No. 25-6622

IN THE

# Supreme Court of the United States

ALANTE MARTEL NELSON,

*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

## SUPPLEMENTAL BRIEF OF PETITIONER

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## SUPPLEMENTAL BRIEF OF PETITIONER

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Pursuant to this Court's Rule 15.8, Petitioner files this supplemental brief to advise the Court how *Barrett v. United States*, 607 U.S. ___ (2026)—decided the day after his petition was filed—supports his petition for certiorari. He asks this Court to grant, vacate and remand for reconsideration—particularly of the third question presented—taking into account *Barrett's* guidance for interpreting statutes that criminalize the same conduct, as do Va. Code § 18.2-248(A) and § 18.2-257(a).

Virginia's General Assembly has long given "the term 'distribute'" in its drug statutes "the broadest possible meaning." *Wood v. Commonwealth*, 214 Va. 97, 99 (1973) (so observing about an earlier version of the relevant statutes which contain the same language as its modern counterparts). Petitioner Nelson argued below that his 2017 Virginia conviction for distribution of a schedule I or II controlled substance

was categorically overbroad by conduct. App. 6a. This was because the ordinary meaning of "distribution" in USSG § 4B1.2(b) (2021) did not include attempts to distribute controlled substances, while Virginia defines distribution "so broadly as to include" mere attempted transfer as its least culpable conduct. *Taylor v. United States*, 495 U.S. 575, 591 (1990). And attempted transfer is an "alternative means" of distribution, *Mathis v. United States*, 579 U.S. 500, 507-08 (2016), not an element,[1] so Va. Code § 18.2-248(A) is indivisible by conduct as to distribution. In sum, § 18.2-248(A) "creates only a single offense" with several means of commission. *Stillwell v. Commonwealth*, 219 Va. 214, 222 (1978). Therefore, the categorical approach—not the modified categorical approach—applies. All of this should have ended the inquiry in Mr. Nelson's favor.

It did not. Instead, the Fourth Circuit used the surplusage canon to effectively erase "attempted transfer" from the plain text of Virginia's Drug Control Act. *United States v. Nelson*, 151 F.4th 577, 581 (4th Cir. 2025) ("attempted transfer" must be interpreted not as an attempted transfer, but instead as a completed distribution, in order to avoid rendering attempt statutes "superfluous"). Remarkably, the Fourth Circuit held that § 18.2-248(A)—which explicitly criminalizes the *attempted transfer* of drugs via § 54.1-3401—criminalized only "*completed* offenses"—i.e., substantive distribution. *Id.* at 582 (emphasis added).

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[1] Virginia juries are not asked, and need not agree, whether a distribution was completed by attempted transfer or any of the other possible means. Va. Model Jury Instructions—Criminal, No. 22.200 ("Schedule I or II Controlled Substance—Selling, Giving or Distributing: No Evidence of Accommodation"), at https://www.vacourts.gov/static/courts/circuit/resources/model_jury_instructions_criminal.pdf

It did so even though this Court has long recognized that multiple criminal statutes can—and often do—criminalize the same conduct. That was true at the time of *Batchelder v. United States*, 442 U.S. 114, 123-24 (1979), and remains true today. *Barrett*, 2026 WL 96659, at *13 (2026) (Gorsuch, J., concurring in part) (observing that today, "federal and state criminal codes have . . . scores of repetitive offenses on the books."). And it did so without mentioning *Batchelder*, or any of this Court's surplusage cases showing that the co-existence of two statutes that criminalize some of the same conduct in a statutory scheme was simply not surplusage. *See* Pet. 24-26 (citing cases).

Indeed, far from presenting any interpretive or surplusage concerns, Petitioner explained that the existence of multiple statutes criminalizing the same conduct is simply a legislative decision giving the government "prosecutorial choice" of statutes—one that courts must respect. Appellant's Opening Br., *United States v. Nelson*, 4th Cir. No. 22-4658, Dkt. No. 21, 2023 WL 4447860 at 23-24 (citing *Batchelder* at 123-24); Pet. 24-25 (same). In *Batchelder*, this Court said "when an act violates more than one criminal statute, the Government may prosecute[] under either," even "when two statutes prohibit *exactly the same conduct*." 442 U.S. at 123-24 (emphasis added). The Fourth Circuit did not engage with or mention *Batchelder*. In a few sentences, the courts invoked superfluousness or surplusage principles in holding that the existence of "attempted distribution" in § 18.2-257(a) must be interpreted to effectively displace "attempted transfer" in § 18.2-248(A), as defined in § 54.1-3401.

