No. 08-192

In the Supreme Court of the United States

SALMAN KHADE ABUELHAWA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINION BELOW

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

JURISDICTION

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

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of using a communication facility in causing or facilitating a felony drug distribution, in violation

of 21 U.S.C. 843(b). He was sentenced to two years of probation. The court of appeals affirmed. Pet. App. 1a-18a.

1. In July 2003, federal agents investigating Mohammed Said, a suspected cocaine dealer, intercepted a series of cell-phone conversations between petitioner and Said. On the night of July 5, 2003, the agents intercepted three calls. Petitioner initiated the first call and asked Said for a gram of cocaine. Said called petitioner back to ask where he was, and the two men agreed on a rendezvous point. During the third call, petitioner told Said that petitioner had arrived at the arranged location but that there were some other people there. To avoid detection, the two agreed on a different location. Pet. App. 4a-5a; see Gov't C.A. Br. 6-11.

On the night of July 12, 2003, the agents intercepted three more calls. Petitioner initiated the first call and asked Said for another half gram of cocaine. Nearly an hour later, petitioner again called Said, this time to increase his order to a full gram of cocaine and to ask where the two should meet. Said told petitioner to meet him at a butcher shop owned by Said's father. Petitioner agreed, indicating that he would be on his way immediately. About half an hour after the second call, Said—apparently nervous that the authorities would detect the drug sale because he had been loitering near the butcher shop for too long—called petitioner back, asking where petitioner was and stating that "I really want to leave this place." Pet. App. 5a-6a; see Gov't C.A. Br. 11-13. Petitioner responded: "I am coming to you man. One minute." Pet. App. 6a. Said relented and told petitioner to meet him at the restaurant next door to the butcher shop. *Ibid.*

Based on the intercepted calls, agents arrested petitioner. When questioned, petitioner admitted that he had long purchased cocaine from a man named Issam Khatib; that when Khatib quit the drug trade, Said assumed control of his customer base; that petitioner then began ordering cocaine from Said; and that petitioner regularly used his cell phone to place his orders with Said and to arrange the deliveries. Pet. App. 6a.

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

Petitioner pleaded not guilty, and the case proceeded to trial. The government presented evidence pertaining to the cell-phone calls. C.A. App. 110-199. At the close of the government's evidence, petitioner moved for a judgment of acquittal, arguing among other things that no rational juror could convict him because causing or facilitating a drug distribution by using a cell phone "simply isn't a crime" where the cell-phone user buys

[1] Said pleaded guilty in a related case, and he was sentenced to 87 months of imprisonment. Petitioner's Presentence Investigation Rep. para. 7.

the drugs for personal consumption. *Id.* at 202. The district court denied the motion. Pet. App. 7a.

The jury found petitioner guilty on Counts 2 through 7. Pet. App. 7a; C.A. App. 209-210. Petitioner again moved for a judgment of acquittal, reasserting his claim that "ordering personal use drugs on the telephone is not a violation of 21 U.S.C. 843(b)." *Id.* at 275. The district court again denied the motion. Pet. App. 7a, 33a-34a. The court sentenced petitioner to two years of probation. *Id.* at 7a-8a.

3. The court of appeals affirmed. Pet. App. 1a-18a. Petitioner argued that Section 843(b) "is not violated when an individual facilitates the purchase of a drug quantity for personal use," since the purchase of cocaine for personal use is a misdemeanor, not a felony. Pet. App. 8a; see 21 U.S.C. 844. The court rejected that argument. The court noted that petitioner did not dispute that he had "used a communication facility (a cell phone) to arrange * * * drug transactions." Pet. App. 9a. Accordingly, the court reasoned that the case could "be decided by focusing only on whether [petitioner] facilitated the commission of a felony." *Ibid.* Giving the term "facilitate" its "common meaning"—namely, "to make easier or less difficult"—the court observed that petitioner's "use of his cell phone undoubtedly made *Said*'s cocaine distribution easier." *Id.* at 11a (quoting *United States* v. *Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988)). Because Said's distribution of cocaine to petitioner was a felony under 21 U.S.C. 841(a)(1), the court concluded that petitioner's use of his cell phone to help arrange the distribution fell squarely within the coverage of Section 843(b). Pet. App. 11a-13a.

In reaching that conclusion, the court of appeals emphasized that "the statute does not specify *whose* felony

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

ARGUMENT

Petitioner renews his argument (Pet. 16-25) that 21 U.S.C. 843(b) does not extend to a defendant's use of a communication facility in causing or facilitating a felony drug distribution where, as here, the defendant is purchasing the drugs for personal consumption. The court of appeals correctly rejected that contention, which finds no support in the language of the statute. Although the court's decision conflicts with the Tenth Circuit's decision in *United States* v. *Baggett*, 890 F.2d 1095 (1989), petitioner overstates both the scope of the conflict (Pet. 8-13) and the need for this Court's immediate intervention (Pet. 13-16). Further review is not warranted.

