No. 06-11429

IN THE
Supreme Court of the United States

KEITH LAVON BURGESS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PAMELA HARRIS
CO-CHAIR, NACDL
AMICUS COMMITTEE
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5386

MARY PRICE
VICE PRESIDENT AND
GENERAL COUNSEL
FAMILIES AGAINST
MANDATORY MINIMUMS
1612 K Street, N.W.
Suite 700
Washington, D.C. 20006
(202) 822-6700

KEVIN B. HUFF
Counsel of Record
GREGORY G. RAPAWY
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, Pennsylvania 19003
(610) 649-8200

January 29, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

United States

CONSTITUTION, STATUTES, AND RULES

United States

INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on a broad range of issues in this Court and other courts and has filed *amicus curiae* briefs in previous cases involving the interpretation of mandatory minimum sentencing statutes. *See*, *e.g.*, *Begay v. United States*, No. 06-11543 (argued Jan. 15, 2008).

Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization of 14,300 members founded in 1991. FAMM's primary mission is to promote fair and proportionate sentenc-

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

ing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

Amici file this brief for two reasons. First, the question presented in this case will affect the sentences of a significant number of criminal defendants in the federal courts. This Court's decision will have a direct and immediate impact on the lives of these individuals and their families. Second, the way in which the Court decides this case will greatly influence how the federal courts deal with the widespread proliferation of mandatory minimum sentencing provisions. *Amici* believe that the Court should take the opportunity offered by this case to emphasize the important role of the rule of lenity in interpreting those provisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Both the historical roots of the rule of lenity and its modern function in American criminal law strongly suggest that a "felony drug offense" for purposes of 21 U.S.C. § 841(b)(1)(A) must be a "felony" within the meaning of 21 U.S.C. § 802(44). The Court should reaffirm the importance of the rule of lenity and emphasize the rule's especially significant role in the interpretation of mandatory minimum sentences.

The rule of lenity derives from the practice of the English courts in the seventeenth and eighteenth centuries of strictly construing penal statutes. The

English courts applied this rule of strict construction primarily to enactments that effectively imposed a mandatory death sentence for a broad range of felonies by removing the so-called "benefit of clergy," a legal fiction that had allowed first-time offenders to avoid hanging. Parliament passed many such statutes, some of which applied to minor felonies, such as shoplifting. The courts responded by reading these statutes narrowly, thereby reducing the number of covered felonies. The result was a rule requiring a clear statement by Parliament before the courts would construe a statute as depriving a defendant of the benefit of clergy and subjecting him to the death penalty. Some of these historical precedents, moreover, show an emerging understanding that a restrained judicial reading of sentencing laws appropriately observes the line between the legislature's prerogative in enacting criminal statutes and the more limited judicial role of interpreting and applying them.

The rule of lenity likewise has deep roots in American law. Chief Justice Marshall's opinion in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820), detached the rule from any particular association with capital sentencing and located it firmly in the understanding that it is the role of the legislature, not the courts, to define crimes and their punishments. By the time of *McBoyle v. United States*, 283 U.S. 25 (1931), it was clear that the rule of lenity was a structural safeguard requiring that criminal punishment be clearly authorized by a statute — not so much for the benefit of the individual defendant, who Justice Holmes's opinion acknowledged was unlikely to "carefully consider the text of the law," *id.* at 27, but rather to protect the broader principle

that prospective statutes, not retrospective judicial decisions, should define the criminal law. The rule of lenity is by now an established part of our legal system and a background principle against which Congress presumptively legislates, and so has acquired precedential significance that reinforces its original justification.

Application of the rule of lenity is particularly appropriate with respect to mandatory minimum sentencing provisions, such as § 841(b)(1)(A). Like the English statutes removing benefit of clergy, mandatory minimums require a harsher punishment than might otherwise be imposed after judicial consideration of the circumstances of a particular case. Mandatory minimums are thus contrary to the usual rule permitting discretion in sentencing. Applying the rule of lenity to mandatory minimums also vindicates the underlying bases of the rule — the separation of powers and the principle of legality. A mandatory minimum sentence, with its serious consequences for individual liberty, should be imposed only when Congress has spoken clearly. In addition, the certainty offered by the rule of lenity enhances the smooth operation of the criminal justice system.

Petitioner correctly argues that § 841(b)(1)(A) is best read in his favor even without the rule of lenity. But that rule resolves any residual doubt in petitioner's favor. The contrary position of the First and Fourth Circuits and the Government ignores the plain language and ordinary meaning of the statute in favor of dubious extensions of inapplicable canons of statutory construction. This Court should reject those arguments and construe § 841(b)(1)(A)

narrowly, consistent with the longstanding and well-justified rule of lenity.

