ORIGINAL

No. 21-5186

Supreme Court of the United States

MIHRAN MELKONYAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mihran Melkonyan
Petitioner
72465-097
P.O. Box 9
Mendota, CA 93640

QUESTION PRESENTED

1.) Whether, as the Courts of Appeals for the Third[1] and Sixth[2] Circuits have held, in conflict with the decision below[3] and decisions of the Fifth[4] and Eleventh[5] Circuits, this Court's *Kisor*[6] decision proscribes the federal courts from granting "*Auer*[7] deference" to the Commentary and Application Notes to the Sentencing Guidelines only if a regulation is genuinely ambiguous and, even then, not when the reasons for that presumption do not apply or when countervailing reasons outweigh them?

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[1] *United States v. Nasir*, 982 F.3d 144 * | 2020 U.S. App. LEXIS 37489 ** (3rd Cir. 12-1-20).
[2] See *United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021).
[3] *United States v. Melkonyan*, 831 Fed. Appx. 319-320; 2020 U.S. App. LEXIS 39305 **2 (9th Cir. 12-15-20). (Appendix A)
[4] *United States v. Cruz-Flores*, 799 Fed. Appx. 245 *246 | 2020 U.S. App. LEXIS 9136 **3-4 (5th Cir. 3-24-20) ("*Kisor* did not discuss the Sentencing Guidelines").
[5] *United States v. Isaac*, 987 F.3d 980 * | 2021 U.S. App. LEXIS 3263 ** (11th Cir. 2-5-21) ("The instruction in the commentary that courts should apply [U.S.S.G.] § 2G2.1(b)(5) broadly and functionally guides our analysis.") (citing *Stinson v. United States*, 508 U.S. 36, 38, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993))
[6] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416, 204 L. Ed. 2d 841 (2019).
[7] *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

More specifically, the Petitioner Mihran Melkonyan and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Mihran Melkonyan, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on 12-15-20.

OPINIONS BELOW

The 12-15-20 opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 831 Fed. Appx. 319 *; 2020 U.S. App. LEXIS 39305 ** and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Ninth Circuit on 2-23-21. This opinion is an unpublished decision reported at 2021 U.S. App. LEXIS 5304 and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Eastern District of California, was entered on 1-22-19, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States District Court for the Eastern District of California denying Mr. Melkonyan's objections to the presentence report was entered on 1-4-19, is an unpublished oral order handed down at sentencing and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the Eastern District of California denying Mr. Melkonyan's motion for new trial was entered on 10-17-18, is an unpublished decision, and is reprinted in the separate Appendix E to this Petition.

The prior opinion and judgment of the United States District Court for the Eastern District of California denying Mr. Melkonyan's 28 U.S.C. § 2255 motion without prejudice was

entered on 3-27-18, is an unpublished decision, and is reprinted in the separate Appendix F to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Ninth Circuit, denying remand for a ruling on Mr. Melkonyan's 18 U.S.C. § 3582(c)(1)(A)(i) motion for compassionate release in the district court was entered on 5-26-20, is an unpublished decision reported at 2020 U.S. App. LEXIS 16702 and is reprinted in the separate Appendix G to this Petition.

The prior opinion and judgment of the United States District Court for the Eastern District of California denying Mr. Melkonyan's 18 U.S.C. § 3582(c)(1)(A)(i) motion for lack of jurisdiction was entered on 4-27-20, is an unpublished decision reported at 2020 U.S. Dist. LEXIS 79091 and is reprinted in the separate Appendix H to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 12-15-20. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Ninth Circuit on 2-23-21. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

18 U.S.C. § 1341 provides:

> § 1341. Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both. *Id.*

18 U.S.C. § 1343 provides:

> § 1343. Fraud by wire, radio, or television
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both. *Id.*

18 U.S.C. Appx § 2B1.1 provides, *inter alia*, as follows:

> § 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States
> (a) Base Offense Level:
> (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
> (2) 6, otherwise.
> (b) Specific Offense Characteristics
> (1) If the loss exceeded $6,500, increase the offense level as follows:
>
> | Loss (Apply the Greatest): | Increase in Level |
> |---|---|
> | (A) $6,500 or less | no increase |
> | (B) More than $6,500 | add 2 |
> | (C) More than $15,000 | add 4 |
> | (D) More than $40,000 | add 6 |
> | (E) More than $95,000 | add 8 |
> | (F) More than $150,000 | add 10 |
> | (G) More than $250,000 | add 12 |
> | (H) More than $550,000 | add 14 |
> | (I) More than $1,500,000 | add 16 |
> | (J) More than $3,500,000 | add 18 |
> | (K) More than $9,500,000 | add 20 |
> | (L) More than $25,000,000 | add 22 |
> | (M) More than $65,000,000 | add 24 |
> | (N) More than $150,000,000 | add 26 |
> | (O) More than $250,000,000 | add 28 |
> | (P) More than $550,000,000 | add 30. |
>
> (2) (Apply the greatest) If the offense—
> (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;
> (B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or
> (C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.
> (3) If the offense involved a theft from the person of another, increase by 2 levels.
> (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels.
(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.
(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.
(8) (Apply the greater) If—
(A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or
(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.
(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.
(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.

