No. _____

IN THE

Supreme Court of the United States

PATRICK GROVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For certain recidivist guideline enhancements, "[t]he term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). In the Fourth Circuit, § 4B1.2(b)'s textual definition includes only those substantive enumerated drug crimes, and consequently, excludes inchoate drug offenses. Accordingly, a conviction for attempted distribution does not qualify as a "controlled substance offense."

Most drug statutes, however—including the federal Controlled Substances Act ("CSA")—broadly define substantive drug distribution to also criminalize the "attempted transfer" of drugs, 21 U.S.C. §§ 802(8), 802(11)—a term that the CSA does not further define. Mr. Groves argued that his 2014 prior conviction for aiding and abetting his codefendant's distribution of a Schedule I or II controlled substance, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), 18 U.S.C. § 2, was therefore overbroad.

The Fourth Circuit held that "attempted transfer," § 802(8), and "attempted distribution," § 846, could not be interpreted to criminalize any of the same conduct, because to do so would violate the canon against surplusage and produce absurd results. The question presented in this case is one of statutory interpretation: Whether an "attempted transfer" of drugs, § 802(8), includes any conduct that would also constitute an "attempted distribution" of drugs, § 846.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Groves*, No. 22-4095 (4th Cir. April 14, 2023)
- *United States v. Groves*, No. 5:20-CR-18 (N.D.W.Va. Feb. 1, 2022)

There are no other proceedings related to this case under Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Patrick Groves, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion affirming Petitioner's sentence is published at 65 F.4th 166, and is reproduced as Appendix ("App.") A, 1a-16a. The district court did not issue a written opinion in this case.

JURISDICTION

The Fourth Circuit entered a decision on April 14, 2023, and denied rehearing on May 12, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under the Controlled Substances Act (CSA),

> it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

U.S.C. § 841(a)(1);

> (11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical,

21 U.S.C. § 802(11),

> (8) The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

21 U.S.C. § 802(8); and

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 846.

Under 28 U.S.C. § 994,

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is—

> (A) a crime of violence; or
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

28 U.S.C. § 994(h).

INTRODUCTION

The federal CSA makes it unlawful to "distribute" a controlled substance. 21 U.S.C. § 841(a)(1). The CSA broadly defines drug distribution to include, among other things, the "attempted transfer" of drugs. 21 U.S.C. § 802(8); *see also* 21 U.S.C. § 802(11). Attempts to commit a controlled substance offense—including attempted distribution—are also prohibited under 21 U.S.C. § 846.

This case presents the question of whether an "attempted transfer" has any conduct in common with an "attempted distribution." In the published decision below, the Fourth Circuit answered that question negatively, holding that "we must construe statutes, where possible, so as to avoid rendering superfluous any parts thereof," and therefore, "construing § 841(a)(1) to criminalize an attempt offense would render § 846 superfluous." App. A, *United States v. Groves*, 65 F.4th 166, 172-73 (4th Cir. 2023)). Although the Fourth Circuit had twice rejected this argument in earlier closely related cases, the *Groves* panel joined two other circuits in its conclusion that surplusage principles overrode the plain text of the statute, placing those three circuits squarely opposite the Seventh Circuit. This split is caused primarily by confusion about the canon against surplusage, when it applies, and what it requires. And the broader confusion among the circuits about what an "attempted

transfer" *is*, exactly, arises in several other contexts beyond the Guidelines—in challenges to sufficiency of the evidence for § 841 distribution convictions; in the Armed Career Criminal Act (ACCA); and in immigration proceedings.

This Court's review is urgently needed. The 1-3 split on the text versus surplusage question specifically—and the broader confusion about what an "attempted transfer" is—subjects countless defendants to draconian guideline range increases, 15-year mandatory minimums, § 841 convictions, and immigration consequences based on geography alone. These disagreements stem primarily from confusion about precedent that only this Court can clarify. This important question of federal law is recurring, in multiple contexts, and the confusion will persist absent intervention from this Court.

Moreover, the "attempted transfer" language at issue in this appeal originated from federal draft legislation made available to the states. Consequently, much-needed clarity on the interpretation of the phrase in its original federal statutory context will also provide equally-needed clarity for the many states whose drug statutes also incorporated the term "attempted transfer" from the draft federal legislation.