ARGUMENT

I. THE HISTORY AND PURPOSES OF THE RULE OF LENITY SUPPORT ITS APPLICATION TO MANDATORY MINIMUM SENTENCES

A. The Rule of Lenity Is Rooted in the Narrow Construction of Mandatory Sentences

At common law, all felonies were punishable by death. *See*, *e.g.*, *Standefer v. United States*, 447 U.S. 10, 15 (1980). Over time, however, the English courts developed procedural mechanisms that left room for discretion to impose what were effectively noncapital sentences. *See id.* Among these was the doctrine known as "benefit of clergy."[2] Benefit of clergy was originally a jurisdictional mechanism by which ordained clergy could transfer criminal cases brought against them out of the royal courts and into the ecclesiastical courts.[3] Later, benefit of clergy became available to almost any male defendant who could read;[4] and, later still, to almost any defendant

---

[2] *See generally* 4 William Blackstone, *Commentaries* *365-74 ("Blackstone"); 1 James Stephen, *A History of the Criminal Law of England* 458-73 (1883); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 37-41 (1983).

[3] *See* Langbein, 50 U. Chi. L. Rev. at 37; Jerome Hall, *Theft, Law and Society* 110-11 (2d ed. 1952) ("Hall"). According to Blackstone's somewhat critical summary, the ecclesiastical courts would reexamine the merits of the conviction under procedures markedly more favorable to the accused, and it was common for them to find innocent those previously found guilty. *See* 4 Blackstone at *361; *see also* Hall at 110 n.1.

[4] Moreover, a specific verse of the Bible — called for this reason the "neck verse" — was used for the literacy test, and

at all, at least for a first offense.[5] A statute had eliminated any actual referral of lay defendants to the ecclesiastical courts, and the royal courts would impose an alternative punishment such as, depending on the period and the offense, branding, whipping, the pillory, imprisonment, or "transportation" to one of the colonies.[6] Effectively, by the time of the eighteenth century, benefit of clergy — when available — rendered a first felony offense noncapital and subject to judicial discretion in sentencing.

From the sixteenth to the eighteenth centuries, however, Parliament passed a series of statutes making certain felonies punishable by death "without benefit of clergy."[7] A conviction under one of these statutes was equivalent to a mandatory death sentence. Some statutes took away benefit of clergy for the most serious offenses against the person, such as murder and rape. *See* 1 Edw. 6, c. 12, §§ 9, 13 (1547); 18 Eliz. c. 7 (1575-76). But, especially in the late seventeenth and early eighteenth centuries, Parliament stripped benefit of clergy from a long list

---

so even illiterate defendants could memorize it to claim the benefit. *See* George W. Dalzell, *Benefit of Clergy in America & Related Matters* 24 (1955) (quoting *Psalms* 51:1: "Have mercy upon me, O God . . . ." (King James)).

[5] *See* 4 Blackstone at *362-63; Langbein, 50 U. Chi. L. Rev. at 37-38.

[6] *See* 4 Blackstone at *362-64; Hall at 115 & n.15; *see also* 1 Leon Radzinowicz, *A History of English Criminal Law and Its Administration*, app. 1, 633 (1948) ("Radzinowicz") (listing punishments for larceny). Branding on the brawn of the thumb was used to indicate that the defendant had already received benefit of clergy once and therefore would not be eligible a second time. *See* Langbein, 50 U. Chi. L. Rev. at 37-38.

[7] For collections of these statutes, see Hall at app., 356-63; 1 Radzinowicz at app. 1, 611-59.

of felonies, some of them newly created by statute. These new capital felonies included shoplifting, *see* 10 Will. 3, c. 12 (1698); destroying a ship to defraud an insurance company, *see* 11 Geo. 1, c. 29, §§ 5, 6 (1724); and bankruptcy fraud, *see* 5 Geo. 2, c. 30, § 1 (1732). A statute even imposed the death penalty upon "any outlandish people calling themselves or being called *Egyptians* . . . [and] any person being fourteen years old, which hath been seen or found in the fellowship of such *Egyptians*,"[8] who remained in England or Wales for more than a month. 1 Matthew Hale, *Historia Placitorum Coronae* *670 (1736) ("Hale") (citing 1 & 2 Phil. & M. c. 4 (1554-55)).

