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P R O C E E D I N G S

(10:07 a.m.)

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

ORAL ARGUMENT OF SRI SRINIVASAN
ON BEHALF OF THE PETITIONER

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

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

I would like to begin with the text of the statute before turning to the textual history and the statutory context. The language of section 843(b) covers the use of the phone in committing, in facilitating, or in causing a drug felony. That language presupposes someone who is causing, facilitating, or committing a drug felony, and with respect to such a person, it makes them guilty of an additional offense in the nature of an aggravated 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: And it seems to me that
20 she may then have committed a felony, and yet it seems
21 to me that her culpability is certainly no -- no
22 greater, if you're talking about your -- the policy of
23 your statute, than the -- than the man that uses the
24 drugs.

25 MR. SRINIVASAN: Well, I think I'm speaking

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

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

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

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

1 2 as an aider or abettor of drug distribution and also
2 would come within 843(b) as a facilitator of drug
3 distribution.

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

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

15 JUSTICE SCALIA: What is -- what I was going
16 to -- what is the purpose of saying "who uses a
17 communications facility"? Is that purely a
18 jurisdictional hook?

19 MR. SRINIVASAN: No, I don't think it's a
20 jurisdictional hook. The -- there would already be
21 Federal jurisdiction by virtue of the underlying felony,
22 and so what Congress was concerned with in penalizing
23 the use of a phone as in the nature of an aggravated
24 offense is that, I think, Congress thought that phones
25 were being used to make detection of drug trafficking

1 more difficult, and in particular at the level of
2 someone who was at the top of the food chain in -- in
3 the architecture of a drug distribution chain. That
4 person was able to avoid detection because they never
5 came into physical contact with drugs and they didn't
6 come into physical contact with the persons who were
7 engaging in the transaction on the street.

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

11 MR. SRINIVASAN: Right.

12 CHIEF JUSTICE ROBERTS: Well, there weren't
13 cell phones of the kind you have now. I think this was
14 directed at the beepers, right, when those were around
15 then, or -- or land-based phones or something like that.
16 And the technology has so expanded that the reach of the
17 statute has so expanded in a way that brings in a lot
18 more casual users than was the case before.

19 And I just don't know how that issue of
20 statutory interpretation is supposed to be resolved.
21 Assuming I'm right that the technology has dramatically
22 expanded the reach of the statute, even if you think
23 it's covered by its terms, how is that issue addressed?
24 What's the right answer there? Is it because the terms
25 still cover it, that's -- the breadth has expanded, or

1 because this is something new technologically that the
2 statute shouldn't be construed that broadly?

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

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

10 MR. SRINIVASAN: Uh-huh.

11 CHIEF JUSTICE ROBERTS: What's the answer
12 then?

13 MR. SRINIVASAN: Well, if you agree with it
14 --

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

21 But, I mean, is there a case of ours that
22 says what to do in that case, in such a situation of
23 statutory construction?

24 MR. SRINIVASAN: No, I'm not aware of a case
25 that speaks directly to that question, Mr. Chief

1 Justice. But our argument doesn't depend on that logic,
2 because even in 1970, certainly land lines were well in
3 use, and in fact the indications are that that's what
4 Congress was principally concerned with in this statute.
5 And even -- and at that time we would make the argument,
6 just as now, a person who used the telephone in buying
7 drugs for personal use wouldn't come within the ambit of
8 the provision because the text of the provision goes to
9 someone who uses a phone in committing, in facilitating,
10 or in causing the commission of a drug felony. And so
11 if you're not someone who's facilitating the commission
12 of a drug felony in the first place, then you can't be
13 charged as using a phone in facilitating a drug felony.

14 And the reason that a buyer for personal
15 use, whether we're talking about 1970 or now, wouldn't
16 be considered a person who is using a phone in
17 facilitating a drug felony is because of the
18 buyer-seller rule. Buyers aren't aiders and abettors of
19 the felony distribution, and by the same token they
20 shouldn't be considered facilitators of felony
21 distribution.

22 JUSTICE SCALIA: Your argument sort of
23 assumes -- more than sort of assumes; it assumes -- that
24 facilitating is the same as aiding and abetting. You
25 know, if they meant aiding and abetting, it's a -- it's

1 a classic criminal law term, they could have said
2 "aiding and abetting." They didn't. They used a
3 different term, "facilitating." Why -- why should I
4 think "facilitating" means "aiding and abetting"?

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

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

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

23 MR. SRINIVASAN: Well --

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

1 MR. SRINIVASAN: Well, I don't know -- the
2 opinion doesn't stand on the rationale that the woman
3 would be a victim. It stands on the rationale that
4 Congress, when it defined the primary offense, which is
5 transporting --

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

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

23 JUSTICE KENNEDY: Well, I'll think about it,
24 but I think your -- Gebardi does involve one statute,
25 one act, transportation. This involves two. The

1 underlying felony is the purchase or possession, and the
2 second statute is use of the telephone. So I don't --
3 I'll think about it, but I don't think Gebardi works.

4 MR. SRINIVASAN: I don't think that's a
5 distinction that ultimately makes a difference, Justice
6 Kennedy, for the following reason: This statute does
7 deal both with someone who is involved in the underlying
8 felony and use of the phone on top of that, but it's in
9 the nature of an aggravated offense. It presupposes
10 somebody who is committing, causing, or facilitating the
11 underlying drug offense, and then it makes them guilty
12 of an aggravated offense if they use a phone in the
13 course of doing so. So the first question you'd have to
14 ask is whether the person is committing, facilitating,
15 or causing the drug felony in the first place.

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

25 JUSTICE SCALIA: What other -- this statute

1 does not just apply to facilitating a drug offense. It
2 applies to any of the felonies covered by subchapter 2
3 of the relevant chapter. I agree, it seems a little
4 strange to have what is a misdemeanor by a buyer
5 converted into a -- into a felony just by use of the
6 phone. What other situations under other felony
7 provisions would arise that create a similar oddity? Do
8 you have any in mind?