1. In pertinent part, 21 U.S.C. 843(b) makes it a felony "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under" the Controlled Substances Act, 21 U.S.C. 801 *et seq.* As the court of appeals observed, pe-

titioner does not dispute that he "use[d]" a "communication facility" (his cell phone) to arrange cocaine transactions with Said. Pet. App. 9a. Nor does he dispute that Said's distribution of cocaine to petitioner was a felony under 21 U.S.C. 841(a)(1). Instead, petitioner argues (Pet. 16-25) that he could not have "facilitat[ed]" Said's felony because he bought the cocaine for personal consumption only; Section 844(a) punishes possession of personal-use quantities of cocaine as a misdemeanor; and Congress could not have meant to impose additional, felony punishment on him for using a cell phone to arrange the transactions through which he obtained the cocaine. The court of appeals correctly held otherwise.

a. The plain language of Section 843(b) applies to "*any* person" who uses a telephone in "causing" or "facilitating" an act that is a felony under the CSA—including those who do so in an effort to obtain drugs for personal use. 21 U.S.C. 843(b) (emphasis added). In ordinary language, a "cause" is something that "brings about an effect or that produces or calls forth a resultant action." *Webster's Third New International Dictionary of the English Language* 356 (1993) (*Webster*); see *ibid.* (defining "cause," in its verb form, as "to serve as cause or occasion of"). Petitioner does not dispute that his calls to Said brought about Said's felony distributions to petitioner. Indeed, he does not address the "causing" prong of the statute at all, even though it was charged in the indictment, and the district court found the government's evidence sufficient to meet it. C.A. App. 11-16, 203-206. Nor does he take issue with the court of appeals' observation that the "common meaning" of "facilitat[e]" is "to make easier or less difficult." Pet. App. 11a (quoting *United States* v. *Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988)); accord *Webster* 812. Indeed, he did not

object when the district court instructed the jury that "[t]he term 'to facilitate the commission' means to * * * in some way make the task less difficult." C.A. App. 250; see *id.* at 258. Nor, finally, does he dispute that his calls to Said made Said's felony distributions easier, especially by enabling Said to avoid detection. See Pet. App. 4a-6a; Gov't C.A. Br. 6-13.

Instead, petitioner argues (Pet. 18) that the court of appeals should have recognized an atextual exception for any "person who uses a telephone to purchase drugs for personal use" because, he says, a buyer cannot aid or abet a distribution offense. Even assuming that a buyer may not be liable for aiding and abetting an unlawful distribution, that is beside the point under the plain terms of Section 843(b). Petitioner was not charged with a distribution offense, nor was he charged with aiding or abetting such an offense. Instead, he was charged with the separate crime of using a cell phone in "causing or facilitating" a drug felony. Though petitioner points out (Pet. 19) that "aiding and abetting" may be defined as "facilitat[ing]," he cites no authority for the converse proposition that "facilitating," as used in Section 843(b), must be defined narrowly as "aiding and abetting." And, again, he does not discuss the "causing" prong of the statute at all.[2]

[2] Petitioner argues (Pet. 19-20) that *Rewis* v. *United States*, 401 U.S. 808 (1971), supports his interpretation of "facilitate," but his reliance on that case is misplaced. In *Rewis*, this Court noted that the Travel Act, 18 U.S.C. 1952, "prohibits interstate travel with the intent to 'promote, manage, establish, carry on, or facilitate' certain kinds of illegal activity." 401 U.S. at 811 (quoting 18 U.S.C. 1952(a)(3)). The Court concluded that "the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." *Ibid.* In *Rewis*, the meaning of the term "facilitate" depended in large measure on the terms surrounding it ("promote, man-

Petitioner further contends (Pet. 20-21) that the canon against surplusage supports his construction of the statute. Just the opposite is true: carving out an atextual exception for those "who use[] a telephone to purchase drugs for personal use" (Pet. 18) would denude Section 843(b) of practical effect. Under petitioner's construction, the statute apparently would cover only drug dealers and third parties who, though not themselves dealers, put the dealers in touch with potential buyers. But such persons are already subject to more stringent penalties than Section 843(b)'s four-year maximum: dealers face up to 20 years under 21 U.S.C. 841(a)(1), and third-party middlemen potentially face the same penalty under the aiding-and-abetting and conspiracy statutes. See 18 U.S.C. 2; 21 U.S.C. 846. For instance, in *United States* v. *Small*, 423 F.3d 1164 (10th Cir. 2005), cert. denied, 546 U.S. 1155, 546 U.S. 1190, and 547 U.S. 1141 (2006)—a case petitioner cites (Pet. 11-12)—one of the defendants, Jones, used a telephone to put his girlfriend, Drew, in touch with a cocaine dealer so that Drew could sell some cocaine and give Jones some of the proceeds. 423 F.3d at 1185. Jones was convicted for aiding and abetting cocaine distribution under Section 841(a)(1) *and* for facilitating the distribution under Section 843(b), and he was ultimately