This case presents a good vehicle to provide that clarity. Mr. Groves preserved his arguments in the courts below; the question presented will be dispositive; in-depth review of the relevant statutory and legislative history, plus the meaning of the relevant terms, were fully aired; and the Fourth Circuit had the benefit of several other circuits' published decisions.

Finally, although this clarity is sorely needed regardless of which side is correct, the decision below is wrong and contrary to this Court's precedents. Certiorari should be granted. At the very least, this petition should be held pending the resolution of *Pulsifer v. United States*, No. 22-340 (cert. granted Feb. 27, 2023), in which this Court will clarify the canon against surplusage's applicability in interpreting another federal criminal-related statute. That decision should inform the answer to the question presented here.

STATEMENT

A. Legal Background

The federal CSA makes it unlawful to "distribute" a controlled substance. 21 U.S.C. § 841(a)(1). The CSA broadly defines drug distribution to include, among other things, the "attempted transfer" of drugs. 21 U.S.C. § 802(8); *see also* 21 U.S.C. § 802(11). Attempts to commit a controlled substance offense—including attempted distribution—are also prohibited under 21 U.S.C. § 846.

The Sentencing Guidelines substantially increase a defendant's guideline range if he or she has a previous conviction (or convictions) for a "controlled substance offense." U.S.S.G. §§ 2K2.1(a)(4), 4B1.1(a), 4B1.2(b). To determine whether a prior conviction is a "controlled substance offense," federal courts use the categorical approach. To do that, courts "compare the elements of the prior offense with the criteria that the Guidelines use to define a 'controlled substance offense.'" *United States v. Ward*, 972 F.3d 364, 368 (4th Cir. 2020) (citing *Shular v. United States*, 140 S.Ct. 779, 783 (2020). Courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those

acts are encompassed by the" relevant predicate definition. *Moncrieffe v. Holder,* 569 U.S. 184, 190–91 (2013) (brackets and quotation omitted).

"The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). In the Fourth Circuit (and five others), § 4B1.2(b)'s textual definition is controlling, and as such, includes only those substantive enumerated drug crimes.[1] *Attempted* drug offenses therefore do not qualify as "controlled substance offenses," and cannot be used to increase a defendant's guideline range. *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022). This distinction is critical because failure to "correctly calculate[e]" a defendant's guideline range is "significant procedural error" at sentencing. *Gall v. United States*, 552 U.S. 38, 49-51 (2007).

For Mr. Groves, then, an attempted *distribution* conviction under § 846 would not qualify as a "controlled substance offense." But what of an "attempted *transfer*," as the least culpable conduct involved in an § 841 distribution conviction? Congress

[1] *United States v. Castillo*, 69 F.4th 648, 664 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1278-80 (11th Cir. 2023) (en banc); *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc); *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc); *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018). *Contra United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc); *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023); *United States v. Smith*, 989 F.3d 575 (7th Cir. 2021); *United States v. Lewis,* 963 F.3d 16 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151 (2d Cir. 2020); *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019).

did not further define the term in the CSA. So, does § 802(8) "attempt" have its ordinary meaning, or does it—like term-of-art or common law attempt—require intent and a substantial step? And what precisely is a drug 'transfer'?

What matters for the purposes of this case is this: whether there are fine distinctions between an "attempted transfer" of drugs and an "attempted distribution" of drugs or not, either way, the "attempted transfer" of drugs has at least *some*, if not *all*, conduct in common with an "attempted distribution." That fact made the district court's application of the six-level enhancement in U.S.S.G. § 2K2.1(a)(4)(A) procedurally erroneous. The Fourth Circuit's affirmation on surplusage and absurdity grounds is also wrong and contrary to this Court's precedent.

B. **Proceedings Below**

In 2014, Mr. Groves pleaded guilty to aiding and abetting his codefendant's distribution of a Schedule I or II controlled substance, in violation of—in relevant part[2]—21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2. App. 2a-3a. As a felon, he was prohibited from possessing a firearm. Mr. Groves was sentenced in February 2015 to three years of probation. *Id.*

In 2021, Mr. Groves was found nonresponsive in his father's bathroom. His father called 911, and responding officers rendered first aid for an overdose. While moving Mr. Groves from the bathroom, officers found a loaded Beretta pistol in Mr. Groves' possession. Groves was subsequently charged with unlawful possession of a

[2] Mr. Groves' conviction also violated 21 U.S.C. § 860 for proximity to a school zone, which is not relevant to the arguments he makes here.

firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty to this offense in February 2021. App. 3a.