18 U.S.C. Appx § 2B1.1 provides, *inter alia*, as follows:

> § 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States
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> (a) Base Offense Level:
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> (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
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> (2) 6, otherwise.
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> (1) If the loss exceeded $6,500, increase the offense level as follows:
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> | (G) More than $250,000 | add 12 |
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> | (I) More than $1,500,000 | add 16 |
> | (J) More than $3,500,000 | add 18 |
> | (K) More than $9,500,000 | add 20 |
> | (L) More than $25,000,000 | add 22 |
> | (M) More than $65,000,000 | add 24 |
> | (N) More than $150,000,000 | add 26 |
> | (O) More than $250,000,000 | add 28 |
> | (P) More than $550,000,000 | add 30. |
>
> (2) (Apply the greatest) If the offense—
>
> (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;
>
> (B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or
>
> (C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.
>
> (3) If the offense involved a theft from the person of another, increase by 2 levels.
>
> (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels.
(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.
(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.
(8) (Apply the greater) If—
(A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or
(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.
(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.
(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—
(A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or
(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.
If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14.
(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.
(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.
(17) (Apply the greater) If—
(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or
(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by 4 levels.
(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed 8 levels, except as provided in subdivision (D).
(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.
(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.
(19)
(A) (Apply the greatest) If the defendant was convicted of an offense under:
(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.
(ii) 18 U.S.C. § 1030(a)(5)(A), increase by 4 levels.
(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.
(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.
(20) If the offense involved—
(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or

dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: ... 18 U.S.C. §§ 1341–1344 ... For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

* * * * * * * * * *

3. Loss Under Subsection (b)(1). This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule. Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss. "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss. "Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm

that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)...

* * * * * * * * * *

(F) Special Rules. Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. **In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device.** However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 10(A).

Id. U.S.S.G § 2B1.1 (As amended Effective ... November 1, 2018 (see Appendix C, amendments 806 and 813). (emphasis added)

Fed. R. Crim. P. 52 provides:

Rule 52. Harmless Error and Plain Error.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Id.* (As amended Dec. 26, 1944, eff. March 21, 1946.)

STATEMENT OF THE CASE

On or about 3-20-14 Mihran Melkonyan was charged with violation of 18 U.S.C. § 1343 (Wire fraud) (Counts 1-21); 18 U.S.C. § 1341 (Mail fraud) (Counts 22-23).

These charges arose from allegations that he took part in a scheme to charge small charges of $15-$30 each against a large number (119,913) of individual American Express credit cards whose numbers and data had been obtained by some individuals in Russia. American Express ultimately calculated that the actual charges/losses totaled $1,418,959.00. (Transcript of sentencing 1-4-19, page 5) (Judgment & Commitment Order page 6) (Presentence Report, paragraph 5) (Indictment 3-20-14) (Superceding Indictment 8-27-15).

He was arraigned on or about 4-16-15 at which time he pleaded not guilty to the charged violations.

On or about 8-27-15, Mihran Melkonyan was charged in a superseding indictment with violation of 18 U.S.C. § 1343 (Wire fraud) (Counts 1-24); 18 U.S.C. § 1341 (Mail fraud) (Counts 25-26).

He was rearraigned on or about 9-3-15 at which time he again pleaded not guilty to the charged violations.

No motion to suppress was filed or litigated.

On or about 2-7-17 Mr. Melkonyan proceeded to trial. (Appendix B)

On 2-15-17, Mr. Melkonyan was found guilty by the jury as to violation of 18 U.S.C. § 1343 (Wire fraud) (Counts 1-24); 18 U.S.C. § 1341 (Mail fraud) (Counts 25-26).

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 33 and a Criminal History of III which resulted in a guideline sentencing range 168-210 months. This guideline sentencing range was based on use of 111,049 credit cards

with individual charges of $15-$30 and American Express' documentation of $1,418,959 in fraudulent charges but then utilized U.S.S.G § 2B1.1, Commentary, Note 3(F)(i) with its $500 per card minimum calculation, which resulted in a 'loss' of $55,524,500. (Presentence Report, paragraphs 22-23, 32, 40, 57-58).

