple 21:11
	respects 21:6	57:21	seller's 17:3,4	22:8,14,16,21
			17:12,15 23:25	23:9 24:23

25:4 33:3 41:13 42:9,13 47:10,11,13 simply 14:17 30:17 33:13,18 34:2 sits 44:12 situation 6:7 8:20 10:18 16:2,15,18 situations 13:2 13:11 six 29:5,6,7 small 3:10 18:13 49:10 51:15 52:19,24 socked 43:16 Solicitor 1:17 somebody 5:16 12:6 13:8 34:22 39:10 44:17 55:18 sorry 14:14 43:13,23 55:16 56:8 sort 5:24 9:19 9:20 32:20,25 42:17 43:5 44:16 sorts 14:6 15:5 16:7 18:8,10 sought 22:4 25:19 Souter 41:18 42:20 43:11,25 44:18 49:6,25 50:2,17 51:1 51:10,25 52:4 52:13 speak 55:25 speaking 4:24 20:3 35:19 speaks 8:23 specific 4:2 specifically 34:14 41:1 squarely 26:6	53:12 SRI 1:15 2:3,8 3:6 53:3 Srinivasan 1:15 2:3,8 3:5,6,8 4:5,10,18,24 5:15 6:10,17 7:9 8:1,8,11,22 10:2,20,23 11:7,25 13:5 13:25 14:23 15:25 16:22 17:14,25 19:6 19:10,20,23 20:22 23:3,6 23:13,19 24:15 25:14,25 53:2 53:3,5 54:5 55:4,15,17 56:8,25 57:3 57:10 stage 57:22 stand 10:24 standards 46:19 stands 10:25 started 45:9 State 40:16 statement 41:7 States 1:1,6,12 3:4 30:8 36:2 40:15,20,24 statistics 46:18 status 47:14 statute 3:17 4:22 4:25 5:2 7:15 7:20,24 8:3 9:2 10:16 11:20,23 12:2,12,13,21 13:8,11 14:22 15:19,23 16:20 17:20 18:5,20 20:9,16 21:14 21:15 24:20 26:5,8 27:8,13 28:15 29:18,20 30:8 31:16,20 32:5,20 33:1,8	33:21 34:1,15 36:5 37:2,9,15 37:22 38:1,19 39:8,13 40:9 41:2 43:8 44:10,21 45:16 46:5 47:1,6 49:4,13,15,20 50:5,12 51:13 51:19,24 52:5 52:17 54:4,21 55:13 56:9,22 57:3,5,15,22 statutes 39:6,25 40:3,6 41:5 50:14 51:16 53:25 54:14 statutory 3:18 7:17 8:20 19:13,15,16,22 20:2,3,4,5 21:7 21:23 22:7 26:17 38:9 43:18 53:9,9 54:19 steps 13:25 Stevens 53:17 54:6 stock 13:17,17 strange 12:25 street 7:5 25:12 streets 46:12 strictly 3:14 structure 11:15 student 35:23 stuff 43:14 sub 23:12,13 subchapter 12:23 subject 29:18,20 46:16 submitted 57:24 58:1 subsequent 36:24 subset 34:1,2,3 substance 34:19	55:10 substances 20:23 21:1,7 27:7,10 34:17 49:24 51:8 substantial 51:18 53:15 substantially 25:20 26:4 substantive 55:7 successful 16:12 successfully 22:18 suddenly 39:19 sufficient 32:2 32:22 suggested 36:14 suggesting 44:9 49:4 suggests 30:14 31:3 44:19 supported 41:10 41:23 suppose 4:13 28:1 supposed 7:18 41:22 Supreme 1:1,12 sure 10:21 15:16 57:10 surprising 44:14 susceptible 15:22 suspect 51:8 sweep 8:4 37:18 swept 37:3 56:7 sympathy 35:5 system 42:18 <hr/> T <hr/> T 2:1,1 tables 30:18 tack 55:23 take 14:20 15:16 16:12 32:16 33:13 35:9,22 49:12	takes 15:10 talismanic 10:10 talked 19:13 talking 4:22 7:6 9:13 42:8 47:25 tap 46:16,23 tapped 46:13 target 5:12 technologically 7:24 technology 7:14 7:19 8:7 telegram 39:17 telephone 9:4 11:6,23 14:19 23:17 25:11,17 26:9 27:9 29:24 36:10 38:23 39:17 44:10 46:16 53:20 54:4,10 54:15 telephones 39:2 tell 40:14 ten 17:21 term 9:23,24 terms 4:25 5:2 7:20,22 12:14 14:1 15:21 20:4 21:22 26:6,8 35:8 37:23 38:25 text 3:16 9:6 19:14 20:4,5,9 20:20 22:7 23:21 43:7 44:15 53:9 textual 3:17 Thank 3:8 26:23 53:1,5 57:23 theory 6:4 17:12 57:13,20 thing 10:8 11:17 14:3,4 31:24 36:16 43:15 things 14:9
--	--	--	--	---