The Presentence Report ("PSR") found Groves' 2014 offense to be a qualifying "controlled substance offense," which enhanced his offense level by a full six (6) levels. Mr. Groves argued in the District Court for the Northern District of West Virginia—and, subsequently, on appeal in the Fourth Circuit—that under the categorical approach, because the least culpable conduct his 2014 federal conviction included, 'attempted transfer,' swept more broadly than 'distribution' as defined in the guidelines' criteria, it was not a qualifying "controlled substance offense."[3] That is, because conduct constituting an "attempted transfer" of drugs is also conduct constituting the "attempted distribution" of drugs, his 2014 conviction was categorically broader than the definition of a "controlled substance offense." In support, Groves provided significant briefing on the meaning of "attempted transfer," including the historical basis for the terms, dictionary definitions, and legislative history relevant to the separate enactment of § 846 attempts.

The Fourth Circuit's decision did not address any of that. It summarily held that "attempted transfer" of drugs under § 802(8) must not criminalize any conduct that is also "attempted distribution," because any overlap between the two would 1) "render § 846 superfluous" and thus violate the canon against surplusage, and 2) produce absurd results. App. 12a-13a.

[3] Mr. Groves also made two other arguments that his 2014 conviction was not a controlled substance offense.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision in *Groves* deepens disagreement among the circuits about how to interpret "attempted transfer" in § 802(8), given the plain text of the statute and legislative history on one hand, and the canon against surplusage on the other. This important question of federal law and statutory interpretation is recurring across multiple contexts and will continue to do so absent clarification from this Court. This case presents a good vehicle to provide that clarity. And the Fourth Circuit's decision in *Groves* is wrong because it conflicts with decisions of this Court.

I. The Circuits Are Divided and Confused (Rule 10(a))

The circuits disagree about whether the plain text of § 802(8) or the canon against surplusage should control the interpretation of "attempted transfer."

Section 841 of the CSA makes it illegal to, among other acts, knowingly and intentionally "distribute . . . a controlled substance." 21 U.S.C. § 841(a)(1). Congress elaborated, in relevant part, that "'distribute' means to deliver . . . a controlled substance." 21 U.S.C. § 802(11). And "'deliver' or 'delivery' mean[s] the "actual, constructive, or *attempted transfer*" of controlled substances. 21 U.S.C. § 802(8) (emphasis added). Congress also provided that "[a]ny person who *attempts* . . . to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed" for the attempted offense. 21 U.S.C. § 846 (emphasis added).

In the decades that followed, federal courts easily recognized an "attempted transfer" of drugs under § 802(8) was, by its text, a fully valid means of committing § 841 distribution. *United States v. Burks*, 934 F.2d 148, 149 (8th Cir. 1991) (upholding § 841 conviction for "attempting to deliver amphetamines" where defendant was

arrested before he possessed the drugs); *United States v. Tamargo*, 672 F.2d 887, 890 (11th Cir. 1982) ("although no actual transfer of methaqualone occurred. . . appellants attempted to transfer methaqualone, and this is all that the statute requires for conviction"); *United States v. Oropeza*, 564 F.2d 316, 322 (9th Cir. 1977) ("an attempted transfer constitutes such a delivery[, so there] was a distribution within the meaning of the statute").

Likewise, courts treated attempted distribution as interchangeable with attempted transfer, including the intent and substantial step components. *Pascual v. Holder*, 723 F.3d 156, 159 (2d Cir. 2013) ("federal law proscribes an *attempted* transfer of a controlled substance . . . a defendant is guilty of attempted distribution if he had the intent to commit the crime" and committed "a substantial step towards the commission"); *Sandoval v. Sessions*, 866 F.3d 986, 990 (9th Cir. 2017) (noting definition of deliver includes "attempted transfer" and ascribing intent and substantial step to same); *United States v. Wilson*, 850 F. App'x 546, 548 (9th Cir. 2021) (unpublished) ("under a theory of attempted transfer[, 'a]ttempt' requires '[1] an intent to commit the underlying offense, along with [2] an overt act constituting a substantial step towards the commission of the offense.'"). Recently, though, surplusage arguments have significantly muddied those waters.