On 1-4-19, Mr. Melkonyan appeared for sentencing. At sentencing, the government first objected to the failure of the Presentence Report to include a 2 points enhancement under U.S.S.G § 2B1.1(b)(2) based on 10 or more victims. (Transcript of sentencing, page 14) The government attorney also objected to the total of 111,049 credit cards in the Presentence Report and argued that the correct number should be changed to 119,913 cards with a 'loss' of $59,956,500 based on U.S.S.G § 2B1.1, Commentary, Note 3(F)(i). (Transcript of sentencing, pages 4-5)

Mr. Melkonyan, in turn, specifically objected to the use of the $500 per card enhancement of U.S.S.G § 2B1.1, Commentary, Note 3(F)(i). (Transcript of sentencing, page 8)

The government attorney's objections were granted by the district court but Mr. Melkonyan's objections were denied. (Transcript of sentencing, page 20)

On 1-4-19, Mr. Melkonyan was sentenced to 230 months plus 3 years supervised release, $1,418,959 restitution, and $2,600 special assessment incarceration for violations of 18 U.S.C. § 1343 (Wire fraud) (Counts 1-24); 18 U.S.C. § 1341 (Mail fraud) (Counts 25-26). This sentence represented a Total Offense Level 35, Criminal History 3, and the mid portion of the guideline sentencing range of 210-262. (Transcript of sentencing, pages 20-21) In spite of Mr. Melkonyan's specific objection, the 'loss' underlying the Total Offense Level was calculated based on the $500 per card minimum of U.S.S.G § 2B1.1, Commentary, Note 3(F)(i) and totaled

$59,956,500 instead of the actual loss, documented by American Express, of $1,418,959. (Appendix B)

But for the use of the $500 per card minimum of U.S.S.G. § 2B1.1, Commentary, Note 3(F)(i), Mr. Melkonyan's guideline sentencing range would have been 108-135 months instead of 210-262 months utilized by the district court. This is because he would have been subjected to 16 levels enhancement under U.S.S.G. § 2B1.1(b)(1)(I) instead of the 22 levels enhancement of U.S.S.G. § 2B1.1(b)(1)(L) based on actual loss of $1,418,959 instead of the enhanced loss of $500 per card totaling $59,956,500 as set forth in U.S.S.G. § 2B1.1, Commentary, Note 3(F)(i).

The judgment was entered on 1-22-19.

On 1-16-19, a Notice of Appeal was filed. On direct appeal, counsel specifically argued, *inter alia*:

> The court erred in determining the amount of loss by multiplying the number of American Express credit card numbers involved in the overall scheme by $500, pursuant to application note 3(F)(i) to U.S.S.G. § U.S.S.G. § 2B1.1

(Melkonyan USCA Brief, PDF pages 3, 29-32) (USCA 9 Docket #19-10026, Entry #12, 1-14-20)

On 12-15-20, the Court of Appeals denied Mr. Melkonyan's appeal. In denying the appeal, the Court of Appeals simply presumed that the $500 per card enhancement of U.S.S.G. § 2B1.1, Commentary, Note 3(F)(i) was valid and failed to make even the slightest determination whether the regulation was ambiguous or whether reasons for the presumption that the regulation was valid did or didn't apply or whether countervailing reasons outweighed any kind of deference to the regulation. The Court of Appeals, like the district court, failed to even mention this Court's *Kisor*[1] decision or "*Auer*[2] deference". *United States v. Melkonyan*, 831 Fed. Appx. 319-320; 2020 U.S. App. LEXIS 39305 **2 (9th Cir. 12-15-20). (Appendix A)

[1] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416, 204 L. Ed. 2d 841 (2019).

Counsel timely filed a petition for rehearing. On 2-23-21, the Court of Appeals denied rehearing. United States v. Melkonyan, 2021 U.S. App. LEXIS 5304 (9th Cir. 2-23-21) (Appendix C)

Mr. Melkonyan demonstrates within that this Court should grant his Petition For Writ Of Certiorari to resolve a remaining conflict among the United States courts of appeals as to whether and when to grant *Auer* deference to the Commentary and Application Notes to the United States Sentencing Guidelines.

[2] *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. MELKONYAN'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A REMAINING CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHETHER AND WHEN TO GRANT *AUER* DEFERENCE TO THE COMMENTARY AND APPLICATION NOTES TO THE UNITED STATES SENTENCING GUIDELINES.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

1A.) Subsequent To Kisor v. Wilkie, The Federal Courts of Appeals Still Remain Divided As To Whether And When To Grant Auer Deference To The Commentary And Application Notes To The Sentencing Guidelines.

