No. _____

IN THE
Supreme Court of the United States

CURTIS MORRIS HARTSFIELD, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an "attempted transfer" of drugs under 21 U.S.C. § 802(8) includes any conduct that would also constitute an "attempted distribution" of drugs under 21 U.S.C. § 846.[1]

[1] This question is also presented by the petition for certiorari in *Groves v. United States* (4th Circuit No. 22-4095), filed in this Court on September 11, 2023. The Fourth Circuit opinion in this case relied entirely on its published decision in *Groves*.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:
United States v. *Hartsfield* (Case No. 21-4550, June 14, 2023).

United States District Court for the Eastern District of North Carolina:
United States v. *Hartsfield*, No. 5:21-CR-54-FL-1

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PETITION FOR WRIT OF CERTIORARI

Petitioner Curtis Hartsfield respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished opinion is reported at 2023 U.S. App. LEXIS 14782 and 2023 WL 3993017 and is produced in the appendix to this petition.

JURISDICTION

The district court had jurisdiction over the criminal prosecution under 21 U.S.C. § 841 in conjunction with 18 U.S.C. § 3231. Mr. Hartsfield timely appealed the district court's final judgment. The Fourth Circuit had jurisdiction under 18 U.S.C. § 3742 over that timely appeal from a final order. The Fourth Circuit issued its opinion affirming Mr. Hartsfield's sentence on June 14, 2023. This petition is being timely filed on September 12, 2023. This Court's jurisdiction rests on 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 Controlled Substances Act ("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 this unpublished case, the 4th Circuit relied entirely on its recent published decision in *United States v. Groves,* 65 F.4th 166 (4th Cir. 2023). There, the Fourth Circuit held that courts "must construe statutes, where possible, so as to avoid rendering superfluous any parts thereof," and concluding that "construing § 841(a)(1) to criminalize an attempt offense would render § 846 superfluous." *Id.* at 172-73 (internal quotation omitted). The *Groves* panel joined two other circuits (the Third and Sixth) 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 Section 841 distribution convictions; in the Armed Career Criminal Act ("ACCA"); and in immigration-related proceedings.

This Court's review is urgently needed. The 1-3 split on the plain 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, Section 841 convictions, and immigration consequences based on geography alone. These disagreements stem primarily from confusion about precedent that only this Court can clarify.

Mr. Hartsfield fully presented his argument to the Fourth Circuit. He did not, however, raise it in the district court. Because the Fourth Circuit ruled on this fully-briefed issue, it is appropriate for this Court's review. But if this Court believes that the lack of district court preservation makes other petitions a better vehicle to raise this issue, then Mr. Hartsfield notes that this Court will be addressing this question in other petitions—including a petition in *Groves* itself filed on September 11, 2023—coming before this Court in this same time frame. In that case, he respectfully requests that this Court consider granting review in one of those other cases and, depending on the resolution, granting this petition and remanding this case in light of that resolution.

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 Career Offender enhancement substantially increases a defendant's guideline range if, among other things, his offense of conviction is a "controlled substance offense." U.S.S.G. §§ 4B1.1(a), 4B1.2(b). To determine whether a prior conviction is a "controlled substance offense," federal courts use the categorical approach, "compar[ing] 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, Section 4B1.2(b)'s textual definition is controlling, and as such, includes only those substantive enumerated drug crimes. *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022). *Attempted* drug offenses therefore do not qualify as "controlled substance offenses." *Id.*

B. Facts and Procedural History

In May, 2020, Raleigh (NC) Police officers began working with a cooperating source who informed them that Mr. Hartsfield was dealing in small amounts of drugs with lower-level drug dealers. Police conducted an investigation that resulted in a grand jury sitting in the Eastern District of North Carolina indicting Mr. Hartsfield on three counts of "knowingly and intentionally distribut[ing] a quantity of cocaine base (crack) . . . in violation of" 21 U.S.C. § 841(a). Mr. Hartsfield pleaded guilty to the indictment without a plea agreement.

At sentencing, the district court calculated an advisory Guidelines range of 151-188 months of imprisonment. This range was driven by the district court's holding that Mr. Hartsfield was a Career Offender because the instant offenses of

his conviction were "controlled substance offense[s]," and he had at least two prior convictions for Career Offender predicates. Without the Career Offender enhancement, his advisory Guidelines range would have been 41-51 months of imprisonment. U.S.S.G. Ch. 5, Pt. A.

The district court, acknowledging that Mr. Hartsfield's offense involved a small amount of drugs, and that his conduct was driven in part by financial pressures caused by the COVID-19 pandemic, imposed a sentence of 133 months of incarceration—a slight downward variance from the 151-188 month Career Offender range recommended by the Guidelines.

Mr. Hartsfield timely appealed, arguing that the district court plainly erred in applying the Career Offender enhancement because Section 841 is not a "controlled substance offense."

The Fourth Circuit, relying on its published decision in *Groves*, affirmed his sentence. Pet. App. 1a.

This petition follows.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision in *Groves* deepens disagreement among the circuits about how to interpret "attempted transfer" in Section 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.

I. The Circuits Are Divided and Confused

The circuits disagree about whether the plain text of § 802(8) or the canon against surplusage should control the interpretation of "attempted transfer." Sup. Ct. R. 10(a).

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 Section 841 distribution. *United States v. Burks*, 934 F.2d 148, 149 (8th Cir. 1991) (upholding Section 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 Section 802(8) controls and rejects surplusage principles as requiring courts to ignore or rewrite "attempted transfer" to have no conduct in common with Section 846 attempted distribution.

In *United States v. McKenzie*, the defendant challenged the denial of his motion for acquittal on a Section 841 distribution conviction, arguing that he could not be guilty of distributing drugs under Section 841 because law enforcement intercepted the parties before the transfer was complete. 743 Fed. App'x 1, 2 (7th

Cir. 2018).[2] 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 Section 808(8) and Section 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 Section 802(8) dispositive, despite the overlap with Section 846, and rejected McKenzie's surplusage argument.

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 Section 802(8).

a. In *United States v. Booker*, 994 F.3d 591, 596 (6th Cir. 2021) the Sixth Circuit found Section 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

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[2] *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.

provisions of the CSA."). Notably, it did so despite—and without addressing—Chief Judge Sutton's observation in *Havis* that Section 846 and Section 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. Relying on *Booker*, the Fourth Circuit in *Groves* refused to find any conduct in common between Section 841 and Section 802(8) attempted transfer and Section 846 attempted distribution because "construing § 841(a)(1) to criminalize an attempt offense would render § 846 superfluous." *Groves*, 65 F.4th at 173.

Thus, there is at least a 1-3 split specifically on whether the plain text of Section 802(8) controls the meaning of "attempted transfer," as the Seventh Circuit decided in *McKenzie*; or whether the canon against surplusage and Section 846

"attempted distribution" requires courts to judicially erase or rewrite the plain text of Section 802(8), as the Third, Fourth and Sixth Circuits did in *Dawson*, *Groves*, and *Booker.*

1. 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 Section 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' Section 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. 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. The question presented is recurring, will continue to recur, and implicates decades of additional prison time based purely on the happenstance of geography.

III. Two Pending Matters Before this Court may Affect the Outcome of this Petition.

As noted above, the defendant in *Groves* filed a petition for certiorari in his case on September 11, 2023. Additionally, this Court recently granted certiorari in *Pulsifer v. United States*, No. 22-340, which involves the canon against surplusage in the context of a federal criminal statute. This Court may choose to hold this petition until it resolves one or both of these matters.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 12, 2023