A. The Circuits are Divided 1-3 on the Question Presented

1. The Seventh Circuit has held that the plain text of § 802(8) is controlling, and reject surplusage principles as requiring courts to ignore or rewrite "attempted transfer" to have no conduct in common with § 846 attempted distribution.

a. In *United States v. McKenzie*, the defendant challenged the denial of his motion for acquittal on an § 841 distribution conviction, arguing that he could not be guilty of distributing drugs under § 841 because law enforcement intercepted the parties before the transfer was complete. 743 Fed. App'x 1, 2 (7th Cir. 2018).[4] But even if so, the Seventh Circuit explained, McKenzie's actions were still "chargeable as a delivery because it was an 'attempted' transfer under § 802(8)." *Id.* at *3. McKenzie argued that the court should "read 'attempted transfer' out of the Act's definition of 'deliver'" because "an 'attempt to distribute' is criminalized by 21 U.S.C. § 846, the general 'attempt' statute." *Id.* The Seventh Circuit found the redundancy between § 808(8) and § 846 unproblematic, because "[t]he plain text of the statute governs, and it defines 'distribution' as 'delivery" and 'delivery' as 'attempted transfer.'" *Id*. The Seventh Circuit thus found the plain text of § 802(8) dispositive, despite the overlap with § 846, and rejected McKenzie's surplusage argument.

b. In the context of drug overbreadth arguments, however, the circuits have reached mixed results on this same question. The Fourth and Sixth Circuits initially held that state drug statutes whose least culpable conduct includes "attempted transfer" were categorically overbroad. *Havis*, 927 F.3d 382 (Tennessee); *Campbell*, 22 F.4th 438 (West Virginia). When the government raised surplusage arguments in subsequent cases raising the same challenge to other statutes, however, the Sixth

[4] *McKenzie* is an unpublished decision, but that does not change anything. Other circuits and district courts recognize that *McKenzie* is the most authoritative statement from the Seventh Circuit on this point and treat it accordingly. *See United States v. Wallace*, 51 F.4th 177, 184 (6th Cir. 2022) (Sutton, C.J., concurring); *Lopez v. United States*, 2022 WL 476235, at *6 (C.D. Ill. Feb. 16, 2022).
Moreover, this Court has granted certiorari for splits involving unpublished decisions—like in *Terry v. United States*, No. 20-5094, in which certiorari was granted to review an unpublished decision from the Eleventh Circuit.

Circuit reversed course. And although the Fourth Circuit twice rejected surplusage arguments in post-*Campbell* cases, it, too, eventually reversed course.

2. Three Circuits—the Third, Fourth, and Sixth—now hold that surplusage principles require interpreting "attempted transfer" as having no conduct in common with "attempted distribution," despite the plain text of § 802(8).

a. In *United States v. Booker*, 994 F.3d 591, 596 (6th Cir. 2021) the Sixth Circuit found § 841 distribution not categorically overbroad, in relevant part, because '[w]e must 'construe statutes, where possible, so as to avoid rendering superfluous any parts thereof[,]'" and "[t]he same applies to the analogous provisions of the CSA."). Notably, it did so despite—and without addressing—Chief Judge Sutton's observation in *Havis* that § 846 and § 802(8) appeared not to be superfluous at all:

> In § 846, Congress codified the well-established legal definition of attempt liability from the Model Penal Code, which requires an intent to commit a crime and a substantial step toward that commission. But, in defining distribution, it appears that Congress used the ordinary meaning of "attempted transfer," not its legal term-of-art meaning.

United States v. Havis, 929 F.3d 317, 319 (6th Cir. 2019) (Sutton, C.J., concurring) (internal citations omitted).

b. The Third Circuit likewise seized on surplusage to avoid the plain text of Pennsylvania's drug statute, which likewise has 'attempted transfer' as its least culpable conduct. *United States v. Dawson*, 32 F.4th 254, 260 (3d Cir. 2022) (refusing to interpret 'attempted transfer' in Pennsylvania drug statute as overlapping with 'attempted distribution' because that "would mean holding that Pennsylvania has codified a redundant, vestigial crime—violating the canon against surplusage").

c. The government made the exact same argument in the Fourth Circuit, and it was twice *rejected* in unpublished opinions finding North Carolina and South Carolina drug distribution statutes that—like § 802(8)—include "attempted transfer." Supplemental Brief for Appellee, *United States v. Locklear*, 2022 WL 1732461 (C.A.4), 22-23 ("It would make little sense to have two separate crimes for attempted distribution--one in § 841 and one in § 846. . . [that] would mean holding that Congress has codified a redundant, vestigial crime-- violating the canon against surplusage.") (internal citations omitted); *United States v. Locklear*, 2022 WL 2764421, at *2 (4th Cir. July 15, 2022) (implicitly rejecting that argument where, under North Carolina law, delivery "is satisfied by attempted transfer, which requires proof of elements of attempt").