Two years ago, in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416, 204 L. Ed. 2d 841 (2019), this Court clarified the scope of *Auer* (or sometimes, *Seminole Rock*) deference to agency regulations. See *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945). While *Kisor*, *Auer*, and *Seminole Rock* progressively clarified the scope of deference to "agency" regulations, it's been 25 years since this Court addressed the "Commentary" to the United States

Sentencing Guidelines, found in 18 U.S.C. Appendix. See *Stinson v. United States*, 508 U. S. 36, 44-45, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993) (holding that the commentary's interpretation of a guideline "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the" guideline).

On its face, *Stinson's* plain-error test seemed to require courts to give great deference to the commentary. By way of analogy, the plain-error test that applies to unpreserved arguments on appeal requires a legal error to "be clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). See *United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021) (Construing *Stinson*).

While the Courts of Appeals for the Third[3] and Sixth[4] Circuits have held that this Court's *Kisor* decision proscribes the federal courts from granting "*Auer* deference" to the Commentary and Application Notes to the Sentencing Guidelines only if a regulation is genuinely ambiguous and, even then, not when the reasons for that presumption do not apply or when countervailing reasons outweigh them, perhaps because of the failure to specifically address the Commentary in *Kisor* some of the lower courts have declined to apply *Kisor* to the Commentary or Sentencing Guidelines. *Cf. United States v. Cruz-Flores*, 799 Fed. Appx. 245 *246 | 2020 U.S. App. LEXIS 9136 **3-4 (5th Cir. 3-24-20) ("*Kisor* did not discuss the Sentencing Guidelines"); *United States v. Isaac*, 987 F.3d 980 * | 2021 U.S. App. LEXIS 3263 ** (11th Cir. 2-5-21) ("The instruction in the commentary that courts should apply [U.S.S.G.] § 2G2.1(b)(5) broadly and functionally guides our analysis.") (citing *Stinson v. United States*, 508 U.S. 36, 38, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993)).

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[3] *United States v. Nasir*, 982 F.3d 144 * | 2020 U.S. App. LEXIS 37489 ** (3rd Cir. 12-1-20).
[4] See *United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021).

In the instant case, even though the question of the scope of deference to the Commentary was specifically and directly presented to the Ninth Circuit Court of Appeals by Petitioner Melkonyan[5], the Court of Appeals simply presumed that the $500 per card enhancement of U.S.S.G. § 2B1.1, Commentary, Note 3(F)(i) was valid and failed to make even the slightest determination whether the regulation was ambiguous or whether reasons for the presumption that the regulation was valid did or didn't apply or whether countervailing reasons outweighed any kind of deference to the regulation. The Court of Appeals, like the district court, failed to even mention this Court's *Kisor* decision or "*Auer* deference". *United States v. Melkonyan*, 831 Fed. Appx. 319-320; 2020 U.S. App. LEXIS 39305 **2 (9th Cir. 12-15-20). (Appendix A)

The split in the circuits is clear cut and the opposing positions appear to be hardening instead of harmonizing. The outcome of litigation should not depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See: *Stinson v. United States*, 508 U.S. , , and [n.], 123 L.Ed.2d 598, 605 and [n. 2], 113 S.Ct. 1913 (1993).

1B.) But For The Lower Court's Presumption Of Deference, The "Loss" In This Case Would Have Been As Low As The $1,418,959 Documented By American Express Instead Of The $59,956,500 Determined By The Unlawful Application Note 3(F)(i).

In Mr. Melkonyan's case, as set forth above, he was sentenced to 230 months plus 3 years supervised release, $1,418,959 restitution, and $2,600 special assessment incarceration for violations of 18 U.S.C. § 1343 (Wire fraud) (Counts 1-24); 18 U.S.C. § 1341 (Mail fraud) (Counts 25-26). This sentence represented a Total Offense Level 35, Criminal History 3, and the mid portion of the guideline sentencing range of 210-262. (Transcript of sentencing, pages 20-21) In spite of Mr. Melkonyan's specific objection, the 'loss' underlying the Total Offense Level

[5] See Melkonyan USCA Brief, PDF pages 3, 29-32. (USCA 9 Docket #19-10026, Entry #12, 1-14-20)

was calculated based on the $500 per card minimum of U.S.S.G. § 2B1.1, Commentary, Note 3(F)(i) and totaled $59,956,500 instead of the actual loss, documented by American Express, of $1,418,959. (Appendix B)