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

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

22 CHIEF JUSTICE ROBERTS: This really isn't
23 the transformation of a misdemeanor into a felony. It's
24 a separate -- separate activity and an activity that
25 facilitates the commission of a crime. It's much easier

1 to carry out your drug distribution business if people
2 are calling you on their cell phones than if they have
3 to meet you in person or call from a land line.

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

18 JUSTICE ALITO: What if --

19 MR. SRINIVASAN: And with respect -- I'm
20 sorry?

21 JUSTICE ALITO: What if the -- the defendant
22 -- what if the defendant who is a buyer of -- of a
23 quantity for personal use does more than simply purchase
24 the drugs? What if information is communicated in the
25 telephone conversation that makes it easier for the

1 transaction to take place or less likely -- less likely
2 that there is -- that the person is going to be
3 apprehended? Would that person fall within the statute?

4 MR. SRINIVASAN: I don't think so, Justice
5 Alito. I probably would have to know more about exactly
6 what they did, but if it is a -- if what they did is a
7 normal incident of purchasing, then I think it would
8 fall within the buyer-seller rule.

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

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

25 JUSTICE GINSBURG: This statute doesn't --

1 it doesn't differentiate between buyer and seller in
2 terms of who makes the call. I gather the purchaser for
3 his or her own use would be just as susceptible to this
4 statute if the dealer called and said: I've got a gram
5 of cocaine; I know you're interested in having it.

6 MR. SRINIVASAN: That's -- that's right,
7 Justice Ginsburg. It would apply equally in that
8 situation, and from our perspective that points up even
9 more of the anomaly in applying it to this factual
10 context. And that would equally be the case under 18
11 U.S.C. 2.

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

20 JUSTICE ALITO: What would happen in the
21 situation where the person who buys the drug is guilty
22 of -- of a felony? It's an instance of felony
23 possession. Wouldn't the application of your
24 understanding of the buyer-seller rule in that situation
25 lead to the conclusion that even that person could not

1 be convicted under this statute for facilitating the
2 commission of the felony of sale?

3 MR. SRINIVASAN: No, I don't think so,
4 because the buyer-seller rule deals with the
5 circumstance in which the way the person is -- is
6 associated with a felony is they're associated with the
7 distributor's felony. And so what the buyer-seller rule
8 says is that a buyer isn't an aider and abettor of the
9 seller's distribution, and I think by the same token
10 shouldn't be associated with the seller's facilitation.

11 But in your hypothetical, where the buyer
12 himself is committing a felony because his possession
13 because of certain characteristics associated with it
14 make it a felony, the buyer himself would be committing
15 a felony.

16 JUSTICE ALITO: Well, that may -- that may
17 be true, but the buyer there still could not, under your
18 theory, be convicted of facilitating the seller's felony
19 of selling the drugs.

20 MR. SRINIVASAN: Right, couldn't be
21 convicted of facilitating the seller's felony, but would
22 fall within the ambit of section 843(b) in any event
23 because they would have used a phone in connection with
24 their own felony.

25 CHIEF JUSTICE ROBERTS: Your gloss on this

1 statute makes -- gives rise to some difficult questions
2 of proof. I mean, what if it's -- I don't know -- 10
3 pounds of something, and the guy says, well, I was just
4 buying in bulk for personal use, like a Costco drug
5 dealer.

6 (Laughter.)

7 MR. SRINIVASAN: Well, I -- I don't know
8 about that, but -- but I think what I do know is it
9 doesn't create any greater problems of application than
10 already exist under Federal drug laws. Because the
11 Federal drug laws bar both possession for personal use
12 under the simple possession statute, section 844, and
13 possession with intent to distribute, under 841.

14 And so courts and juries and the government
15 already have to make those sorts of decisions, and I
16 don't know that they've been particularly difficult to
17 make. They have to draw a distinction between the sorts
18 of quantities and other aspects of the offense that
19 bring it within the possession with intent to distribute
20 land or whether the possession is of such a small
21 quantity, and there aren't other associated
22 characteristics of the offense that make it possession
23 for purposes of personal use.

24 That distinction is one that's already
25 embedded in the fabric of the drug laws, and we're just

1 applying the same distinction for purposes of this
2 statute. I don't think we're making it any more
3 complicated than it already is.

4 JUSTICE KENNEDY: If the government were to
5 prevail here, I assume that it would then as a result
6 have a much larger, more expansive discretion in
7 charging and plea bargaining and -- and et cetera.
8 Other than the rule of lenity, is there anything in our
9 cases that indicates that we should be cautious about
10 giving the government that authority so that that's an
11 aid in our interpretation, or is that just all within
12 the rule of lenity?

13 MR. SRINIVASAN: Well, it's -- it's
14 definitely within the rule of lenity, and I think that's
15 the principal place that it's found.

16 JUSTICE KENNEDY: Other than the rule --

17 MR. SRINIVASAN: And I don't -- I don't -- I
18 don't know of any background principle that one would
19 bring to bear on that other than the -- the normal tools
20 of statutory construction that I've already talked about
21 in the first place, which is you look at the text, and
22 you look at the statutory history, and you look at the
23 statutory context.

24 JUSTICE KENNEDY: No background principles
25 either way on granting the prosecutors vast discretion

1 in charging --

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

3 JUSTICE KENNEDY: -- as it applies to
4 statutory interpretation?

5 MR. SRINIVASAN: Well, I think as a general
6 rule we ought to be circumspect about doing that. My --
7 my understanding is that circumspection is given voice
8 through the rule of lenity. But a background principle
9 of particular applicability here is -- is the statutory
10 history. It -- it is the statutory history. And I'm
11 speaking now in terms of the enacted statutory text; not
12 legislative history, but the history of the enacted
13 statutory text.

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

1 Petitioners --

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

5 MR. SRINIVASAN: That's right, Justice
6 Ginsburg. Before the Controlled Substances Act, the
7 communication facility provision barred the use of a
8 phone in connection with any drug offense. And in 1970
9 in the Controlled Substances Act, Congress narrowed its
10 reach to encompass only use of a phone in connection
11 with a drug felony.

12 So it excluded use of a phone in connection
13 with a drug misdemeanor, and that's significant in two
14 respects. One is, even without reference to the
15 statutory context of the 1970 Controlled Substances Act,
16 it's significant because Congress excluded use of a
17 phone in connection with a drug misdemeanor.