Faced with application of these statutes, the royal courts began to invoke the principle that "penal statutes must be construed strictly," 1 Blackstone at *88, meaning that they would be applied to cases only within their express terms and that those terms would be read narrowly (in some cases, very narrowly). Blackstone gives two examples. One statute took away benefit of clergy if a defendant had been convicted of stealing "horses," but "the judges conceived that this did not extend to him that should steal but *one horse*." *Id.* Another statute made benefit of clergy inapplicable to the stealing of "sheep, *or other cattle*." *Id.* "[T]hese general words, 'or other cattle,' being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep." *Id.* Similarly, in the later case of *The King v. Beaney*, Russ. & Ry. 416, 168 Eng. Rep. 874 (1820), a defendant was found to have stolen two "colts," and the courts found that "as 'colts' were not mentioned, *eo nomine* in the statute,

[8] Blackstone refers to the targets of this statute as "gypsies," 4 Blackstone at *165, today more properly called Roma.

the judges could not take notice that they were of the horse species," so that Beaney could be convicted only of common law larceny. *Id.* at 416, 168 Eng. Rep. at 874 (citation omitted); *see also The King v. Cook*, 1 Leach 105, 168 Eng. Rep. 155 (1774) (theft of a "heifer," though "clearly proved," could not be punished under a statute forbidding the stealing of a "cow"). In each case, although framed as interpretation of the substantive scope of the statutory prohibition, the strict construction principally worked to limit the application of the mandatory penalty.

The English rule of strict construction also applied to situations in which the interaction of two different statutes, or of a statute with the common law, was doubtful or ambiguous. For example, *Evans & Finch's Case*, Cro. Car. 473, 79 Eng. Rep. 1009 (1638), interpreted a statute denying benefit of clergy to those convicted of robbery from a dwelling house. Although the common law made accessories to robbery equally liable with principals, the statute did not mention accessories, and so the King's Bench held that Finch, who had been convicted as an accessory, was entitled to benefit of clergy. *Id.* at 474, 79 Eng. Rep. at 1009; *see* 1 Hale at *528 (explaining the reasoning in more detail). Similar results were reached in *The King v. Baynes*, 1 Leach 7, 8, 168 Eng. Rep. 106, 106 (1731) (statutory offense of "privately stealing from the person"), *The King v. Sterne*, 1 Leach 473, 474-75, 168 Eng. Rep. 338, 339 (1787) (same), and *The King v. Page & Harwood*, Style 86, 82 Eng. Rep. 550 (1648) (statutory manslaughter by stabbing).[9]

---

[9] Additional cases on the treatment of accessories are discussed in the reporter's note to *The King v. Midwinter & Sims*, Fost. 415, 168 Eng. Rep. 90 (1751), which criticizes the result

The English courts' practice of strict construction was motivated in large part by the fatal result of a holding that the benefit of clergy was not available. *See* 2 Hale at *335 (stating that, when a statute has "ousted clergy . . . , it is only so far ousted, and only in such cases and as to such persons, as are expressly comprised within such statutes, for *in favorem vitae & privilegii clericalis* such statutes are construed literally and strictly").

There is evidence, however, that by the late eighteenth century the practice of narrowly construing penal statutes had already begun to rest on more general principles about the appropriately limited role of the courts in construing criminal legislation. In *The King v. Hammond*, 1 Leach 444, 168 Eng. Rep. 324, tried at the Old Bailey in 1787, the court said:

> In all cases . . . so highly penal as the present case is, it is certainly necessary not only to consider the intention of the Legislature, but to bring the offender within the words of the Act of Parliament itself. . . . The Judges . . . are not to consider what the Legislature would have done in certain cases, but to look at the words they have used, and to construe them according to the meaning which it is most likely they entertained at the time the subject was under their consideration.

---

in that case as inconsistent with the general principle and adds that "[c]ases without number might [be] cited to shew how extremely tender the judges in all times have been in the construction of Acts, which take away clergy." *Id.* at 419, 168 Eng. Rep. at 92; *see also* Hall at 118-26 (collecting and discussing more cases); 1 Radzinowicz at app. 2, 660-98 (same).

Id. at 446, 168 Eng. Rep. at 325. This case reflects the more modern concern of the courts that the legislature's role was to define a crime and its potential punishment and the judiciary's role was to ensure that the definition clearly applied to the defendant.

B. This Court Has Employed the Rule of Lenity To Protect the Separation of Powers and the Principle of Legality

When the courts of the United States adopted the rule of lenity, they rested it primarily on concerns about the separation of powers and the principle of legality (which holds that punishment must be imposed only pursuant to law), rather than concerns about erroneous application of the death penalty.[10] In *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) (Marshall, J.), the Court adopted the "rule that penal laws are to be construed strictly," alluding to its English history by observing that the rule "is perhaps not much less old than construction itself." *Id.* at 95. *Wiltberger* made express what the English courts had largely hinted at: that the rule of lenity is founded both on "the tenderness of the law for the rights of individuals; *and* on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Id.* (emphasis added).[11] Although these goals would not justify a

[10] The Congress of 1790, in "An Act for the Punishment of certain Crimes against the United States," provided that the benefit of clergy should not apply in the federal courts, so this Court never had occasion to apply the rule of lenity in its original context. *See* Act of Apr. 30, 1790, ch. 9, Preamble, § 31, 1 Stat. 112, 112, 119.