46:25 think 4:24 5:15 6:17,22 7:11 7:20 9:25 10:9 11:19,20,24,24 11:25 12:17 13:7 14:2,5,12 14:23 15:1,3 16:9,22 17:3 18:1,20 19:7 19:20,23 30:19 31:19 33:16 35:15 36:19 37:25 38:14 39:23 40:8 41:18 43:7,22 45:6 50:3,21 51:22 52:7,7 53:9,19 54:5 55:4,18,24 thinking 44:12 thinks 38:24,25 44:16,18 thought 5:9 6:22 33:22 39:1,22 44:17,20 45:9 49:18 three 11:10 28:2 42:22 time 5:23 9:3 26:21 35:11 36:5 43:16,21 53:24 times 28:2 43:20 43:21 Title 46:19 today 3:4 token 9:17 14:12 17:3 tools 19:12 top 6:25 12:4 total 29:3 traditional 45:1 trafficker 13:15 traffickers 36:10 45:18 47:16 48:10	trafficking 6:23 35:5 transaction 5:19 5:23 7:4 14:20 16:10 34:25 37:1 42:2 transactions 45:19 47:7,20 49:14 52:18 transform 3:13 33:14 39:20 transformation 13:19 transformed 34:3 transportation 10:15,15 11:21 transporting 10:13 11:2,4 travel 30:9,18 30:21 31:9 32:16 53:25 traveler's 30:14 31:3,8 32:10 treat 48:6 treated 5:6 36:9 tremendously 39:1 trial 29:7 trifling 42:22 true 17:11 41:11 43:15 51:12 52:21 try 36:13 turn 10:5 turning 3:17 turns 8:17 twin 49:8 two 11:6,21 13:25 21:5 24:21,22 25:15 27:17 28:4,25 29:12 36:11,14 36:18 42:22 43:5 50:6,7 51:13,16,20 52:5,20	type 5:13 <hr/> U Uh-huh 8:8 ultimate 15:17 ultimately 12:1 unconstitutio... 42:19 underlies 21:18 underlying 4:8 4:12 6:19 11:13,14,14,21 12:3,7,16 40:11 45:7 54:7,11,13 55:22 56:14,16 56:17,17 undermined 34:1 understand 25:22 29:16 54:18 57:4 understanding 16:18 19:25 26:5 42:15 52:23 understood 37:25 United 1:1,6,12 3:4 30:8 40:15 40:20,24 unlawful 31:14 31:17 32:18 unlawfully 27:10 unpunished 37:2 usage 8:2 use 3:11,19,25 6:10,20 9:1,5 9:12 11:7,23 12:4,8,12,14 12:16 13:1,7,9 13:10,13 14:17 15:15,22 17:23 18:4,16 20:10 20:13,15,16,24	21:2,4,8 22:8 22:11 24:8,8 24:21 25:17,23 25:25 26:9 27:4,16 28:18 33:22 36:10 37:9,14,17,19 38:2,23 40:1 48:7,11,15,19 53:19 54:22 55:2,5,23 56:2 56:3,3,4,9,12 56:16,19 57:5 57:8 user 4:4 27:21 27:23 users 7:16 22:5 35:4 47:16 uses 3:13 4:23 6:15 9:7 10:16 11:8 27:9 37:8 39:16,17 57:17 U.S 41:1,11 U.S.C 5:24 11:11 14:11 15:4,13 16:5 22:15 <hr/> V v 1:5 3:4 30:8 vast 19:18 victim 10:19,25 view 10:18 49:12 50:5 51:12 52:5 57:2 viewed 47:6 violated 27:8 52:12 violating 12:19 violation 41:13 violations 51:8 virtually 50:7 52:6 56:6 virtue 6:19 26:18 55:10 voice 19:25	voting 36:2 <hr/> W walk 8:15 want 15:15 33:13 36:5 37:18 50:9 wanted 33:3,23 37:11 55:12 wants 44:6 Washington 1:8 1:15,18 wasn't 20:20,20 23:9,13 53:22 54:15 waves 27:19 way 7:15 16:10 16:24 19:18 24:10 28:22 33:11,12 38:22 38:23 39:16 47:3,7 53:22 57:2 weapon 40:6 weapons 40:7 Wednesday 1:9 weigh 53:10 went 22:19 29:7 weren't 7:10 We'll 3:3 we're 9:12 18:18 18:20 28:12 47:10 we've 37:20 wire 39:8 wiretap 46:18 47:3 wiretapping 45:25 47:8 woman 10:13,18 10:24 word 11:4,8 20:6,8,9 30:22 30:25 32:8 33:5,6 34:11 34:12 words 11:9,18
--	---	--	---	--

50:2	23:6,17,17,23	27:4 31:9		
work 15:12	23:24 24:6,7	32:22 33:17		
40:15 46:9	24:16,17,17	34:9 35:1,16		
57:21	33:1 34:11,15	41:13 42:4,10		
working 36:12	35:16 46:6,7	47:17 49:2		
works 11:24	49:4 51:24	52:24		
world 5:13	53:21 54:6	844 18:5		
worried 39:2	1970s 8:3,7			
worse 39:13				
45:7,11	2			
worthless 51:17	2 5:25 11:11			
51:21 52:21	12:23 14:11			
wouldn't 5:6 9:5	15:4,13 16:5			
9:13 16:17	37:3			
23:24 29:20	2009 1:9			
30:16 48:13	21 22:22			
49:21 52:9	24 29:10,11			
55:5,12,15	25 39:25			
56:21 57:21	26 2:6			
X	3			
x 1:2,7	3 2:4			
	3rd 4:15			
Y	30 53:23			
Yeah 40:25	3607 22:16			
years 27:21,22				
27:24 28:2	4			
29:10,11 42:25	4 1:9			
43:17 53:23	40 53:23			
young 35:23				
youthful 25:6	5			
	53 2:9			
0	56 47:10			
08-192 1:5 3:4				
	7			
1	70 47:11			
10:07 1:13 3:2				
11:08 57:25	8			
12 28:2 42:25	829 34:18			
1403 34:9 45:17	841 18:6			
46:3	842 50:20,20			
18 5:24 11:11	843 42:10			
14:11 15:4,13	843(b) 3:12,18			
16:4 22:15	4:4,17 6:1			
1956 45:16	11:10,16 14:13			
1970 7:8 8:3,25	17:16 22:1			
9:13 20:19,25	24:3 25:3 26:7			
21:7 22:3 23:1	26:8,11,12,15			