18 Petitioner used a phone in connection with
19 his misdemeanor, simple possession. But under the
20 government's argument, the very same conduct by the very
21 same person would be brought back into the fold of the
22 statute. Even though Congress excluded it, it would be
23 brought back into the fold of the statute by recasting
24 it as facilitating the dealer's felony.

25 And the mode of analysis the Court used in

1 Gebardi and the mode of analysis that underlies the
2 buyer-seller rule to begin with would -- would lead us
3 not to infer that Congress would have intended that
4 result.

5 But in terms of the history and the
6 statutory context which you were alluding to, Justice
7 Ginsburg, it is significant for that reason, as well,
8 because the context in which Congress narrowed the reach
9 of section 843(b) so that it only encompasses
10 facilitation of a felony and not facilitation of a
11 misdemeanor is one in which Congress, in the 1970 Act,
12 sought to extend leniency and afford a chance at
13 rehabilitation to drug users.

14 And that's manifested not in legislative
15 history but in the statutory text itself, because
16 Congress penalized simple possession for personal use as
17 a misdemeanor; whereas, the receipt of drugs previously
18 was a felony, regardless of the purpose of the
19 possession, whether it was for use or for distribution.

20 But Congress did more than that, because in
21 immediately adjacent provisions to the one in which it
22 narrowed simple possession to a misdemeanor, it also
23 enacted a provision which is now found in 18 U.S.C.
24 3607, which allowed a simple possessor who is a
25 first-time offender to avoid any conviction at all if

1 they successfully complete a period of probation.

2 And Congress went further still because it
3 also enacted, in another adjacent provision, further
4 relief for a first-time simple possessor who is under
5 the age of 21. With respect to that person, it allowed
6 the person to obtain a complete expungement of the
7 criminal records associated with the arrest.

8 CHIEF JUSTICE ROBERTS: So you would have
9 lost this case before 1970 --

10 MR. SRINIVASAN: Yes.

11 CHIEF JUSTICE ROBERTS: -- because the
12 incongruity on which you rely --

13 MR. SRINIVASAN: Well, the basis --

14 CHIEF JUSTICE ROBERTS: -- didn't exist
15 then?

16 MR. SRINIVASAN: Yes. Before 1970 it would
17 have been a very difficult climb because -- not only
18 because the communication facility applied to any drug
19 offense, but because simple possession wasn't a
20 misdemeanor.

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

23 MR. SRINIVASAN: It -- it wasn't sub
24 silentio. It was explicit.

25 CHIEF JUSTICE ROBERTS: No, but this

1 language: "Facilitating," covered purchasers using a
2 telephone in the period before 1970, but not after 1970,
3 because of the changes in some other sections?

4 MR. SRINIVASAN: No, well, it's in part
5 because of the changes in this section. This section
6 changed from "any offense" to "felony," so it's the text
7 of this section itself. And the buyer-seller rule
8 equally applied in -- before 1970. It's just that
9 before 1970 you wouldn't have had to show that the buyer
10 was associated with the seller's felony, because the
11 buyer was associated with his own offense and that was
12 enough, because at that point the buyer's offense was a
13 felony. And then the law, section 843(b), didn't care
14 whether it was a felony because it applied to any drug
15 offense.

16 It's only after 1970 that this distinction
17 becomes important, because after 1970 it's clear that
18 the buyer for personal use doesn't use a phone in
19 committing a drug felony. What he's committing is a
20 drug misdemeanor. So you have to find some way, if
21 you're the government, to make him associated with the
22 drug felony. And way that arises --

23 CHIEF JUSTICE ROBERTS: Well, no. That
24 question goes to whether or not the distribution was a
25 felony.

1 MR. SRINIVASAN: Right, which is the only
2 avenue available after 1970. There was a different
3 avenue available before 1970, because before 1970 a
4 purchaser of drugs would -- if they used a phone in
5 connection with their purchase, would have used a phone
6 in connection with a drug offense. And now the statute
7 is different in two respects: One, it only covers use
8 of a phone in connection with a drug felony; and, two,
9 in another provision, Congress narrowed the simple
10 possession offense from a mis -- from a felony to a
11 misdemeanor.

12 And Congress did so with respect to the
13 historical context in an immediately adjacent provision.
14 It narrowed 843(b) in an immediately adjacent provision
15 to the one in which it provided that the simple
16 possessor could avoid any conviction at all and the one
17 in which it provided that a youthful offender could
18 obtain a complete expungement of its records. And --

19 JUSTICE GINSBURG: You didn't -- I haven't
20 heard you question so far the government's rationale.
21 The reason Congress did this is it's more difficult to
22 detect a drug deal when it's by telephone than if it
23 were an encounter on the street or in an apartment. You
24 have not questioned that?

25 MR. SRINIVASAN: No, we don't question that,

1 Your Honor, but I'd like to make two points with respect
2 to that: First of all, it may be more difficult -- the
3 use of the telephone may be more difficult, and that may
4 be the animating purpose that Congress sought to address
5 through this provision. But that purpose is
6 substantially served even in the context of this case,
7 because --

8 JUSTICE SCALIA: I don't understand what
9 you're saying. The use of a phone may be more
10 difficult?

11 MR. SRINIVASAN: Use of a phone may make
12 detection more difficult, and that may be the animating
13 purpose -- excuse me. That may have been the animating
14 purpose behind the enactment of this provision. But
15 that purpose is substantially served, even if you accept
16 our understanding of the statute on the facts of this
17 case, because the seller comes squarely within the terms
18 of section 843(b). So because the seller comes within
19 the terms of section 843(b), the statute is already
20 operating against the seller's use of a telephone.

21 The question in our case is whether the
22 buyer also comes within the ambit of section 843(b).
23 And because section 843(b) presupposes someone who is
24 committing, facilitating, or committing a drug felony,
25 the buyer doesn't come within the reach of section

1 843(b) because he's not committing, causing, or
2 facilitating a drug felony in the first place. The
3 seller may be, but the buyer is not. The statutory
4 purposes are still served by virtue of penalizing the
5 seller.