[11] The manslaughter statute interpreted in *Wiltberger* did not provide for capital punishment, *see* 18 U.S. (5 Wheat.) at 93-94, and Chief Justice Marshall did not invoke the presumption *in favorem vitae* in support of the rule of lenity.

court in "defeat[ing] the obvious intention of the legislature," this "intention . . . is to be collected from the words [the legislature] employ[s]," and so, "[t]o determine that a case is within the intention of a statute, its language must authorise [a court] to say so." *Id.* at 95-96.[12]

Justice Holmes's opinion for the Court in *McBoyle v. United States*, 283 U.S. 25 (1931), provides another leading explanation of the rule of lenity. Justice Holmes wrote that, before imposing a criminal punishment, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 27. *McBoyle* makes clear, however, that the rule is not based on any unrealistic assumption that "a criminal will carefully consider the text of the law before he murders or steals." *Id.*[13] Instead, the rule of lenity ensures that courts do not punish "because it may seem to [them] that a similar policy applies" to acts not expressly covered by a statute, "or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *Id.* This "fair warning" function of the rule is closely tied to the separation-of-powers justification given by Chief Justice Marshall in *Wiltberger*. It is less concerned with actual notice to particular defendants, and

---

[12] *See also* Charles de Montesquieu, *The Spirit of Laws* 80 (1794 ed.) ("In republics the very nature of the constitution requires the judges to keep to the letter of the law. Here there is no citizen against whom a law can be interpreted, in cases where his honour, property, or life is concerned.").

[13] *See also Bell v. United States*, 349 U.S. 81, 83-84 (1955) (the rule of lenity does not "assume that offenders against the law carefully read the penal code before they embark on crime").

more with the certainty and predictability that the justice system as a whole derives from ensuring that statutes providing for criminal punishments contain clear statements rather than calling for judicial extrapolation.

Many other decisions of this Court similarly emphasize the role of plain statutory language in monitoring the boundary between the legislative and judicial spheres in criminal punishment. In *Fasulo v. United States*, 272 U.S. 620 (1926), for instance, the Court wrote that, in construing a criminal statute, "it is not permissible for the court to search for an intention that the words themselves do not suggest." *Id.* at 628. In *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), the Court explained that, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* at 221-22. The Court's reference to "what conduct . . . has [been] made a crime" meant not the difference between conduct that is criminalized and that which is not, but to a scope-of-punishment issue — the "unit of prosecution," which determines how many counts may be charged against the defendant for a single course of conduct. In *Bell v. United States*, again addressing the scope of punishment rather than the definition of crime, the Court addressed the number of counts that could be laid for a single act that endangered multiple victims, adding that the rule of lenity applies when "Congress leaves to the Judiciary the task of imputing to Congress an undeclared

will." 349 U.S. at 83-84.[14] This Court also has said recently that the rule of lenity asks whether, in a criminal statute, "'Congress has spoken in clear and definite language,'" citing the concern that "expansion of the law's coverage must come from Congress, and not from the courts." *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)).

This requirement for a clear statutory statement to guide decisions of whether and how much to punish also safeguards the "principle of legality," which requires that punishment be dictated by "law in existence at the time the conduct complained of occurred," and "that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits." Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968) ("Packer"); *see also United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997). Legality is protected in federal criminal law both by the Constitution's Ex Post Facto and Due Process Clauses and by the rule of lenity. *See Lanier*, 520 U.S. at 266-67; Packer at 95 (observing that lenity "may perhaps be viewed as something of a junior

---

[14] *See United States v. Aguilar*, 515 U.S. 593, 600 (1995) (giving both "deference to the prerogatives of Congress" and *McBoyle*'s concern for "fair warning" as reasons for the Court's "traditional[] . . . restraint in assessing the reach of a federal criminal statute"); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985) (citing "[d]ue respect" for Congress as the justification for the rule, and quoting *Wiltberger*); *see also Bifulco v. United States*, 447 U.S. 381, 401-02 (1980) (Burger, C.J., concurring) (observing that, "[p]articularly in the administration of criminal justice, a badly drawn statute places strains on judges," but warning against "[t]he temptation to exceed our limited judicial role and do what we regard as the more sensible thing").

version of the vagueness doctrine"). Uncertainty in the interpretation of penal statutes, or judicial expansion of them beyond their plain language, erodes legality by removing the required constraints on judicial discretion. Because of the importance of avoiding this danger, "[c]ourts have . . . traditionally been quite insistent on maintaining a high standard of compliance with th[e] policy of clear statement" embodied by the rule. Packer at 95.[15]

To be sure, the rule of lenity does not preclude the use of the "traditional tools of statutory construction." *Caron v. United States*, 524 U.S. 308, 316 (1998) (citing *United States v. Shabani*, 513 U.S. 10, 17 (1994)). This Court has always made clear, however, that, when called upon to clarify a criminal statute, these traditional tools of statutory construction must meet a high burden: if, after consulting them, "a reasonable doubt persists about a statute's intended scope," then the traditional presumption takes effect. *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992) (plurality opinion) (internal quotation marks omitted).[16] There is no precise way to quantify exactly the "weight" of the "judicial thumb on . . . the scales" imposed by the rule of lenity, Antonin

---

[15] *See* Cesare Beccaria, *An Essay on Crimes and Punishments* 16 (4th ed. 1775) ("The disorders, that may arise from a rigorous observance of the letter of penal laws, are not to be compared with those produced by the interpretation of them.").