Subsequently, in *United States v. Jackson*, the government again argued that "by adopting a reading that 'distribute' includes attempts, we would render South Carolina's separate codification of attempts 'meaningless.'" 2023 WL 2852624, at *4 (4th Cir. Apr. 10, 2023) (unpublished). Rejecting that premise, now-Chief Judge Diaz—writing for a unanimous panel—explained that first, the statute *wasn't* superfluous, because there can be "other ways or circumstances that drug crimes can be attempts." *Id.* And second, "even if reading 'distribution' to include certain inchoate conduct creates some redundancy," as the Seventh Circuit in *McKenzie* also recognized, "that wouldn't be a sufficient reason to ignore the statute's plain text." *Id.* (internal punctuation omitted).

Mr. Groves' panel below, however, considered the same arguments as to § 841 and arrived at the opposite conclusion. Relying on *Booker*, the panel refused to find

any conduct in common between § 841, § 802(8) attempted transfer and § 846 attempted distribution because "construing § 841(a)(1) to criminalize an attempt offense would render § 846 superfluous." *Groves*, 65 F.4th at 173. Relying summarily on *Groves*, two subsequent panels of the Fourth Circuit reversed course on North Carolina and South Carolina delivery for the same surplusage reasons. *United States v. Davis*, 75 F.4th 428, 443 (4th Cir. 2023) ("Although the definition of "distribute" includes the "delivery" act of "attempted transfer," accepting Davis's position would render the word 'attempt' . . . wholly superfluous."); *United States v. Miller*, 75 F.4th 215, 230 (4th Cir. 2023) ("Construing § 90-95(a)(1) to include attempt offenses would render that attempt statute superfluous, just as we noted it would have done in *Groves* . . . [and] *Davis*."

B. The Circuits are Confused About Surplusage

1. Consequently, there is at least a 1-3 split specifically on whether the plain text of § 802(8) controls the meaning of "attempted transfer," as the Seventh Circuit decided in *McKenzie*; or whether the canon against surplusage and § 846 "attempted distribution" requires courts to judicially erase or rewrite the plain text of § 802(8), as the Third, Fourth and Sixth Circuits did in *Dawson*, *Groves*, and *Booker*. This Court's precedents and the statutory text and legislative history easily settle this debate: there is no surplusage, and any redundancy between the two is entirely permissible in criminal statutes. *See* Arg. IV, *infra.*

C. There is Also Uncertainty About Attempted Transfer

Practically, the confusion is more widespread than just the 1-3 split explicitly concerning surplusage. More fundamentally, there is "some uncertainty" about what

exactly a drug 'transfer' *is*. *Wallace*, 51 F.4th at 183-84 (comparing the First, Third, and Seventh Circuits' broader view of 'transfer' to its ordinary meaning and this Court's precedents). And the question arises—beyond the Sentencing Guidelines—in the ACCA context, *see United States v. Penn*, 63 F.4th 1305 (11th Cir. 2023) (least culpable conduct in Florida drug statute, attempted transfer, was categorically an ACCA serious drug felony); and regarding sufficiency-of-evidence for § 841 convictions as in *McKenzie* and as observed in *Wallace*. And the question is implicated in the immigration context, too, as treating "attempted transfer" as interchangeable with "attempted distribution" has expressly formed the basis for decisions in cases like *Pascual,* 723 F.3d at 159 (equating "attempted transfer" with "attempted distribution," including intent and substantial step), and *Sandoval*, 866 F.3d at 990 (noting definition of deliver includes "attempted transfer" and ascribing intent and substantial step to same).