6 If the Court has no further questions, I'd
7 like to reserve the balance of my time for rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Miller.

10 ORAL ARGUMENT OF ERIC D. MILLER

11 ON BEHALF OF THE RESPONDENT

12 MR. MILLER: Mr. Chief Justice, and may it
13 please the Court:

14 Section 843(b) prohibits the use of a
15 communication facility in causing or facilitating the
16 commission of any act constituting a felony under the
17 Controlled Substances Act. The court of appeals
18 correctly held that the statute is violated when a
19 person uses a communication facility such as a telephone
20 to purchase controlled substances unlawfully. A call to
21 order drugs both causes and facilitates a felony
22 distribution of drugs.

23 There's no basis in the statute for creating
24 an exemption for people who facilitate or cause felony
25 distributions by purchasing drugs for their own personal

1 use.

2 CHIEF JUSTICE ROBERTS: So two people across
3 the park -- and they know there's a drug dealer on the
4 other side, the one waves and the dealer comes over, the
5 other calls on the cell phone and the dealer comes over;
6 the other gets four more years? The phone user gets
7 four more years?

8 MR. MILLER: The phone -- phone user is
9 exposed to four more years. There's no mandatory
10 minimum --

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

13 MR. MILLER: That's right. Congress -- I
14 mean, those two cases are different and Congress made
15 the judgment.

16 JUSTICE SCALIA: Not just that, he gets a
17 felony on his record. Before that he would have had
18 just a misdemeanor; right?

19 MR. MILLER: That's right.

20 JUSTICE KENNEDY: And does the call -- does
21 the call have to be completed -- I mean, if he gets an
22 answer saying, "Your call is important to us, but we're
23 serving someone else"?

24 (Laughter.)

25 MR. MILLER: If the call -- the statute

1 requires that the communication facility be used. And
2 if the call doesn't actually go through, it would be
3 difficult to see how you would use the --

4 JUSTICE GINSBURG: But if he leaves a
5 message?

6 MR. MILLER: If he leaves the message and
7 the message in some way causes or facilitates a felony
8 drug distribution, then, yes, he has used the
9 communication facility.

10 JUSTICE GINSBURG: In this case we have two
11 separate episodes, each involving one gram of cocaine?

12 MR. MILLER: That's correct.

13 JUSTICE GINSBURG: And there were a total of
14 seven phone calls?

15 MR. MILLER: There were six. The government
16 dismissed one of the counts. It was six counts that
17 went to trial, six phone calls.

18 JUSTICE GINSBURG: So that would be an
19 exposure --

20 MR. MILLER: Of 24 years.

21 JUSTICE GINSBURG: Twenty-four years for the
22 one gram of cocaine on two occasions.

23 Do you agree that it doesn't make any
24 difference who initiates the call? That is, if the
25 seller says -- seller calls the buyer, and says, I

1 understand that you are in the market for one gram of
2 cocaine, I'll sell it to you. Is the buyer similarly
3 subject to this statute?

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

7 JUDGE GINSBURG: Yes.

8 MR. MILLER: -- with the dealer where you
9 are using the telephone to cause --

10 JUSTICE GINSBURG: Yes, we are assuming the
11 purchase is made in either case.

12 MR. MILLER: Yes.

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

15 MR. MILLER: That's right. It --

16 JUSTICE SCALIA: Counsel, what do you do --
17 the case that I find pretty close to what we have here
18 is *Rewis v. United States*, which involved a statute that
19 prohibited interstate travel with the intent to, quote,
20 "promote, manage, establish, carry on, or facilitate"
21 certain kinds of illegal activities, one of which would
22 have been gambling.

23 And we said the ordinary meaning of this
24 language suggests that the traveler's purpose must
25 involve more than the desire to patronize the illegal

1 activity. So it wouldn't have been facilitating a
2 gambling operation simply to be engaging in interstate
3 travel for the purpose of playing the tables.

4 MR. MILLER: I think there are a couple
5 answers to that, Your Honor. First, Rewis, as you say,
6 was construing the Travel Act. It didn't focus on the
7 word "facilitate," and it certainly didn't set out a
8 general theory of what --

9 JUSTICE SCALIA: Oh, certainly, it focused
10 on the word "facilitate." That was the whole purpose of
11 that passage. It said -- it quoted "promote, manage,
12 establish, carry on, or facilitate," and the ordinary
13 meaning of this language suggests that the traveler's
14 purpose must involve more than the desire to patronize
15 the illegal activity.

16 MR. MILLER: That's right, and -- and as --
17 as indicated by the passage you've just quoted, the
18 focus of the Court there was on the traveler's purpose.
19 The Travel Act requires intent. Section 843(b) is
20 different in that it's satisfied by knowingly or
21 intentionally using a phone.

22 So the Court in Rewis said, quite
23 reasonably, that someone whose only purpose is to be a
24 customer of an unlawful enterprise doesn't have the
25 intent to facilitate -- and significantly, although the

1 Court's quotation of the statute ends at "facilitate,"
2 it's not just to facilitate any unlawful activity; it's
3 to facilitate the promotion, management --

4 JUSTICE SCALIA: Don't you think that the
5 "knowingly" in this statute also requires that you are
6 knowingly facilitating?

7 MR. MILLER: It does require.

8 JUSTICE SCALIA: Okay. So this is the same
9 thing here.

10 MR. MILLER: But it doesn't have to be -- it
11 doesn't have to be that you have the purpose of
12 facilitating the seller. It's sufficient that you know
13 that the seller's --

14 JUSTICE SCALIA: Well, this didn't
15 mention -- this statute didn't mention purpose, either,
16 did it?

17 MR. MILLER: It -- it said "intent." It
18 does not include the word "knowledge," and the Court in
19 the passage you just read construed that to require --

20 JUSTICE SCALIA: An intent --

21 MR. MILLER: -- an inquiry into the
22 traveler's purpose.

23 And it's also significant that --

24 JUSTICE SCALIA: I find it pretty close, I
25 really do.

1 MR. MILLER: Well, one other difference,
2 then, Your Honor, is that the facilitation that has to
3 take place under the Travel Act is facilitation of the
4 promotion, management, establishment, or carrying on of
5 unlawful activity, which is defined not as a discrete
6 crime but as a business enterprise involving gambling.
7 So you have a statute that's focused on the sort of
8 management or direction of an ongoing enterprise;
9 whereas, here under 843(b), it's sufficient to
10 facilitate a discrete act.

