NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

LUKE JOSELIN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Commentary to the Fraud Loss Table U.S.S.G. §2B1.1(b), Note 3(A) Defining Loss as Including "Intended Loss," Should Be Given Deference After *Kisor v. Wilkie,* 139 S.Ct. 2400, 2415 (2019).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Luke Joselin, No. 22-60028-Cr-Dimitrouleas (November 2, 2022)

United States Court of Appeals (11th Cir.):

United States v. Luke Joselin, No. 22-13739 (January 10, 2024)

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PETITION FOR WRIT OF CERTIORARI

Luke Joselin respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-13739 in that court on January 10, 2024, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District

Court for the Southern District of Florida, is contained in the Appendix (A-1). The judgment of the District Court for the Southern District of Florida imposing sentence is contained in the Appendix (A-2).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on January 10, 2024. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

GUIDELINE PROVISIONS INVOLVED (2021)

Petitioner intends to rely on the following guideline provisions:

U.S.S.G. §2B1.1(b)(1) (guideline text)

(b)(1) If the loss exceeded $6,500, increase the offense level as follows:

Loss (apply the greatest)

* * *

(G) More than $250,000 . . . . . add 12
(H) More than $550,000 . . . . . add 14
(I) More than $1,500,000 . . . . . .add 16

U.S.S.G. §2B1.1, comm. n. 3(A)(i), (ii)

> General Rule. — . . . . 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).

STATEMENT OF THE CASE

Mr. Joselin was indicted on April 24, 2022, for: (1) conspiracy to commit wire fraud in violation of 18 U.S.C. §1349 (count 1); substantive wire fraud in violation of 18 U.S.C. §1343 (counts 2-10); and two counts of aggravated identity theft in violation of 18 U.S.C. §1028A(a)(1) (counts 11-12). Mr. Joselin proceeded to trial and was found guilty of counts 1-10 and 12. The jury acquitted Mr. Joselin of count 11, which was one of the aggravated identity theft charges.

Mr. Joselin was sentenced under the guideline for fraud, U.S.S.G. §2B1.1. He had a base offense level of 7, additional enhancements for sophisticated means (+2) and leadership role (+2), and a loss enhancement of 16 points based on an intended loss of $1.9 million dollars. This gave Mr. Joselin a guideline level of 27, criminal history category I, for a sentence of 70-87 months plus a 24-month consecutive

sentence for the aggravated identity theft conviction. Mr. Joselin objected to the inclusion of the intended loss amount, arguing that the actual loss of $477,533, should have controlled the loss enhancement. Had the actual loss figure governed, Mr. Joselin would have received a 12-point loss enhancement, rather than a 16-point loss enhancement, and his guidelines would have been at level 23, criminal history category I, for a guideline sentence of 46-57 months. The sentencing court upheld the 16-point loss enhancement based on intended loss. Thereafter, the court granted Mr. Joselin's request for a downward variance, reducing the sentence by 10 months based on Mr. Joselin's health conditions. Thus, Mr. Joselin was sentenced to a guideline sentence of 60 months plus the 24 month consecutive sentence for the aggravated identity theft, resulting in a total sentence of 84 months.

Mr. Joselin appealed his sentence. He argued that under *Kisor v. Wilkie,* 139 S.Ct. 2400 (2019) actual loss should have governed his loss enhancement under §2B1.1 because the intended loss commentary, §2B1.1, Note 3(A) was not entitled to deference. The Eleventh Circuit rejected Mr. Joselin's arguments, finding that he had not properly preserved the issue at sentencing, and that any error was not plain because the Eleventh Circuit had not directly resolved whether §2B1.1's definition of loss was ambiguous. *United States v. Joselin,* App. No. 22-13739, 2024 WL 113718, *6 (11th Cir. 2024). Accordingly, Mr. Joselin's sentence was affirmed. *Id* . This petition follows.

REASON FOR GRANTING THE WRIT

This Court Should Resolve the Circuit Conflict Regarding Whether the Commentary to the Fraud Loss Table U.S.S.G. §2B1.1(b), Note 3(A) Defining Loss as Including "Intended Loss," Should Be Given Deference.

I. The Third and Sixth Circuits Are Split on Whether Under *Kisor,* U.S.S.G. §2B1.1, Commentary Note 3(A) Should Be Given Deference.