II. The Question Presented is Important and Recurring

1. This Court should grant certiorari primarily to resolve the conflict on the federal statutory interpretation question presented. In light of this confusion, geography alone will now determine whether federal defendants' § 841 distribution convictions will be upheld or vacated where their conduct amounted only to an attempted transfer or attempted distribution. Geography alone will also determine whether federal defendants' prior distribution convictions will qualify as recidivist enhancements for ACCA or guidelines purposes, or whether they qualify for immigration consequences. Finally, geography alone will determine whether the

lower federal courts correctly or incorrectly apply this Court's statutory interpretation precedents.

There are numerous such direct appeals in the Fourth Circuit alone, some of which were recently decided and some of which still await decisions.[5] That is not counting the habeas petitions in the district courts and Fourth Circuit for defendants who have already been sentenced and will be sentenced before the guideline amendments take place. The question presented is recurring, will continue to recur, and implicates decades of additional prison time based purely on the happenstance of geography.

2. Answering the question presented will provide much-needed clarity both in and outside of the context in which it arises in this case. Mr. Groves received a four-level enhancement under U.S.S.G. § 2K2.1(a)(4)(A) for a prior conviction under the federal CSA, § 841 and 18 U.S.C. § 2. But as the discussion above reflects, the same question also arises in challenges to the sufficiency of evidence for § 841 distribution convictions. It also arises under the Career Offender Guideline, U.S.S.G. § 4B1.2(b), which implements a congressional directive to sentence repeat offenders near the statutory maximum, 28 U.S.C. § 994(h), resulting in "particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). And what precisely an

[5] Those include convictions under the federal CSA, *United States v. Hartsfield*, 21-4550; *United States v. Brewington*, No. 4444; *United States v. Nelson*, No. 22-4658, *United States v. Stevenson*, No. 22-4286, and *United States v. Atkinson*, No. 23-4170; under South Carolina's drug laws, *United States v. Long*, No. 19-4325; *United States v. Jackson*, No. 22-4179; *United States v. Davis*, No. 20-4443; *United States v. Page*, No. 22-4090; *United States v. Wofford*, No. 22-4044, *United States v. Woodham*, No. 22-4214, *United States v. McQueen*, No. 22-4104, *United States v. McNeill*, No. 18-4682 and *United States v. Jenkins*, No. 21-4003; North Carolina's drug laws, *United States v. Boone*, No. 20-4496; *United States v. Thompson*, No. 22-4042; *United States v. Harris*, No. 21-4647, *United States v. Sloan*, No. 21-4295; and *United States v. Davis*, No. 21-4217; Virginia's drug laws, *United States v. Nelson*, No. 22-4658; and Pennsylvania's drug laws, *United States v. Westbrook*, No. 21-4321.

"attempted transfer" of drugs is arises in the ACCA context, too, with implications for immigration proceedings as well.

Moreover, although this case concerns CSA's federal definitions, § 802(8), interpreting "attempted transfer" in its original federal context will also provide much-needed clarity to "attempted transfer" language that also is incorporated in many state statutes. That is because the "attempted transfer" language at issue in § 802(8) originated in draft legislation made available to the states, and subsequently adopted by many. By 1975, the "Uniform Controlled Substances Act [wa]s the law in 41 states as well as the Virgin Islands and Puerto Rico" *United States v. Jones*, 527 F.2d 817, 832 (D.C. Cir. 1975), and only seven states were still using the prior version of uniform act at that point. *Id.* at n.10.

Resolving the question presented will clarify the widespread confusion about how to interpret "attempted transfer" in § 802(8) relative to "attempted distribution" in § 846. The canon against surplusage is a principal reason why some circuits have recently reversed course and read "attempted transfer" to have no conduct in common with an "attempted distribution," or read it out of § 802(8) entirely. And this Court often grants review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Stephen M. Shapiro et al., Supreme Court Practice § 4.5 pp. 4-23–24 (11th ed. 2019).

3. Finally, the need for this Court's review is especially pressing where the question presented now recurs with increasing frequency across these contexts. Over the last few years, defendants have increasingly argued that their state or federal drug distribution offenses are categorically overbroad because the least culpable

conduct is an attempted transfer. Those decisions have all dated 2018 or later, continue to issue—most within the past three years—and will continue to do so for the foreseeable future. Finally, even after the guidelines are amended, the question of what precisely an attempted transfer is will persist regarding challenges to § 841 convictions, ACCA enhancements, and immigration proceedings.