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age, establish, carry on"), all of which are more restrictive than "caus[e]," the term that appears next to "facilitate" in Section 843(b) and that gives "facilitate" a different meaning than it has in the Travel Act context. See *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008) (noting that the ordinary meaning of a particular statutory term may be broadened or narrowed "by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated"). Petitioner elides the distinction in the two statutory contexts by ignoring the "causing" prong of Section 843(b).

sentenced to concurrent prison terms of 140 months for aiding and abetting and the maximum of 48 months for the Section 843(b) violation. *Id.* at 1171-1172. It is difficult to imagine that Congress, in enacting the CSA in 1970, went out of its way to retain the communication-facility restriction—which had previously been part of Title 18, see 18 U.S.C. 1403(a) (1964) (repealed 1970)—only to make it all but superfluous, relegated to a role as a statutory backstop for the newly-enacted Sections 841(a)(1) and 846. See *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007) ("It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render [an] entire provision a nullity.").

Moreover, petitioner's proposed exception would be difficult to administer, because it is not always clear at the time a defendant sets up a drug transaction whether the purchase will be for further distribution or personal consumption. To take another example from *Small*, Jones's girlfriend, Drew, *did* obtain the cocaine from the dealer, but she ultimately consumed it herself instead of selling it and giving the proceeds to Jones. 423 F.3d at 1185. The use of a telephone to facilitate the distributor's intended dispensing of cocaine to some unknown third party was a crime at the time of the call. It would defy common sense to hold—and the Tenth Circuit indeed declined to hold—that Drew could later undo the offense under Section 843(b) by simply consuming the cocaine, an act that would make her and Jones no less blameworthy under any reasonable reading of the statute.

In short, the court below was right to conclude that, under the statute's plain terms, it is "irrelevant" what a defendant does with cocaine after he facilitates its distri-

bution, because "the crime is complete long before [he] either use[s] or dispose[s] of the cocaine." Pet. App. 12a (quoting *United States* v. *Kozinksi*, 16 F.3d 795, 807 (7th Cir. 1994)). Adopting petitioner's contrary construction would give facilitators a perverse incentive to consume narcotics in an effort to evade additional punishment. The court of appeals properly declined to endorse that anomalous interpretation.[3]

b. Because the language of Section 843(b) is clear, there is no basis for recourse to the legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). In any event, petitioner's argument (Pet. 23-24) based on the legislative history is unpersuasive. Contrary to petitioner's suggestion (Pet. 24), the court of appeals did not hold that Section 843(b) prohibits "the facilitation of drug misdemeanors." The issue instead is whether Congress meant to give a free pass to those who facilitate a *felony* distribution when they are on the receiving end rather than the supplying end, or are serving as a middle man. Section 843(b)'s limited legislative history discloses no such intent to undermine Congress's "comprehensive regime to combat the * * * traffic in illicit drugs." *Gonzales* v. *Raich*, 545 U.S. 1, 12 (2006); cf. *United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975) (Though Congress deleted language about

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[3] Given the plain language of the statute and the common meanings of "caus[e]" and "facilitat[e]," petitioner is mistaken in invoking the rule of lenity (Pet. 24-25). The rule applies only in cases of "grievous ambiguity," which Section 843(b) does not contain. *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994)).

conspiracy in carrying over 18 U.S.C. 1403(a) (1964) into Section 843(b), it did not "intend[] to carve conspiracy out of" the provision, because the 1970 legislation "sought to strengthen existing law enforcement authority in the field of drug abuse, not weaken it."), cert. denied, 425 U.S. 971 (1976).

Had Congress meant to fashion an exception for those who cause or facilitate a felony distribution of drugs to themselves as opposed to someone else, it could have done so explicitly, but it did not. The omission is telling, especially because, as petitioner does not dispute, Section 843(b) plainly does cover a defendant's use of a communication facility to buy a personal-use amount of drugs where the defendant's simple possession is itself a felony—for example, because the defendant possesses cocaine base, or because he has prior drug convictions. 21 U.S.C. 844(a); see *United States* v. *Williams*, 176 F.3d 714, 716-717 & n.3 (3d Cir. 1999) (Alito, J.) (observing that "a defendant could be convicted under [Section] 843(b)" even in a case of "mere possession," and noting the "example" of where, under Section 844(a), the defendant commits a felony by possessing a controlled substance "after a prior conviction").