On direct appeal, again over Mr. Melkonyan's specific objection[6], the Court of Appeals simply presumed that the $500 per card enhancement of U.S.S.G. § 2B1.1, Commentary, Note 3(F)(i) was valid and failed to make even the slightest determination whether the regulation was ambiguous or whether reasons for the presumption that the regulation was valid did or didn't apply or whether countervailing reasons outweighed any kind of deference to the regulation. The Court of Appeals, like the district court, failed to even mention this Court's *Kisor*[7] decision or "*Auer*[8] deference". *United States v. Melkonyan*, 831 Fed. Appx. 319-320; 2020 U.S. App. LEXIS 39305 **2 (9th Cir. 12-15-20). (Appendix A)

In *United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021), the Sixth Circuit recently remanded a case directly on point with that of Mr. Melkonyan. It was a case where a postal employee had stolen 1,505 gift cards from the mail. Most of these gift cards had an average value of about $35 for a total value of about $47,000. Instead of calculating her sentence based on the actual loss of $47,000, the district court utilized the same U.S.S.G. § 2B1.1, Commentary, Note 3(F)(i) that was utilized in Mr. Melkonyan's case to increase her charged 'loss' to $500 per card no matter its actual value or the victim's actual harm resulting in sentencing based on a total loss amount of $752,500. *United States v. Riccardi*, 989 F.3d 476, 479 (6th Cir. 2021).

In reversing and remanding, the Court of Appeals analyzed the case as follows:

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[6] (Melkonyan USCA Brief, PDF pages 3, 29-32) (USCA 9-Docket #19-10026, Entry #12, 1-14-20)

[7] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416, 204 L. Ed. 2d 841 (2019).

[8] *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

The guideline for theft offenses—U.S.S.G. § 2B1.1—starts with a base offense level of 6. Id. § 2B1.1(a)(2). It then lists a variety of offense characteristics that can affect this offense level, ranging from the number of victims involved, id. § 2B1.1(b)(2)(A)(i) [**6] , to the possession of a firearm, id. § 2B1.1(b)(16)(B). As relevant here, courts must "increase the offense level" in incremental amounts based on the "loss" from the offense. Id. § 2B1.1(b)(1). If the loss is "[m]ore than $6,500," § 2B1.1 instructs courts to add 2 to the offense level. Id. § 2B1.1(b)(1)(B). If the loss is "[m]ore than $15,000," it instructs them to add 4. Id. § 2B1.1(b)(1)(C). The guideline continues in this fashion up to a loss amount of "[m]ore than $550,000,000," for which it directs courts to increase the offense level by 30. Id. § 2B1.1(b)(1)(P).

The government bears the burden to prove the amount of the loss by a preponderance of the evidence. See, e.g., *United States v. Jones*, 641 F.3d 706, 712 (6th Cir. 2011); *United States v. Rothwell*, 387 F.3d 579, 582 (6th Cir. 2004). We treat the district court's "determination of the amount of loss" as a factual finding and thus review it under a deferential clear-error standard. *United States v. Warshak*, 631 F.3d 266, 328 (6th Cir. 2010). But we review de novo the district court's "methodology for calculating" the loss and its interpretation of the guidelines. *Id.*; *United States v. Thomas*, 933 F.3d 605, 608 (6th Cir. 2019). A misinterpretation of a [***5] guideline can result in a procedurally unreasonable sentence. See, e.g., *United States v. Stubblefield*, 682 F.3d 502, 510 (6th Cir. 2012); cf. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907-08, 201 L. Ed. 2d 376 (2018).

Here, the government did not attempt to meet its burden to prove the loss from Riccardi's theft by relying on factual evidence about the total amount that Riccardi stole or the total harm that her victims suffered. Instead, the government sought to meet its burden by relying on a legal rule that treats the "loss" for each of the 1,505 gift cards as $500 even though most of the gift cards had values averaging about

* * * * * * * * * *

For whatever reason, the Commission opted to place its $500 minimum in § 2B1.1's commentary, not in § 2B1.1. So Riccardi alternatively asserts that the $500 minimum conflicts with § 2B1.1. We agree. Commentary may only interpret the guideline. And a $500 mandatory minimum cannot be described as an interpretation of the word "loss." Rather, it is a substantive legislative rule that belongs in the guideline itself to have force.

We start with the basic differences between the guidelines [**12] and the commentary. The Sentencing Reform Act of 1984, Pub. L. 98-473, Title II, ch. II, 98 Stat. 1987, tasked the Commission with creating "guidelines" that contain sentencing ranges for various categories of offenses. 28 U.S.C. § 994(a)(1), (b)(1); *Stinson v. United States*, 508 U.S. 36, 40-41, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993). These administratively adopted guidelines significantly affected individual liberty because Congress required district courts to follow them when choosing the length of a defendant's prison term. 18 U.S.C. § 3553(b)(1); *United States v. Havis*, 927 F.3d 382, 385-86 (6th Cir. 2019) (en banc) (per curiam). Congress thus included several procedural safeguards to act as a check on the

sentencing rules that the Commission put in the guidelines. Congress required the Commission to submit the original guidelines [*484] for its review and to give it six months to review all amendments. See Sentencing Reform Act, § 235(a)(1), 98 Stat. at 2031-32; 28 U.S.C. § 994(p). It also required the amendments to go through notice-and-comment rulemaking. 28 U.S.C. § 994(x). And while the guidelines have been only advisory since United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), they still significantly affect individual liberty because a court must use them as the initial benchmark for a proper sentence. *Havis*, 927 F.3d at 385.