III. This Case is a Good Vehicle.

This case is a good vehicle to provide much-needed clarity and uniformity as to what exactly an "attempted transfer" of drugs includes, and whether statutory interpretation principles permit courts to interpret it as anything other than what the text of the statute provides. Mr. Groves fully preserved his arguments below, and the relevant statutory and legislative history and definitions were fully aired. The Fourth Circuit had the benefit of multiple other circuits' decisions and its own prior decisions. Clear Supreme Court precedent defining an "attempted transfer" will be dispositive of the dispute; Mr. Groves does not have any other prior convictions that could substitute as an enhancing predicate if his prior § 841 conviction does not qualify. If this Court holds that an "attempted transfer" of drugs has any conduct in common with an "attempted distribution" of drugs, Mr. Groves will have to be re-sentenced under U.S.S.G. § 2K2.1(a)(6). Finally, Mr. Groves' term of supervised release will not expire until 2026, avoiding any mootness concerns.

IV. The Decision Below Is Wrong and Conflicts with Relevant Decisions of This Court (Rule 10(c)).

The canon against surplusage is hardly an absolute prohibition. It provides that "every word and every provision is to be given effect [and that n]one should

needlessly be given an interpretation that causes it to duplicate another provision or to have *no* consequence," A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) (emphasis added), or "to be *entirely* redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (emphasis added). Accordingly, there *is* no surplusage to avoid where a word or phrase "still has work to do" or "serves another purpose." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019). In this circumstance, the words or phrases simply "[a]re not superfluous," *id*, leaving no basis to support the canon's application.

A. There is No Surplusage to Avoid.

a. Even if "attempted transfer" and "attempted distribution" fully overlapped conduct-wise, that is not surplusage. Both would "still have work to do" for three independent reasons.

i. First, Congress criminalized the "attempted transfer" of drugs in § 802(8), and criminalized *all* "attempts" to commit drug crimes in § 846—not just attempted distribution, but also attempted manufacture, attempted possession with intent to distribute, attempted possession, and so on. Section 846 thus has a much broader scope than § 802(8) "attempted transfer" from the outset, giving it "work to do" despite—and "another purpose" to serve independent of—§ 802(8).

ii. Second, Congress' well-known reason for enacting § 846 despite full awareness that "attempted transfer" was already in § 802(8) was to remove the impossibility defense to prosecutions for attempted drug crimes under § 846. *United States v. Everett*, 700 F.2d 900 (3d. Cir. 1983). But § 802(8) lacks that same clear legislative history, which is specific only to § 846. This difference in defense likewise

distinguishes both statutes even further, despite the clear, plain-text overlap in conduct they prohibit.

iii. Third, criminal statutes covering precisely the same conduct are not superfluous in any case. "This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute[] under either." *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979). This is true even "when two statutes prohibit *exactly the same conduct*." *Id*. at 124 (internal quotation marks omitted) (emphasis added). Far from creating surplusage, Congress' inclusion of "attempted transfer" in § 802(8) and "attempted distribution" in § 846 simply reflects this "'settled rule' allowing prosecutorial choice." *Id*. It does not justify selectively reading one out of the statute Congress duly enacted. Nor does it justify judicially rewriting the statute to have no overlap, as the Fourth Circuit did below.

B. There is Substantial Tolerance for Redundancy in Criminal Statutes.

a. Moreover, even where a term *has* actually "become unnecessary or redundant," "sometimes the better overall reading of the statute contains some redundancy." *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S.Ct. 873, 881 (2019). That is because "some redundancy is hardly unusual in statutes" addressing crimes, as discussed above. *Id*. (quoting *Marx v. General Revenue Corp*., 568 U.S. 371, 385 (2013) (internal quotation marks omitted)). Consequently, "even if reading 'distribution' to include certain inchoate conduct creates some redundancy in [a drug statute], that wouldn't 'be a sufficient reason to ignore [the statute's] plain text.'" *Jackson*, 2023 WL 2852624 at *5 (*quoting United States v. Jones*, 60 F.4th 230, 238 (4th Cir. 2023) (rejecting Government's argument that Jones' interpretation in another federal

criminal-related statute—the safety valve provision at 18 U.S.C. § 3553(f)(1)—results in both surplusage and absurdity).

b. Relatedly to *Jones*, this Court is already aware that the circuits' disagreement about how the canon against surplusage should be used to interpret federal statutes extends beyond § 802(8). This Court recently granted certiorari in *Pulsifer v. United States*, No. 22-340, in which some circuits have relied on the canon against surplusage to find that the word "and" in § 3553(f)(1) instead means "or." The government petitioned for certiorari in *Jones* on this same question. No. 23-46. But the *Groves* panel did the opposite with respect to § 802(8), incorrectly.