11 JUSTICE BREYER: Why are you going through
12 all this sort of parsing? I mean, I'm looking at the
13 legislative history as well as the statute in 1970.
14 What is your answer to the last point that they made,
15 that what Congress wanted to do was to make simple
16 possession a misdemeanor? That's why they changed the
17 word, which -- "offense" to "felony." That's why they
18 changed the word "felony" to "misdemeanor."

19 And I can't imagine why else they amended
20 the statute, and just because I was curious, I looked it
21 up, and that's why they amended it, right? So -- so I
22 mean, the legislative history makes that clear.

23 So what you've done is figure out a way --
24 the government's figured out a way to do the opposite of
25 what they want, to take people who simply possess and

1 transform it into a felony. Now, what justification is
2 there in the law for doing that?

3 MR. MILLER: Well, I think there are a
4 couple of answers to that: First is that section 843(b)
5 doesn't apply to people who simply possess. It applies
6 to people who possess by using a phone to facilitate a
7 felony distribution. And Congress -- I mean, the very
8 existence of the statute demonstrates that Congress
9 thought that the use of a phone is a separate element
10 that introduces a distinct evil that Congress wanted to
11 combat. And as to the change in the felony language --

12 JUSTICE BREYER: As to the first, I said
13 "subset." I didn't say you undermined the entire
14 statute. I said you took a subset of people who simply
15 possessed, and that subset you transformed into felons.
16 Now, your response I guess is just what you said.

17 MR. MILLER: Well, yes --

18 JUSTICE BREYER: And what's the second?

19 MR. MILLER: -- and also that the reason for
20 the -- as you know, the predecessor to 843(b), which was
21 section 1403, referred to causing or facilitating any
22 offense. All of the enumerated offenses were felonies.
23 In 1970, they changed the word "offense" to the word
24 "felony." But that -- part of the reason for that --
25 there is no legislative history specifically addressing

1 the reason for that change. But part of the reason we
2 can infer is that the 1970 statute created a whole host
3 of misdemeanors, of misdemeanor regulatory offenses
4 under the Controlled Substances Act. So one good
5 example is section 829, which prohibits distributing a
6 controlled substance without a prescription, and that's
7 an offense -- that's a misdemeanor, and that could
8 easily be caused or facilitated over the phone, if
9 somebody calls a pharmacist.

10 And so that -- where both parties to the
11 transaction are only engaging in a misdemeanor, that's
12 something that 843(b) would not apply to.

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

18 But the difference between the
19 classification felony and misdemeanor is huge in terms
20 of consequences for a person's life. So let's take the
21 defendant in this case. If he becomes a felon, rather
22 than a misdemeanant, even if it's his first time and
23 it's only one gram, he loses a lot of rights, doesn't
24 he?

25 MR. MILLER: Yes. Yes, that's right. But I

1 -- and I think -- but one other change that Congress
2 made to 843(b) in 1970 that's significant is that it
3 eliminated the mandatory minimum. There was under the
4 predecessor --

5 JUSTICE GINSBURG: Yes, but I'm speaking
6 about the post consequences.

7 MR. MILLER: Yes. Yes. It --

8 JUSTICE GINSBURG: Like -- let's take a
9 young person. It has an effect on student loans,
10 government loans?

11 MR. MILLER: Yes.

12 JUSTICE GINSBURG: And it may be that in
13 certain States voting rights are removed, and there is
14 on this person's record forever that he is a felon. It
15 just seems odd that Congress would have at one and the
16 same time, in the same statute, say, we want these -- to
17 give these people a chance, and if they are in a
18 rehabilitation program and they make it, they won't even
19 get any charge, not even a misdemeanor charge, and then
20 say, but a whole group of them are going to be treated
21 just like traffickers if they use a telephone.

22 It's hard -- these two seem to be working
23 at odds with each other. So mustn't the Court then
24 try to reach some accommodation, some harmonization
25 of these two provisions? And it was suggested that we

1 do that by saying "facilitation" -- "causing" in this
2 context -- means the same thing as "aiding and
3 abetting." Then we have the buyer-seller rule for the
4 aider and abettor, and then we have made these two
5 provisions harmonious.

6 MR. MILLER: I think the buyer-seller
7 principle and the limitation on aiding and abetting and
8 accessory liability, that this Court recognized in
9 Gebardi, doesn't apply here, because the principle that
10 the Court set out in that case, and it has been
11 recognized in subsequent cases, is that -- is that when
12 Congress criminalizes or punishes one party to a
13 transaction, that inevitably involves a second party.
14 The second party who is left unpunished by the statute
15 doesn't get swept back in under section 2 as an aider
16 and abettor.

17 That principle doesn't apply here because,
18 although the existence of a purchaser or a receiver of
19 drugs is an inevitable incident of a distribution, the
20 existence of a purchaser who uses a phone is not. The
21 whole point of this statute is that the use of a phone
22 is a separate and distinct element that introduces a
23 different evil and that Congress wanted to combat that.

24 The other -- the other reason that aiding
25 and abetting --

1 JUSTICE SCALIA: Except that the use of a
2 phone in this statute is applied to the seller as well
3 as to the buyer. I mean, it seems to me it is parallel:
4 use of a phone to commit the offense by the seller, and
5 you want us to similarly sweep in the facilitating of
6 the offense by the use of the phone by the buyer. It
7 seems to me pretty parallel to what we've done in the
8 buyer-seller rule.

9 MR. MILLER: The -- the statute -- but by
10 its terms makes clear that the person using the phone
11 and the person committing the felony don't have to be
12 the same person, and I think I understood Petitioner to
13 -- to acknowledge that. The statute doesn't say
14 "knowingly or intentionally use a communication facility
15 in causing or facilitating his or her commission of a
16 felony."