One day after Mr. Nelson's petition was filed, this Court decided *Barrett*. The question in *Barrett* was whether two subsections of 18 U.S.C. § 924(c) that "define[d] the same offense"—i.e., "the very same conduct violate[d] two statutes"—authorized separate convictions under each subsection. 607 U.S. ___, 2026 WL 96659, *7 (2026). In answering that question, this Court—citing *Batchelder*, among other cases—explained "if offenses that share elements . . . have penalties that operate on their own rather than by reference to each other, that suggests that Congress intended to place in front of prosecutors a menu, not a buffet." *Id*. at *11.

That *precisely* describes Virginia's statutory scheme. Virginia's drug attempt statute and the distribution statute criminalizing attempted transfer provide for different statutory punishments. In Virginia, someone convicted of attempted distribution of controlled substances faces 1-10 years' imprisonment, while someone convicted of distribution-by-attempted-transfer faces 5-40 years' imprisonment for a first offense. *Compare* § 18.2-257(a) (providing for 1-10 years' imprisonment for an attempted distribution, though sentencer retains discretion to impose the penalty for the felony attempted if it is less); *with* § 18.2-248(c) (providing that the penalty for a § 18.2-248 distribution via attempted transfer involving a Schedule I or II controlled substance is 5-40 years' imprisonment for a first offense, 5-life with a 3 year mandatory minimum for a second offense, and 10-life with a 10-year mandatory minimum for a third offense). And that is precisely what Petitioner said below about § 18.2-257(a) and § 18.2-248(A), (C). 2023 WL 4447860 at 23-24 (citing *Batchelder*) & n.3 (explaining Virginia's statutory scheme).

Virginia's two statutory drug attempt statutes operate the same, for present purposes, as the two gun statutes at issue in *Barrett*. As explained above, like the two § 924(c) subsections in *Barrett*, § 18.2-248 and § 18.2-257 offer prosecutors a "menu" from which to choose in prosecuting an attempted drug distribution or transfer. Like the two Virginia drug statutes at issue here, § 924(c)(1)(A)(i) and § 924(j) both criminalize "the very same conduct." *Barrett*, 2026 WL 96659 at *7. In both cases, one statute criminalized the same conduct in a slightly different way than already criminalized by another statute.[2] Insofar as interpreting overlapping statutes goes, the analogy from *Barrett* is direct.

*Barrett's* interpretive guidance, relying in part on *Batchelder*, is thus highly relevant to Mr. Nelson's *Batchelder*-based argument that his 2017 Virginia conviction was categorically overbroad by conduct. Pet. 24-25. The question in *Barrett* was whether 18 U.S.C. §§ 924(c)(1)(A)(i) and 924(j) authorized separate convictions for one single offense.[3] 2026 WL 96659, *6. This Court recognized that while Barrett's "argument arrives in constitutional garb," resolving it was necessarily a matter of

[2] For example, while a sale or attempt to sell would constitute a distribution or attempted distribution in all conceivable circumstances, neither—standing alone, without more—would constitute an attempted *transfer*. Moreover, impossibility is likely not a defense to an attempted distribution of drugs under § 18.2-257(c), while it may be for an attempted transfer. *See United States v. Everett*, 700 F.2d 900 (3d. Cir. 1983) (so observing about the federal counterparts to these statutes, on which the Uniform Controlled Substances Act made available to states was based; and which Virginia, among many other states, adopted).

[3] That exact question is not one here, because Petitioner has only a single Virginia conviction at issue. However, the way *Barrett*—relying on *Batchelder* and other cases—instructs courts to interpret statutes criminalizing the same conduct, is *directly* applicable to the third question presented here.

"statutory construction." *Id.* The two Virginia statutes here should be interpreted with those same principles. However, they were not.

The Fourth Circuit below erred in its interpretation of Virginia's statutory scheme, and *Barrett* reinforces that conclusion more than *Batchelder* already did. This Court should grant, vacate, and remand for the Fourth Circuit to reconsider its interpretation of Virginia "attempted transfer" in light of *Barrett's* guidance for interpreting statutes that criminalize the same conduct, as Va. Code §§ 18.2-257(a) and 18.2-248(A), 54.1-3401 do here. Doing so could eliminate the need for this Court's review.

## CONCLUSION

This Court should grant, vacate and remand for the Fourth Circuit to reconsider its interpretation of "attempted transfer" in §§ 54.1-3401, 18.2-248(A) and "attempted distribution" in § 18.2-257(a) in light of *Barrett*.

Respectfully Submitted,

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