Since the beginning, the Commission has also included "application notes" in "commentary" that accompanies the guidelines. See, e.g., U.S.S.G. § 2B1.1 cmt. nn.1-8 (1987). An original guideline explained that this HN10 "commentary" "may serve a number [**13] of purposes." Id. § 1B1.7. Among other things, "it may interpret the guideline or explain how it is to be applied." [***9] Id. Yet the Sentencing Reform Act did not mention the "commentary," and later amendments have made only passing reference to it. Sentencing Reform Act, 98 Stat. at 1987-2040; *Stinson*, 508 U.S. at 41 (citing 18 U.S.C. § 3553(b)). To amend the commentary, then, the Commission need not follow the same procedures that govern changes to the substantive rules in the guidelines themselves (congressional review and notice-and-comment rulemaking). *Havis*, 927 F.3d at 386. That fact led some circuit courts to hold originally that they were not bound by the commentary's interpretation of the guidelines. See *Stinson*, 508 U.S. at 39-40 & 40 n.2.

The Supreme Court rejected this view in *Stinson*. Analogizing to administrative law, the Court viewed the guidelines as the "equivalent of legislative rules adopted by federal agencies." Id. at 45. And it viewed the commentary as "akin to an agency's interpretation of its own legislative rules." Id. It thus found that the commentary deserved the deference given to an agency's interpretation of its regulations—what was then known as *Seminole Rock* deference but now goes by *Auer* deference. Id.; see Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945). Applying *Auer's* test, *Stinson* held that the commentary's interpretation of [**14] a guideline "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the" guideline. 508 U.S. at 38 (quoting *Seminole Rock*, 325 U.S. at 414). *Stinson* added that the Commission could effectively amend a guideline by amending the commentary so long as "the guideline which the commentary interprets will bear the [amended] construction." Id. at 46.

On its face, *Stinson's* plain-error test seemed to require courts to give great deference to the commentary. By way of analogy, the plain-error test that applies to unpreserved arguments on appeal requires a legal error to "be clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). Unsurprisingly, then, we have previously been quick to give "controlling weight" to the commentary without asking whether a guideline could bear the construction that the commentary gave it. See, e.g., *United States v. Ednie*, 707 F. App'x 366, 371-72 (6th Cir. 2017);

United States v. Jarman, 144 F.3d 912, 914 (6th Cir. 1998). Perhaps for this reason, defendants have not previously "challenge[d] the general validity" of the $500 minimum loss amount at issue here. *Gilmore*, 431 F. App'x at 430; see *Moon*, 808 F.3d at 1091.

Recently, however, the Supreme Court clarified *Auer's* narrow scope in the related [*485] context of an agency's interpretation of its regulations. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-18, 204 L. Ed. 2d 841 (2019). Kisor acknowledged that the Court's "classic" plain-error phrasing of *Auer's* test "suggest[ed] [**15] a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2415 (citation omitted). Yet *Kisor* cautioned that a court should not reflexively defer to an agency's interpretation. Before doing so, a court must find that the regulation is "genuinely ambiguous, even after [the] court has resorted to all the standard tools of interpretation" to eliminate that ambiguity. Id. at 2414. The agency's interpretation also "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2416.

Should *Kisor* affect our approach to the commentary? We think so for both a simple reason and a more complicated one. As a simple matter, *Stinson* analogized to agency interpretations of regulations when adopting *Seminole Rock's* plain-error test for the commentary. 508 U.S. at 45. *Stinson* thus told courts to follow basic administrative-law concepts despite Congress's decision to locate the relevant agency (the Commission) in the judicial branch rather than the executive branch. See *id.*; *cf. Mistretta v. United States*, 488 U.S. 361, 384-85, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). So *Kisor's* clarification of the plain-error test applies just as much to Stinson (and the Commission's guidelines) as it does to Auer (and an agency's regulations). Indeed, *Kisor* itself cited *Stinson* as [**16] a decision applying *Seminole Rock* deference before *Auer*. *Kisor*, 139 S. Ct. at 2411 n.3.