17 JUSTICE BREYER: Is there another example in
18 the law, anywhere in the law, where -- and there may be,
19 I'm asking -- which you've come across, where we have an
20 illegal business and there is a customer; and all the
21 customer does is be a customer; and is there an example
22 where just because he's a customer in a statutory
23 provision that normally has a lesser penalty -- all
24 right; imagine those circumstances -- you still can
25 punish him as if he -- as if he ran the business?

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

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

5 MR. MILLER: But this -- this isn't one,
6 because this isn't a case that punishes people just for
7 being a customer. It's a case -- it's a statute that
8 punishes people for being a customer and for
9 facilitating --

10 JUSTICE BREYER: It's the way they're a
11 customer.

12 MR. MILLER: -- and using a phone --

13 JUSTICE BREYER: The way they're a customer
14 is they use the telephone, and I guess one side thinks
15 that's not a big deal, and the other side thinks that,
16 anyway, in terms of what Congress thought, it's a
17 tremendously big deal because Congress was really
18 worried about telephones. Okay, that's possible.

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

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

22 JUSTICE BREYER: What one comes to mind?

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

1 JUSTICE BREYER: That's the jurisdictional
2 hook. What I'm looking for is there's a business and a
3 customer, the statute punishes the business worse than
4 the customer. Now, we get the customer as if he were a
5 business participant. That's what I'm looking for,
6 where it's the way he does it -- i.e., whether he uses a
7 telephone or whether he uses a telegram or semaphore
8 signals or -- where the -- where the means of
9 communication here or something like that suddenly
10 transform him?

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

14 MR. MILLER: Well, I mean, if -- as we
15 identified on page 25 of our brief, a number of statutes
16 where the use of a communication facility is an element
17 of the offense, and the conduct that was covered by
18 those statutes in many cases might not be a Federal
19 offense at all.

20 JUSTICE KENNEDY: Carry -- carrying a
21 weapon. A lot of statutes punish more severely for
22 carrying weapons.

23 MR. MILLER: Right. And I think, to be
24 clear, this is not -- this is not a statute that
25 punishes people -- punishes customers as if they were

1 distributors or that aggravates an underlying felony.
2 This is a separate offense; it has its own penalty; it
3 put the --

4 JUSTICE KENNEDY: But it -- can you tell me,
5 how does it work? The district -- the United States
6 Attorney in one State, one district, has a case like
7 this where there are four different phone calls; and he
8 doesn't like the looks of the defendant, or for some
9 reason he can charge him, and in the neighboring
10 jurisdiction the United States Attorney does not. Are
11 there guidelines? Does the Department of Justice
12 control this in each case? Is there some manual where
13 we could see what the rules are for charging? Is it all
14 at the discretion of the United States Attorney?

15 MR. MILLER: I mean -- I'm not aware of
16 anything in the U.S. Attorney's Manual that specifically
17 addresses this statute, but of course the Court
18 recognized in Batchelder that prosecutors legitimately
19 have discretion when there are different criminal
20 statutes that cover the conduct, and --

21 JUSTICE GINSBURG: What about the -- the
22 statement that in the manual -- maybe this is
23 incorrect -- but that the charging policy of the
24 Department of Justice instructs prosecutors to charge
25 the most serious offense supported by the facts? And if

1 that's true, then the Assistant U.S. Attorney would have
2 no choice. The most serious offense is not misdemeanor
3 of simple possession, but it is the violation of 843(b).

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

7 JUSTICE GINSBURG: Ordinarily --

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

10 MR. MILLER: Well, I mean --

11 JUSTICE GINSBURG: Is that the policy, first
12 of all? That they're supposed to charge the most
13 serious offense supported by the facts?

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

15 JUSTICE GINSBURG: So that means in every
16 one of these cases, whether the dealer picks up the
17 phone or the buyer picks up the phone for a transaction
18 for one gram of cocaine, the prosecutor has no choice
19 but to indict under 843(b)?

20 MR. MILLER: Well, again, if -- if there is
21 to be an indictment at all. There's no requirement that
22 --

23 JUSTICE GINSBURG: I'm talking about the
24 choice between misdemeanor, simple possession
25 misdemeanor, or 843 -- adding on this 843(b). The

1 prosecutor -- if what I read is correct -- has no
2 discretion, has to, if he makes the charge -- he cannot
3 make a simple misdemeanor charge. He has to charge the
4 felony.

5 MR. MILLER: That's my understanding of the
6 policy, but, you know, this Court has recognized that,
7 you know, that sort of charging decision is a legitimate
8 aspect of the system as long as it's not exercised for
9 unconstitutional reasons.

10 JUSTICE SOUTER: No, but there's -- there's
11 a difference here, and that is, as these cases
12 illustrate, three phone calls for one trifling sale, two
13 for another, this gives a kind of multiplier effect
14 which it's -- it's hard to find a parallel for in the
15 law. We go from a misdemeanor to 12 years, depending on
16 the fact that there were -- there were a couple of cell
17 phone calls.

18 That is -- maybe -- maybe that is exactly
19 what Congress intended, and maybe that's good law
20 enforcement policy, but those are not sort of two
21 intuitively obvious positions.

22 MR. MILLER: I think the -- the text of the
23 statute and the fact that it covers any act constituting
24 a felony does demonstrate that that's what Congress
25 intended as well --

1 JUSTICE SOUTER: Well, what about the
2 question?

3 JUSTICE SCALIA: Let's feel sorry for this
4 -- for the felon who is selling this stuff, too. I
5 mean, the same thing is true of him, isn't it?

6 MR. MILLER: Yes.

7 JUSTICE SCALIA: Every time he makes another
8 phone call he gets socked with another how many years?

9 MR. MILLER: The -- the statutory maximum is
10 four, but again --

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

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

14 JUSTICE SCALIA: We should feel sorry for
15 him, too.

16 JUSTICE SOUTER: -- he knows the difference,
17 that -- he knows that he's committing a felony, and the
18 possessor of a gram or less doesn't.