[16] *See R.L.C.*, 503 U.S. at 307-08 (Scalia, J., concurring in part and concurring in the judgment) (disagreeing with the *R.L.C.* plurality's reliance on "legislative history" and "motivating policies" but agreeing with its "reasonable doubt" criterion) (internal quotation marks omitted); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (same "reasonable doubt" standard); *see also United States v. Corbett*, 215 U.S. 233, 242 (1909); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 395-96 (1868).

Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990), but the rule's deep roots and crucial purpose establish that the weight should be significant. As the line from *Evans & Finch's Case* through *Wiltberger* to the modern cases shows, judges have often found the rule of lenity, and its function of protecting the separation of powers and the principle of legality, decisive in the interpretation of criminal statutes.[17]

---

[17] *Muscarello v. United States*, 524 U.S. 125 (1998), includes language suggesting that only a "grievous ambiguity or uncertainty" will trigger the rule of lenity. *Id.* at 138-39 (internal quotation marks omitted; quoting, among others, *Chapman v. United States*, 500 U.S. 453, 463 (1991)); *see also Huddleston v. United States*, 415 U.S. 814, 831 (1974). Conceivably, the term "grievous" could indicate a lightened "thumb on the scales" — a heightened degree of ambiguity as necessary to trigger lenity, especially in contrast with older cases that require lenity in the absence of a "clear and definite" statement, *e.g.*, *Universal C.I.T.*, 344 U.S. at 221-22. But *Muscarello* and its short line of predecessors should not be read to depart from the traditional standard. These cases show no intent to change a centuries-old rule and contain additional language that is more consistent with the clear-statement requirement of the properly applied rule of lenity. *See*, *e.g.*, *Muscarello*, 524 U.S. at 139 (reasoning that the conduct there at issue fell within the "generally accepted contemporary meaning" of the statutory language); *Chapman*, 500 U.S. at 463-64 (quoting *Moskal*'s formulation that lenity applies in cases of "reasonable doubt"). Moreover, this Court has in more recent cases reaffirmed that the rule of lenity is a requirement that Congress speak in "clear and definite language." *Scheidler*, 537 U.S. at 409 (internal quotation marks omitted). The "grievous ambiguity" formulation, if read to require a heightened degree of ambiguity, would be in considerable tension with the "reasonable doubt" test applied in such cases as *R.L.C.* and *Moskal*. This case presents a good opportunity to review this Court's many statements about the rule of lenity and to clarify that triggering ambiguity need not be "grievous," except perhaps in the sense that any uncertainty

In addition, as with other background principles of statutory interpretation, the rule's long history alone reinforces its importance: because Congress "presumably has [the rule] in mind when it chooses its language," *id.* at 583, the absence of clear language in a statute that might be read to expose individuals to additional liability suggests that Congress did not mean to achieve that result.

C. The Rule of Lenity Should Apply to Mandatory Minimum Sentences Today

The interpretation of a mandatory minimum sentencing provision squarely implicates the history and policies underlying the rule of lenity. Accordingly, the Court should give that rule very serious consideration in interpreting those provisions.

This Court's precedents firmly establish that the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco*, 447 U.S. at 387; *see also Ladner v. United States*, 358 U.S. 169, 178 (1958) (stating that the rule applies to any question of statutory interpretation that would "increase the penalty that [the statute] places on an individual"). These holdings make sense from a historical perspective, given the rule's roots in cases interpreting statutes that enhanced sentences for crimes already punishable at common law. They also make sense in light of the rule's theoretical grounding in the principle of legality.[18] Because the rule of

---

about the reach of a criminal statute raises grievous concerns for the rule of law.

[18] *Cf. Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.) (stating that *ex post facto* laws include "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed").

lenity does not rest on an "assum[ption] that offenders against the law carefully read the penal code," *Bell*, 349 U.S. at 83-84, but instead on a broader imperative that the criminal laws be clear, it has equal force in decisions whether to punish conduct at all, and, if so, how much punishment to inflict.