The more complex reason follows from *Kisor's* response to a notice-and-comment concern raised by the challenger in that case. When asking the Court to overrule *Auer*, the challenger argued that *Auer* allowed an agency to freely change a legislative rule (a change that otherwise requires notice-and-comment rulemaking) simply by changing its interpretation of the rule without using that type of rulemaking. *Id.* at 2420. *Kisor* rejected the challenger's premise—that an agency could willy-nilly change a legislative rule simply by changing its interpretation. Why? Precisely because of the limits that *Kisor* imposed: Before deferring to the changed reading of the rule, a court must "first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference." Id. In other words, *Kisor's* limitations on *Auer* deference [***11] restrict an agency's power to adopt a new legislative rule under the guise of reinterpreting an old one.

The same concern applies here, so *Kisor's* response should too. See *Havis*, 927 F.3d at 386. Only the guidelines (not the commentary) must go through [**17] notice-and-comment rulemaking. 28 U.S.C. § 994(x). So if the Commission could freely amend the guidelines by amending the commentary, it

could avoid these notice-and-comment obligations. The healthy judicial review that *Kisor* contemplates thus will restrict the Commission's ability to do so.

We are not alone in this conclusion. The en banc Third Circuit recently adopted the same view. See *United States v. Nasir*, 982 F.3d 144, 158 (3d Cir. 2020) (en banc). It recognized that its pre-*Kisor* cases had upheld commentary expanding the guidelines. *Id.* Yet these cases could not stand after Kisor, the court found, because it "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations[.]" Id. As a concurrence put it, *Kisor* must awake us "from our slumber of reflexive deference" to the commentary. Id. at 177 (Bibas, J., concurring in part).

We thus do not immediately defer to Application Note 3(F)(i). Rather, we first ask whether § 2B1.1 is "genuinely ambiguous." *Kisor*, 139 S. Ct. at 2415. Section 2B1.1's language tells courts to "increase the offense level" in incremental amounts based on the amount of the "loss" (measured in dollars). U.S.S.G. § 2B1.1(b)(1). Where, as here, a legal text does not define a term, we generally "give the term its ordinary meaning." *United States v. Zabawa*, 719 F.3d 555, 559 (6th Cir. 2013); *United States v. Sands*, 948 F.3d 709, 713-14 (6th Cir. 2020). And "dictionaries are [**18] a good place to start" to identify the range of meanings that a reasonable person would understand a word like "loss" to have. *Zabawa*, 719 F.3d at 559. One dictionary defines the word to mean, among other things, the "amount of something lost" or the "harm or suffering caused by losing or being lost." American Heritage Dictionary of the English Language 1063 (3d ed. 1992). Another says it can mean "the damage, trouble, disadvantage, [or] deprivation . . . caused by losing something" or "the person, thing, or amount lost." Webster's New World College Dictionary 799 (3d ed. 1996). A third defines it as "the being [***12] deprived of, or the failure to keep (a possession, appurtenance, right, quality, faculty, or the like)," the "[d]imunition of one's possessions or advantages," or the "detriment or disadvantage involved in being deprived of something[.]" 9 Oxford English Dictionary 37 (2d ed. 1989).

These definitions show that "loss" can mean different things in different contexts. The word might include emotional harms, as in the statement that the children "bore up bravely under the [loss] of both parents[.]" Webster's Third New International Dictionary 1338 (1986). Or it might include just economic harms, as in [**19] the statement that my friend was "forced to sell all the stock at a [loss]." *Id.* (Another part of § 2B1.1's commentary does, in fact, read § 2B1.1 as limited to economic harms. See U.S.S.G. § 2B1.1 cmt. n.3(A)(iii); *Kozerski*, 969 F.3d at 313.) Even in the economic realm, the word might cover only the precise value of, say, a gift card that is stolen (the "amount of something lost"). American Heritage Dictionary, supra, at 1063. Or it might include the costs associated with obtaining a replacement gift card, including the time and expense from a second trip to the store ("the damage, trouble, disadvantage, [or] deprivation . . . caused by losing something"). Webster's New World College Dictionary, supra, at 799.

In this case, however, we need not decide whether one clear meaning of the word "loss" emerges from the potential options after applying "the 'traditional tools' of construction" to § 2B1.1. Kisor, 139 S. Ct. at 2415 (citation omitted). No

matter the word's meaning, the commentary's $500 minimum loss amount for gift cards does not fall "within the zone of [any] ambiguity" in this guideline. Id. at 2416; cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225-29, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994). No reasonable person would define the "loss" from a stolen gift card as an automatic $500. Rather, the "amount" of the loss or "damage" to the victim from a gift-card theft in any case [**20] will turn on such fact-dependent things as the value of the gift card or the costs of replacing it. American Heritage Dictionary, supra, at 1063; Webster's New World College Dictionary, supra, at 799. This case proves the point. It is undisputed that 1,322 of Riccardi's stolen gift cards had total face values of $47,000 for an average value of about $35. And the government identifies no evidence suggesting that the total "damage" from this theft approached the $752,500 required [*487] by the commentary's mandatory $500 loss amount.