* * *

The Fourth Circuit's decision below was based on the incorrect assumption that it must interpret "attempted transfer" and "attempted distribution" to have no overlap in conduct, when the canon against surplusage requires no such thing. This Court's precedents make clear that 1) the canon against surplusage does not apply where, as here, there *is* no surplusage; and 2) even if there is redundancy between the two, that does not justify judicially overwriting the language Congress purposefully enacted.

C. The absurd-results canon does not require such a result, either.

a. Whatever force it may have elsewhere, so-called "absurd results" are a regular feature of the categorical approach, as many courts have recognized. Recently, the Eleventh Circuit, in holding that Florida possession of a listed chemical with reasonable cause to believe it would be used to unlawfully manufacture a controlled substance was not an ACCA "serious drug offense," acknowledged that

> we cannot overlook the absurd, factual reality of our decision. Miles was convicted under Section 893.149(1) because he was *literally* manufacturing methamphetamine when he set himself and a house on fire. But under the categorical approach, the facts of the conviction do not matter. So we can add this case to the long line of cases where the categorical approach leads to an unusual and, some might say, unjust result. As for that problem, only "Congress [can] act to end this ongoing judicial charade." *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc) (William Pryor, J., concurring). In the meantime, district courts may use their discretion to impose sentences that reflect the true facts of an offender's criminal history and personal circumstances, even if they are unaccounted for in the mandatory minimums that would otherwise apply.

United States v. Miles, 75 F.4th 1213, 1223–24 (11th Cir. 2023). That is just as true for any categorical approach case as it is for Mr. Groves' case here. So-called absurd results do not justify judicially rewriting § 802(8) any more than the surplusage canon does.

b. That is especially so where the Fourth Circuit's absurd results rationale rests on the Congressional directive in 28 U.S.C. § 994(h). App. 12a. In § 994(h), the 98th Congress[6] directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for" career offenders.

i. But first, Mr. Groves is not a career offender, so § 944(h) is, in fact, silent as to him or his guideline range to begin with. There can be no absurd result where § 994(h) does not even speak to his situation.

ii. Second, it was *Congress* who ultimately approved the definition of "controlled substance offense" in U.S.S.G. § 4B1.2(b). More specifically, it was the

[6] The 98th Congress was in its second session from January 23, 1984 to October 12, 1984. United States Senate, *Dates of Sessions of the Congress*, online at https://www.senate.gov/legislative/DatesofSessionsofCongress.htm (last accessed August 26, 2023).

101st Congress, in 1989.[7] *See* U.S.S.G. § Appx. C, Amend. 268.[8] And "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey v. United States*, 567 U.S. 260, 274 (2012). As a result, the 101st Congress was free to approve any new definition of "controlled substance offense" it wished, no matter what the 98th Congress directed the Sentencing Commission to do previously. Consequently, there can be no absurdity resulting from the 101st Congress doing precisely what it was free to do. Instead, the plain text of § 802(8), coupled with the clear statutory and legislative history, are conclusive as to the meaning of "attempted transfer."

* * *

At bottom, the Fourth Circuit's two reasons for finding that an "attempted transfer" had no conduct in common with an "attempted distribution" are demonstrably mistaken and contrary to this Court's established precedent. And in doing so, it deepened a circuit split that is now at least 1-3 on the surplusage aspect of the question presented, although the confusion is more widespread than that and will recur across multiple contexts for both federal and many state drug offenses.

At minimum, this Court should hold this petition pending the resolution of *Pulsifer*, in which it will clarify the canon against surplusage's applicability in interpreting another federal statute. As such, that decision will likely also inform the answer to the question presented here.

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[7] The 101st Congress was in its first session from January 3, 1989 to November 22, 1989. *Id.*

[8] The 101st Congress replaced a previous definition which *did* expressly enumerate 21 U.S.C. § 841 as a "controlled substance offense" with a new definition that did not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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