A mandatory minimum sentencing statute, moreover, raises with particular force the concerns that underpin the rule of lenity. Such a statute represents a legislative abrogation of the "uniform and constant . . . federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as . . . unique." *Koon v. United States*, 518 U.S. 81, 113 (1996), *quoted in Gall v. United States*, 552 U.S. ---, 128 S. Ct. 586, 598 (2007).[19] Every mandatory minimum provision is a congressional directive that a greater risk of injustice in many cases will be tolerated in order to serve a perceived social need for greater deterrence or incapacitation of a class of offenses or offenders. This kind of tradeoff is within legislative competence, subject to constitutional constraints, but it is not part of the judicial role. *Cf. Williams v. United States*, 503 U.S. 193, 205 (1992) ("[E]xcept to the extent *specifically* directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'") (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983)) (emphasis added).

---

[19] *See also Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum.").

Accordingly, the courts should read such statutes narrowly to ensure that they are implementing a decision that the legislature has actually made, rather than guessing about an unclear legislative intent. *See Busic v. United States*, 446 U.S. 398, 408-09 (1980) (refusing to interpret a sentencing enhancement based on the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible").

Indeed, in one sense, the argument for reading a mandatory minimum narrowly is stronger than the concern that motivated the English courts. Even after this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines system promotes "uniformity [as] an important goal of [federal] sentencing." *Kimbrough v. United States*, 552 U.S. ---, 128 S. Ct. 558, 573 (2007). And the existence of this system, together with judicial discretion guided by 18 U.S.C. § 3553(a), ensures that the policy considerations that underlie mandatory minimums will be taken into account even in cases to which the minimums themselves do not apply. For example, if the mandatory minimum is held not to apply in this case, the sentencing court will be required to take Burgess's prior state conviction into account for the light it sheds on his "history and characteristics," 18 U.S.C. § 3553(a)(1), to consider its seriousness and the need for deterrence, *id.* § 3553(a)(2)(A), (B), and to balance it against the other factors present in the case. There is therefore no need for the courts to stretch the language of § 841(b)(1)(A) to ensure that prior convictions are given due weight and much reason to read that provision narrowly to ensure that the significance of prior convictions is not exaggerated beyond what Congress's clear intent requires.

Moreover, the Sentencing Reform Act of 1984 itself, including its overriding principle of parsimony (requiring a sentence "not greater than necessary," *id.* § 3553(a)), is to be applied at every federal sentencing unless "otherwise *specifically* provided." *Id.* § 3551(a) (emphasis added). This mandate reinforces the traditional requirement that a departure from discretionary sentencing be justified by an unambiguous statement of congressional intent.

A robust rule of lenity applied to mandatory minimum sentencing provisions also will promote clarity and predictability in interpreting those provisions. Congress has passed and continues to consider many such provisions.[20] This Court has felt it necessary to grant review in a significant number of cases to resolve circuit splits in the interpretation of these mandatory minimums.[21] Proper application of the rule of lenity can provide helpful clarity and reduce litigation over the meaning of such statutes. Moreover, uncertainty in the interpretation of mandatory minimums can impede the plea negotiations that today help resolve a large majority of the federal criminal caseload. These negotiations will proceed more quickly and smoothly if the law that governs criminal punishment is clear. *See Holloway v. United States*, 526 U.S. 1, 22 (1999) (Scalia, J., dissenting) (citing the "*in terrorem* effect" of expanded

---

[20] *See*, *e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(a)(1), 120 Stat. 587, 602; Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 6(b), 119 Stat. 2095, 2102 (2005); PROTECT Act, Pub. L. No. 108-21, § 103(b), 117 Stat. 650, 653 (2003).

[21] *See*, *e.g.*, *Begay v. United States*, No. 06-11543 (argued Jan. 15, 2008); *Logan v. United States*, 552 U.S. ---, 128 S. Ct. 475 (2007); *James v. United States*, 550 U.S. ---, 127 S. Ct. 1586 (2007).

liability on "a modern federal criminal-law system characterized by plea bargaining" to support the rule of lenity).

Finally, the consequences of triggering a mandatory minimum can be severe. Although not as severe as the parliamentary statutes that led to the rule's English predecessor, mandatory minimums nevertheless have a dramatic impact on individual liberty in many cases, and this is the kind of consequence that courts for centuries have given reasonable weight in the construction of statutes. *See Callanan v. United States*, 364 U.S. 587, 596 (1961) (when "applicable statutory provisions [are] found to be unclear . . . , the rule of lenity [is] utilized, *in favorem libertatis*, to resolve the ambiguity"). The Court has approved Judge Friendly's observation that the rule of lenity embodies an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *in Benchmarks* 196, 209 (1967), *quoted in United States v. Bass*, 404 U.S. 336, 348 (1971). It should do so again today.

II. THE RULE OF LENITY REQUIRES REVERSAL IN THIS CASE

Applied properly to this case, the rule of lenity compels reversal. As petitioner's brief shows, the Controlled Substances Act can be read harmoniously only if a prior "felony drug offense" within the meaning of § 841(b)(1)(A) is defined in accord with both § 802(13) and § 802(44). This reading best accords with the text of the statute and with the ordinary usage of the English language. The arguments presented by the court below and by the Government for the harsher reading of § 841(a)(1) fail to overcome

this more natural reading and certainly cannot eliminate the "reasonable doubt" (*R.L.C.*, 503 U.S. at 305-06 (plurality opinion)) that calls the rule of lenity into play.