Petitioner emphasizes (Pet. 21) that in enacting the CSA, "Congress intended to draw a sharp distinction between distributors and simple possessors." Pet. 21 (quoting *United States* v. *Martin*, 599 F.2d 880, 889 (9th Cir.), cert. denied, 441 U.S. 962 (1979)). That is true but beside the point. The distinction is embodied in Sections 841 and 844, which respectively prohibit distribution and possession. But the distinction is immaterial under the text of Section 843(b), which prohibits neither distribution nor possession as such but instead proscribes a third and wholly separate category of conduct: using a

communication facility in causing or facilitating a drug felony. The House Report and the floor statement on which petitioner relies (Pet. 24) do not aid him, because they relate only to the distribution-possession dichotomy of Sections 841 and 844, not to causation or facilitation under Section 843(b). See H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 11 (1970); see also *id.* at 46, 48-49 (distinguishing possession with intent to distribute under Section 841 from "possession for one's own use," under Section 844); 116 Cong. Rec. 33,316 (1970) (statement of Rep. Boland) (discussing Section 844).

2. Petitioner argues (Pet. 8-13) that a conflict among the courts of appeals in the interpretation of Section 843(b) warrants this Court's intervention. Petitioner overstates both the extent of the conflict and the necessity of this Court's immediate review.

a. As petitioner observes (Pet. 8-10), the decision below is fully consistent with the Seventh Circuit's decisions on the same issue. In *United States* v. *Binkley*, 903 F.2d 1130 (1990), the court found sufficient evidence to sustain the defendant's conviction under Section 843(b), where the defendant used a telephone to arrange with a drug dealer a purchase of cocaine for the defendant's own personal consumption. *Id.* at 1135-1136. Giving the term "facilitate" its "ordinary meaning" of "to make easier," the court reasoned that the defendant's use of his telephone to arrange the purchase made the dealer's distribution easier and that the defendant's "subsequent treatment of the cocaine cannot retroactively diminish [his] previous facilitation of [the] cocaine sale." *Ibid.* (quoting *United States* v. *McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984)). The court reaffirmed that conclusion in *Kozinski*. See 16 F.3d at 807

("Under the clear terms of the statute a person who uses a telephone to assist the distribution of cocaine, and then consumes the cocaine is as culpable as the one who uses the telephone to assist the distribution, and then gives the cocaine to another to consume.").

b. Contrary to petitioner's contentions (Pet. 10-12), the decision below does not conflict with decisions of the Sixth and Ninth Circuits. In *United States* v. *Van Buren*, 804 F.2d 888 (1986), the Sixth Circuit held that "evidence of the purchase [by telephone] of cocaine for personal use does not establish use of the telephone to further [a drug distribution] *conspiracy*." *Id.* at 892 (emphasis added). The Ninth Circuit in *Martin*, 599 F.2d 880, reached a similar conclusion, again in the conspiracy context. *Id.* at 888-889. For reasons already discussed, arranging a drug transaction by cell phone "makes easier" the seller's distribution as to that same transaction, such that personal-use purchases like the one in this case fall within the ambit of Section 843(b). By contrast, it is not clear as a linguistic matter whether or how a personal-use purchase like the one here, or in *Van Buren* or *Martin*, can "caus[e]," "facilitat[e]," or have any other bearing on a conspiratorial *agreement* to which the defendant is not a party. See *id.* at 888 (the evidence did "not support a finding that [the Section 843(b) defendant] knew of the existence of the conspiracy to distribute"); *Van Buren*, 804 F.2d at 891-892 (in accepting the defendant's guilty plea, the district court "did not establish by means of an inquiry directed to [the] defendant a factual basis" for believing that the defendant "kn[e]w of the conspiracy").