19 MR. MILLER: The possessor who purchases the
20 drugs using his phone knows that he is causing the
21 felony. The reason he calls the drug dealer is because
22 he wants to cause the dealer to send him drugs.

23 JUSTICE BREYER: Well, what about the
24 legislative history? Because I would read it -- and in
25 fact what it seems to me that you're suggesting, when

1 you read the statute, is using a telephone is -- because
2 Justice Kennedy came up with a good example of what I
3 was thinking of. If the buyer sits there with a gun,
4 well, that's different, he shouldn't have the gun, and
5 it's not surprising that he gets a higher sentence. And
6 you're saying by reading the text you've discovered
7 Congress thinks that cell phones are sort of like guns.
8 Okay. I grant you somebody might have thought that.
9 Justice Souter thinks it's not intuitively obvious, but
10 is there any legislative history that suggests that that
11 indeed is what people in Congress thought when they
12 passed this statute? I'll read it if there is.

13 MR. MILLER: Yes, and it --

14 JUSTICE BREYER: And what should I read?
15 Where -- what exactly --

16 MR. MILLER: I mean, beyond -- first of all,
17 the -- the Congress has a traditional interest in
18 keeping the channels of commerce and communication free
19 from --

20 JUSTICE BREYER: Normally, where that is
21 involved, I've learned, it's called what Justice Scalia
22 called it "a jurisdictional hook." They don't think the
23 underlying behavior is worse, but they believe there has
24 to be a basis and should be a basis for Federal
25 prosecution. I started out where he was. I thought

1 this is just a jurisdictional hook, but now you say no,
2 it isn't; it's much worse than that. It's like carrying
3 a gun, not quite as bad as that, but on that -- in that
4 direction. So I'm asking you what would I read in this
5 history to show that what you're claiming is right?

6 MR. MILLER: The legislative history of the
7 1956 Act, which is the -- where the predecessor statute,
8 1403, was enacted, shows that Congress was concerned
9 with the ability of drug traffickers and people engaging
10 in drug transactions to avoid detection by using the
11 phone --

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

14 MR. MILLER: Yes. And the initial proposal
15 in the initial Senate bill would have allowed
16 wiretapping in connection with drug investigations of
17 certain enumerated offenses that covered both purchasers
18 and sellers. That was replaced with the provision that
19 became 1403, which also -- which applied to "causing or
20 facilitating" enumerated offenses, and again applied to
21 both buyers and sellers. And that statute was applied
22 to buyers in a number of reported decisions before 1970,
23 and there is nothing in the 1970 legislative history
24 that Congress intended to change that aspect.

25 JUSTICE GINSBURG: How does it work? I

1 mean, I know your overall rationale about the ease of
2 detection -- easier to detect face to face encounter on
3 the streets. But here, I mean, we know that the
4 government tapped the dealer's phone, and that's how the
5 government got the list of the people who bought from
6 the dealer. How common is it that -- that either the
7 buyer or the seller is the subject of a telephone tap?

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

13 JUSTICE GINSBURG: But what had -- what had
14 to be met in this case in order to put this tap on the
15 dealer's phone?

16 MR. MILLER: Well, among other things, I
17 believe the statute requires some showing that it's not
18 possible to obtain evidence in some other less intrusive
19 way. So in this case there was a wiretap on the
20 dealer's phone, but in a lot of cases there's not going
21 to be that. And certainly Congress, when it enacted the
22 statute, viewed keeping people from using the phones to
23 conceal their drug transactions as one way of minimizing
24 the need for more intrusive measures like wiretapping.

25 JUSTICE GINSBURG: So, you would interpret

1 Congress -- now we're getting away from '56, when simple
2 possession was a felony, to '70, when simple possession
3 becomes a misdemeanor. And you're saying that Congress
4 meant to relegate the simple possessor to misdemeanor
5 status, but only if the encounter was face to face. So
6 you're reading into the -- what Congress did to sharply
7 distinguish between traffickers and users, and say but
8 that was only taking 843(b) into account. That benefit
9 -- that you're not going to be a felon; you're going to
10 be a misdemeanant -- is only for face-to-face
11 transactions.

12 MR. MILLER: Well, it's -- I mean, it
13 doesn't apply when -- when a communication facility is
14 used. It also doesn't apply, I mean, in a number of
15 other contexts, you know, that Petitioner acknowledges
16 that --

17 JUSTICE GINSBURG: But I'm talking about
18 this context, the purchase of one gram of cocaine on one
19 occasion, nothing more.

20 MR. MILLER: As a first offense. I mean,
21 that --

22 JUSTICE GINSBURG: So Congress's design was
23 we treat as a less grave offender the buyer for his own
24 use, but only if he buys in a face-to-face encounter?
25 That's what -- what you would have to read -- you would

1 have to limit the line Congress drew between
2 traffickers, on the one hand, and possessors for their
3 own use, on the other, and say it applies only if the
4 drug is purchased in face-to-face encounters.

5 MR. MILLER: Yes, although I wouldn't
6 describe it as an issue of a less grave offense or a
7 more grave offense in the sense that the use of the
8 phone aggravates the offense of possession.

9 JUSTICE GINSBURG: But I mean, practically
10 --

11 MR. MILLER: But use of a phone is a
12 different --

13 JUSTICE GINSBURG: -- the difference between
14 being labeled a misdemeanor and being labeled a felon
15 is an enormous difference.

16 MR. MILLER: That -- that's right. But
17 Congress, again, did recognize that there could be a
18 range of levels of culpability associated with the
19 843(b) offense, which is part of the reason that it
20 eliminated the mandatory minimum when it amended the
21 statute in 1970, suggesting that there could be
22 different kinds of conduct that would satisfy it.

23 JUSTICE SOUTER: Mr. Miller, in answer to
24 one of Justice Breyer's earlier questions, he indicated
25 that the premise of his question was the effect of the

1 twin amendments from offense to felony and from felony
2 to misdemeanor for possession of small quantities. And
3 he said, well, in effect, is -- is that combination of
4 amendments really being rendered nugatory by the view
5 that you take of the statute? And you said not
6 necessarily, and you said there may be some drug
7 transactions in which it is a misdemeanor on both sides,
8 so that the statute wouldn't apply there.