Our conclusion is reinforced by caselaw distinguishing "legislative rules" (which must proceed through notice-and-comment rulemaking) from "interpretive rules" (which need not proceed through that rulemaking) under the Administrative Procedure Act. See generally *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95-97, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015); 5 U.S.C. § 553(b). Precedent in that context recognizes that a specific numeric amount like the $500 in this case generally will not qualify as a mere "interpretation" of general nonnumeric language. *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495, 393 U.S. App. D.C. 1 (D.C. Cir. 2010). An agency, for instance, did not simply "interpret" a rule requiring parties to use "structurally sound" facilities to house dangerous animals when it concluded that this rule mandated an eight-foot fence. See *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169-71 (7th Cir. 1996). Rather, [**21] "when an agency wants to state a principle 'in numerical terms,' terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking." *Catholic Health Initiatives*, 617 F.3d at 495 (quoting Henry J. Friendly, Watchman, What of the Night?, in Benchmarks 144-45 (1967)).

The same logic applies here. The commentary's bright-line $500 loss amount cannot "be derived from [§ 2B1.1] by a process reasonably described as interpretation." Hoctor, 82 F.3d at 170. The Commission's decision to adopt this minimum loss amount was instead a substantive policy choice, one presumably based on empirical factors like the difficulty of determining actual losses in cases involving "access devices" or the "average" loss in those types of cases. Yet if the Commission seeks to keep individuals behind bars for longer periods of time based on this type of "fictional" loss amount, this substantive policy decision belongs in the guidelines, not in the commentary. *Lyles*, 506 F. App'x at 445; see *Havis*, 927 F.3d at 385-86.

* * * * * * * * * *

We end by flagging one issue that the government did not raise. It appears that the Commission sent the amendment adopting this $500 minimum amount to Congress for its review and added it to the commentary using notice-and-comment rulemaking. See 65 Fed. Reg. 26,880, 26,895 (May 9, 2000); 65 Fed. Reg. 2663, 2668 (Jan. 18, 2000). Should we overlook that this $500 minimum sits in the commentary given that the Commission may have met the procedural

> checks required for it to amend the guidelines themselves? We [*489] think not. By placing this loss amount in the commentary, the Commission has retained the power to adjust it tomorrow without satisfying the same procedural safeguards. See *Stinson*, 508 U.S. at 39-46. So the normal administrative principles should apply. Under those principles, this $500 minimum loss amount for gift cards does not "fall 'within the bounds of reasonable interpretation'" of § 2B1.1's text. *Kisor*, 139 S. Ct. at 2416 (citation omitted). The district court thus should not have used it.
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> * * * * * * * * * *
>
> We reverse Riccardi's 56-month sentence, dismiss her separate challenge to the restitution order, and remand for resentencing consistent with this opinion.

United States v. Riccardi, 989 F.3d 476, 481, 485-87, 490 (6th Cir. 2021)

Based on the foregoing and the conflict among the circuits as to the applicability of *Kisor* to the Commentary and Application notes to the Sentencing Guidelines, this Court should VACATE the Court of Appeals' decision affirming Mr. Melkonyan's appeal (Appendix A) and REMAND to the Court of Appeals for reconsideration in light of this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416, 204 L. Ed. 2d 841 (2019).

This remand would likely not only result in Mr. Melkonyan's resentencing within the guideline sentencing range of 108-135 months instead of 210-262 months utilized by the district court. This is because he would have been subjected to 16 levels enhancement under U.S.S.G. § 2B1.1(b)(1)(I) instead of the 22 levels enhancement of U.S.S.G. § 2B1.1(b)(1)(L) based on actual loss of $1,418,959 instead of the enhanced loss of $500 per card totaling $59,956,500 as set forth in U.S.S.G. § 2B1.1, Commentary, Note 3(F)(i).

The remand would also dispel any lingering doubt in the lower courts that *Kisor* has broad application not only to typical federal agency regulations but also to the special case of interpretation of the Commentary and Application Notes of the Sentencing Guidelines found in 18 U.S.C. Appendix.

CONCLUSION

For all of the foregoing reasons, Petitioner Mihran Melkonyan respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[9] to the court of appeals for reconsideration in light of *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416, 204 L. Ed. 2d 841 (2019).

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Mendota, CA 93640

Date: _____

[9] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).