It is therefore an open question how the Sixth Circuit or the Ninth Circuit would rule if presented with facts similar to those presented in the court below. The Sixth

Circuit has elsewhere indicated that, if anything, it may be inclined to reach the same result as the court below did. Before *Van Buren*, the court stated in dicta that "[i]t is sufficient if a defendant's use of a telephone to facilitate the possession or distribution of controlled substances facilitates either *his own* or another person's possession or distribution." *McLernon*, 746 F.2d at 1106 (emphasis added) (quoting *United States* v. *Phillips*, 664 F.2d 971, 1032 (5th Cir. 1981), cert. denied, 457 U.S. 1136, and 459 U.S. 906 (1982)). See Pet. App. 10a (rejecting petitioner's reliance on *Van Buren* and distinguishing *McLernon*). It is true that language in *Martin* suggests that the Ninth Circuit, for its part, might reach a different conclusion than the court below did. See 599 F.2d at 888-889. But the Ninth Circuit has never squarely faced the issue presented here, whether before or in the 30 years since *Martin*.[4]

c. Petitioner is correct that the decision below conflicts with *Baggett*, 890 F.2d 1095, but the conflict with that single decision does not warrant further review in this case. In *Baggett*, the Tenth Circuit emphasized that Section 843(b) prohibits the use of a communication facility "in causing or facilitating * * * a *felony*" and concluded that the statute did not cover the defendant's use of a telephone to order heroin for personal consumption because "illegal possession of controlled drugs by an individual for [her] own use is a *misdemeanor*."

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[4] Petitioner cites (Pet. 11) *United States* v. *Brown*, 761 F.2d 1272 (9th Cir. 1985), but the court did not confront the issue in that case. And the court actually held that the district court properly *declined* to give a proposed defense instruction stating that "a person who uses the telephone to order 'small amounts of cocaine for his and others' personal consumption' cannot be convicted under [Section] 843(b)." *Id.* at 1278.

Id. at 1097 (citation omitted). Contrary to petitioner's suggestion (Pet. 11, 13) that the Tenth Circuit has "reaffirmed" *Baggett*, the court has not directly confronted the issue presented there in the 19 years since, a fact that itself suggests the issue is not pressing.

In any event, there is at least some reason to believe that, if faced with the issue again, the Tenth Circuit might revisit the rationale in *Baggett*, particularly in view of the Seventh Circuit's intervening decisions in Binkley and *Kozinski* and the Fourth Circuit's decision in this case. The two crucial components of the reasoning in *Binkley*, *Kozinski*, and the decision below were (1) that the "ordinary meaning" of "facilitate" is "to make easier," and there can be no doubt that a purchase for personal use "make[s] easier" the dealer's felony drug distribution, *Binkley*, 903 F.2d at 1135 (quoting *McLernon*, 746 F.2d at 1106); see *Kozinski*, 16 F.3d at 807; Pet. App. 11a; and (2) that Section 843(b) "does not specify *whose* felony must be at issue, just that 'a' felony must be facilitated," Pet. App. 11a; see *Binkley*, 903 F.2d at 1136.

The Tenth Circuit, even in *Baggett*, has never questioned the first of those propositions. 890 F.2d at 1097 (acknowledging that it "may be true" that drug buyers "assist in the distribution or sale" of drugs by buying them and arranging the logistics of their delivery, and that dealers "would go out of business" but for such purchases and assistance) (citation omitted); see *Small*, 423 F.3d at 1185-1186 (though defendant Jones did not himself distribute drugs to his girlfriend Drew, his use of a telephone "resulted in [a dealer] giving * * * cocaine to Drew," such that Jones's conduct "facilitate[d]" distribution and fell within Section 843(b)).

The court in *Baggett* did apparently reject the second proposition underlying *Binkley*, *Kozinski*, and the decision below—*i.e.*, that under Section 843(b), it "does not [matter] *whose* felony must be at issue, just that 'a' felony must be facilitated." Pet. App. 11a; see *Baggett*, 890 F.2d at 1097 (concluding that, because "illegal possession of controlled drugs by an individual for [her] own use is a *misdemeanor*," a buyer for personal use necessarily cannot violate Section 843(b), which prohibits only the facilitation of "a *felony*"). Before *Baggett*, however, the Tenth Circuit in *United States* v. *Watson*, 594 F.2d 1330, cert. denied, 444 U.S. 840 (1979), made clear that it is sufficient for Section 843(b)'s purposes if a defendant facilitates *another person's* drug felony. *Id.* at 1342-1343 & n.14 ("[W]hen [the] defendants used the telephone and contacted [the dealer], they * * * facilitated his unlawful possession with intent to distribute."). And after *Baggett*, the court held in *Small* that the defendant, Jones, "facilitate[d]" his girlfriend's felony possession—by putting her in contact with a dealer— even though Jones was not himself a felony distributor. 423 F.3d at 1185-1186.

The logical tension among the Tenth Circuit's cases may lead that court, if presented with the opportunity, to harmonize its case law in favor of *Binkley*, *Kozinski*, and the decision below. Given the infrequency with which the issue has directly arisen both in the Tenth Circuit and elsewhere, there is no pressing need for this Court's intervention in the interim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008