To begin, as the Court should, with the text of the statute, § 802(13) says plainly that "[t]he term 'felony' means . . . [an] offense classified by applicable Federal or State law as a felony." Any reading of the statute that did not incorporate this requirement into the meaning of "felony drug offense" would fail to give § 802(13) full application according to its language, because, when used as part of the phrase "felony drug offense," the term "felony" would *not* refer to an offense so classified. Such a reading would make the provisions of the Controlled Substances Act internally inconsistent, which is not a promising beginning for an argument that must show that the statute contains no ambiguity. *Cf. United States v. Turkette*, 452 U.S. 576, 580 (1981) (observing that the process of statutory construction involves "deal[ing] with" any "internal inconsistencies in the statute").

This reading is reinforced by this Court's "assumption that the ordinary meaning of [statutory] language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). Congress, of course, is "free to be unorthodox" and may "define [statutory terms] in an unexpected way" — but, to do so, it must "tell us so." *Lopez v. Gonzales*, 549 U.S. ---, 127 S. Ct. 625, 630 (2006). This logic applies to the relationship between noun and adjective in the phrase "felony drug offense" — such an offense would, in ordinary usage, be a "felony." Congress could, to be sure, have

created a statutory scheme in which a felony drug offense was not necessarily a felony, or indeed one in which the two categories were mutually exclusive. This statute, however, does not speak directly to the relationship between § 802(13) and § 802(44). Accordingly, because a situation in which a felony drug offense is not a felony is "just what the English language tells us not to expect," this Court should be "very wary" before reaching that result. *Id.*

The contrary arguments presented and discussed by the court below and by the First Circuit in *United States v. Roberson*, 459 F.3d 39 (1st Cir. 2006), *cert. denied*, 549 U.S. ---, 127 S. Ct. 1261 (2007), rely on various canons and maxims of statutory construction. In this context, it is worth remembering Justice Frankfurter's caution that "[g]eneralities about statutory construction . . . are not rules of law but merely axioms of experience." *Universal C.I.T.*, 344 U.S. at 221; *accord Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). To begin with, the court below relied on this Court's statement in *Colautti v. Franklin*, 439 U.S. 379 (1979), that "a statutory definition 'which declares what a term means . . . excludes any meaning that is not stated.'" Pet. Br. App. 7a (quoting 439 U.S. at 392 n.10) (ellipsis in original). This undoubtedly accurate statement does not resolve the problem, but only restates it, because this case, unlike *Colautti*, features two statutory definitions rather than only one. If § 802(44) excludes from the term "felony drug offense" any meaning other than § 802(44) itself provides, then § 802(13) should likewise exclude from the term "felony" any meaning other than § 802(13) *itself* provides, and the word "felony" remains part of the phrase "felony drug offense." Recognizing Congress's ability to define

words does not help to resolve the question, in an individual case, of how Congress actually chose to define them.

The canon that "specific statutory language should control more general language when there is a conflict between the two," *National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002), relied upon by the Government in the First Circuit and in its brief in opposition, *see Roberson*, 459 F.3d at 55 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992)); Br. in Opp. 12 (same), likewise fails to remove ambiguity from the statute. As the First Circuit itself acknowledged in rejecting this argument, the canon applies only where a conflict exists within the text of the statute. *See Roberson*, 459 F.3d at 55; *see also National Cable & Telecomms.*, 534 U.S. at 336 (canon inapplicable where "there is no conflict"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.05, at 105 (5th ed. 1992) (canon applies only "[w]here there is inescapable conflict"). In this case, however, only the Government's construction creates a conflict between § 802(13) and § 802(44). Petitioner's construction does not, and it is preferable for that reason alone.

Further, any attempt to apply to the Controlled Substances Act the canon that the specific trumps the general deepens, rather than resolves, the ambiguity created by the Government's interpretation. As the D.C. Circuit correctly observed in *United States v. West*, 393 F.3d 1302 (D.C. Cir. 2004), "the word 'felony,' as used in the enhancement provisions of the Act to refer to prior convictions, always pertains explicitly to drug offenses." *Id.* at 1314.[22] It is there-

[22] This is true not only for the enhancement provisions themselves, but also for a large majority of all uses of the term

fore wrong to say that either definition is more specific than the other: both refer to felony drug offenses. The First Circuit, and the Government, have objected that the word "felony" is used in the statute for purposes other than to describe a felony drug offense. *See Roberson*, 459 F.3d at 53-54; Br.