9 Are there any other -- are there many
10 examples of that? I thought not. And are there any
11 other examples of misdemeanor-misdemeanor cases that the
12 -- that the statute would apply to so that -- so that
13 the anomaly wouldn't be quite so obvious?

14 MR. MILLER: Well, I mean, if you're asking
15 other misdemeanor offenses under the Controlled
16 Substances Act --

17 JUSTICE SOUTER: Yes.

18 MR. MILLER: I mean, there's the --

19 JUSTICE SOUTER: In other words, how
20 important is this? It looks to us -- I mean, I think it
21 was the premise of the question and it was -- it was my
22 assumption coming in that your view of the statute
23 largely renders those two amendments, or the combined
24 effect of those two amendments, virtually nugatory.

25 And you said, well, not necessarily because

1 there may be misdemeanor-misdemeanor cases. And I want
2 to know how many of them there are. Is that really a
3 significant area for the application or nonapplication
4 of this statute?

5 MR. MILLER: I -- I don't know how many
6 prosecutions are brought under those statutes. I
7 imagine that, in part because they are misdemeanors, not
8 a lot of prosecutions.

9 JUSTICE SOUTER: How many separate -- how
10 many misdemeanor-misdemeanor combined offenses are there
11 under the -- under the code?

12 MR. MILLER: 842 -- section 842 enumerates I
13 think it is on the order of a dozen or so, and then we
14 cite a couple of them in our brief. So distributing a
15 -- a controlled -- a prescription drug without a
16 prescription would probably be one of the most common
17 that someone would engage in, and --

18 JUSTICE SOUTER: You -- you don't have any
19 figures on the number of actual prosecutions under --
20 under the -- in the misdemeanor-misdemeanor combination
21 cases?

22 MR. MILLER: No. I mean, again, because --
23 because they're misdemeanors and prosecutorial resources
24 are probably concentrated on the more serious felony
25 violations of the Controlled Substances Act, I suspect

1 there aren't a lot of prosecutions.

2 JUSTICE SOUTER: So -- well, then, I guess
3 that leads to my last question, and that is: Isn't it
4 probably true that if we accept your view of the
5 statute, then the effect of those two combined
6 amendments, offense to -- to felony, felony to
7 misdemeanor for small quantities, the -- the combined
8 effect of -- of those two statutes is, in effect,
9 rendered worthless in -- in most cases? In the
10 substantial number of cases to which the -- the
11 communication facility statute would be applied. It --
12 it will render those -- those two amendments, in
13 effect, worthless?

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

17 JUSTICE SOUTER: That may be the relevant
18 inquiry, but what about my irrelevant inquiry?

19 MR. MILLER: Well, I --

20 (Laughter.)

21 JUSTICE SOUTER: It's going to -- your --
22 your view of the statute is going to render those two
23 amendments virtually dead letters.

24 MR. MILLER: I mean I think -- I think from
25 the perspective of -- of Congress, that there was no --

1 they wouldn't have anticipated that the amendment would
2 not have any consequence. I mean, the fact that -- that
3 they created this whole set of misdemeanors, the fact
4 that they aren't violated very often --

5 JUSTICE SOUTER: Yes, but as you said -- as
6 you said, they -- you don't have figures on the number
7 of prosecutions. And the number of prosecutions under
8 those misdemeanors, as distinct from the number of
9 applications of the communications statute to
10 conventional buyer-seller transactions, is probably the
11 difference between a very small set and a very large set
12 of cases. And in the very large set of cases, the two
13 amendments are being rendered, in effect, worthless;
14 isn't that true?

15 MR. MILLER: If I -- if I may answer, my
16 understanding is that the number of prosecutions under
17 843(b) is -- is also relatively small, but I don't have
18 precise figures on -- on the comparative numbers.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MR. MILLER: Thank you.

21 CHIEF JUSTICE ROBERTS: Four minutes, Mr.
22 Srinivasan.

23 REBUTTAL ARGUMENT OF SRI SRINIVASAN

24 ON BEHALF OF THE PETITIONER

25 MR. SRINIVASAN: Thank you, Mr. Chief

1 Justice.

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

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

19 At that time, there was a lot of concern --
20 the Travel Act and other statutes -- about exactly what
21 the Federal justification for -- justification for
22 Federal participation existed. And I -- I always had
23 the impression that that was really what was behind the
24 telephone aspect of this statute.

25 MR. SRINIVASAN: I don't think so, Justice

1 Stevens, because as of 1970 there were already
2 underlying drug laws that barred distribution, that
3 barred receipt of drugs, and that barred most of the
4 activities that are now prohibited under the drug laws.
5 And the telephone law presupposes that one of those
6 underlying acts is already going on.

7 And so to the extent that there was
8 jurisdiction over those underlying acts, which
9 presumably there was since the statutes are on the
10 books, the Telephone Act wasn't necessary to create
11 jurisdiction.

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

24 MR. SRINIVASAN: Well, I think the -- the
25 use of the machine gun wouldn't come within the

1 buyer-seller rule because what the buyer-seller rule
2 deals with is a substantive prohibition on distribution.
3 And the -- the presumption is that when Congress
4 prohibits distribution, it knows that there is also a
5 receiver of the banned substance. And by virtue of
6 excluding that receiver from the distribution
7 prohibition, it wouldn't have wanted to bring that
8 receiver back within the fold of the statute.

9 JUSTICE ALITO: Right, but aren't the two
10 cases --

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

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

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

22 JUSTICE ALITO: Well, I don't -- I don't see
23 the difference between use of a phone to facilitate --
24 use of a phone in facilitating, use of -- of a firearm
25 in facilitating --

1 MR. SRINIVASAN: Oh --

2 JUSTICE ALITO: -- unless you can say that
3 the -- the use of a communication facility in effecting
4 the purchase is such a -- a virtually indispensable
5 element of the purchase that it -- it -- it's swept up
6 within it.

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

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

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

25 JUSTICE ALITO: The buyer-seller rule would

1 apply in your view exactly the same way.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 11:08 a.m., the case in the
25 above-entitled matter was submitted.)

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