"felony" in the Controlled Substances Act as a whole. For example, 21 U.S.C. § 824(a)(2) refers to a "felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance or a list I chemical"; any such felony would be a "felony drug offense" as defined by § 802(44). *Accord id.* §§ 841(b)(2) ("felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances"), 841(b)(1)(A), (B), (C), (D) ("felony drug offense"), 841(e) ("felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical"), 843(b) ("felony under any provision of this subchapter or subchapter II of this chapter"), 843(d)(1) ("felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances"), 843(d)(2)(B) ("felony under any other provision of this subchapter or subchapter II of this chapter"), 843(e) ("felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical"), 848(c)(1) ("any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony"), 848(e)(1)(B) ("felony violation of this subchapter or subchapter II of this chapter"), 853(d) ("felony under this subchapter or subchapter II of this chapter"), 862a(a) ("felony [under] the law of the jurisdiction involved . . . which has as an element the possession, use, or distribution of a controlled substance"); *see also id.* § 881(a)(9) (1994) (amended in relevant part in 1996; formerly referring to "a felony provision of this subchapter or subchapter II of this chapter"); *id.* §§ 960(b)(1), (2), (3), 962(b) (in penalty provisions of adjacent Controlled Substances Import and Export Act; "felony drug offense").

in Opp. 9. Inspection, however, shows that the three relevant references apply only to *federal* felonies, so that § 802(13)'s incorporation of state law is irrelevant to them.[23] Accordingly, while the word "felony" is used in these three parts of the statute, the definition of "felony" contained in § 802(13), which is the relevant subject for the specificity analysis, is not.

Section 802(44)'s enactment history also does not support the inference that it was intended to define felony drug offenses that were not necessarily felonies, as the Government has argued. *See* Br. in Opp. 11-12. Before 1994, § 841(b)(1)(A) contained a section-specific definition of "felony drug offense" that included a requirement that any prior non-federal offense be a felony under state law. *See* Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, tit. VI, § 6452(a), 102 Stat. 4181, 4312, 4371. In 1994, Congress removed that definition and enacted § 802(44) as it now stands (then numbered § 802(43)). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 90105(c)-(d), 108 Stat. 1796, 1987-88. If consistent with the inference that Congress meant to remove the state-law requirement from the operation of § 841(b)(1)(A), this sequence nevertheless equally supports the inference that, with § 802(44) now located alongside § 802(13), Congress considered the

---

[23] The provisions are 21 U.S.C. § 878(a)(3), which authorizes arrests for a "felony, cognizable under the laws of the United States," and former § 848(q)(5) and (q)(6), repealed in 2006, which required counsel in capital cases to have "experience in the actual trial of felony prosecutions," or the "handling of appeals . . . in felony cases," in the specific courts in which those capital cases were to be tried or appealed, *id.* § 848(q)(5), (6) (2000). Because the courts were federal ones, the felonies would also have been federal.

extra language unnecessary for both requirements to apply. After all, if Congress had the intent the Government now attributes to it, it also could easily have added express language to § 802(44) stating that a felony drug offense need not be a felony under state law. The Government's indirect extrapolation of congressional intent thus falls far short of the "clear and definite language" that this Court's precedents require before invocation of the rule of lenity. *Scheidler*, 537 U.S. at 409; *see United States v. Laub*, 385 U.S. 475, 487 (1967) ("Crimes are not to be created by inference.").

In summary, the arguments for a broad construction of § 841(b)(1)(A) fail because they neglect this Court's instructions that legislative "intention . . . is to be collected from the words [the legislature] employ[s]," *Wiltberger*, 18 U.S. (5 Wheat.) at 95, and that courts may not "search for an intention that the words [of a criminal statute] themselves do not suggest," *Fasulo*, 272 U.S. at 628. No inferences that can be drawn from the structure or history of the statute are strong enough to establish a "clear and definite" conclusion (*Scheidler*, 537 U.S. at 409) that greater punishment is justified. To affirm in this case would disserve a judicial tradition that predates the English Civil War. It also would increase the danger that harsh mandatory minimums will be applied in ways that Congress never considered and did not authorize. Therefore, this Court should adopt "the safer construction of so penal a statute," *Howard's Case*, Fost. 77, 79, 168 Eng. Rep. 39, 39 (1751) (reporter's note), reverse, and in doing so reaffirm the importance of the rule of lenity in the construction of sentencing provisions.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

PAMELA HARRIS
CO-CHAIR, NACDL
AMICUS COMMITTEE
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5386

MARY PRICE
VICE PRESIDENT AND
GENERAL COUNSEL
FAMILIES AGAINST
MANDATORY MINIMUMS
1612 K Street, N.W.
Suite 700
Washington, D.C. 20006
(202) 822-6700

KEVIN B. HUFF
Counsel of Record
GREGORY G. RAPAWY
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, Pennsylvania 19003
(610) 649-8200

January 29, 2008