This Court has equated the United States guidelines and their commentary to administrative regulations and agency interpretations of those regulations through a series of cases, *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1925); *Stinson v. United States,* 508 U.S. 36 (1993); and *Auer v. Robbins,* 519 U.S. 452 (1997). Accordingly, courts have applied the same deference test to guidelines commentary as they have applied to administrative regulations and their interpretations. *Stinson,* 508 U.S. at 36. Traditionally, such deference has been virtually automatic, giving the guidelines commentary "controlling weight" unless they were "plainly erroneous or inconsistent with" the actual guideline text. *Stinson,* 508 U.S. at 45, *citing Bowles*, 325 U.S. at 414.

In 2019, this Court limited such deference in *Kisor v. Wilkie,* 139 S.Ct. 2400, 2415 (2019). *Kisor* requires a searching review of the relevant guideline and its commentary to determine if deference to the commentary is warranted.[1] First, the

[1] Mr. Joselin notes that this Court is currently considering further limitations on, and the possible elimination of the deference doctrine in *Loper Bright Enterprises v. Raimondo,* S.Ct. No. 22-451. (Question presented: "2. Whether the Court should

guideline itself has to be reviewed through traditional statutory tools to see if it is genuinely ambiguous. *Kisor*, 139 S.Ct. at 2415, citing *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). If the guideline is clear and unambiguous, then it "just means what it means – and the court must give it effect, as the court would any law." *Kisor*, 139 S.Ct. at 2415.

If the guideline is ambiguous, deference can only be given to the commentary if: (1) the commentary is within the "zone of ambiguity," meaning the commentary actually addresses the part of the guideline that is ambiguous and resolves the ambiguity in a reasonable way; (2) the commentary is an official position that implicates the "substantive expertise" of the Sentencing Commission; and (3) the commentary is a "fair and considered judgment" of the Commission. *See, Kisor*, 139 S.Ct. at 2416-17. If those requirements are met, then deference can be given to guideline commentary to assist in the interpretation of the guideline.

The relevant guideline in Mr. Joselin's case is the fraud table set out at U.S.S.G. §2B1.1(b). The fraud loss guideline states:

(1) If the loss exceeded $6,500, increase the offense level as follows:

---

overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.") (oral argument held January 17, 2024). Therefore, Mr. Joselin requests as an alternative that this Court hold his case pending the resolution of *Loper,* and remand accordingly if *Loper* further limits or eliminates the deference doctrine.

Loss (apply the greatest)

* * *

(G) More than $250,000 . . . . . add 12
(H) More than $550,000 . . . . . add 14
(I) More than $1,500,000 . . . . . add 16
U.S.S.G. §2B1.1(b)(1).

The commentary to this guideline, Note 3(A) states:

> General Rule. — . . . . loss is the greater of actual loss or intended loss.

U.S.S.G. §2B1.1, n. 3(A). The commentary further defines actual loss as: "the reasonably foreseeable pecuniary harm that resulted from the offense." U.S.S.G. §2B1.1, n. 3(A)(i). And it defines "intended loss" as the "pecuniary harm that the defendant purposely sought to inflict" including harms that would have been "impossible or unlikely to occur. . . " U.S.S.G. §2B1.1, n. 3(A)(ii).

Two circuits dispute whether the commentary to the fraud loss table, U.S.S.G. §2B1.1(b), Note 3(A) which defines loss as including "intended loss" should be given deference. The Third Circuit in *United States v. Banks*, 55 F.4th 246, 257-58 (3d Cir. 2022) found under *Kisor,* that no deference should be accorded to note 3(A), and that the losses calculated under §2B1.1's fraud table should only include "actual" losses. *Banks*, 55 F.4th at 257-58. In its analysis, the *Banks* court followed *Kisor's* directives by analyzing §2B1.1's guideline text. It found most significant that §2B1.1's text did not support the inclusion of "intended loss," because "[t]he Guideline [did] not mention 'actual' versus 'intended' loss; that distinction appeared only in the

commentary." *Id.* at 257. It found that textual feature compelling because "[t]hat absence alone" counseled against finding "intended loss" in the guideline itself. *Id.* at 257. Moreover, it found that the context of §2B1.1 as "a sentence enhancement for basic economic offenses," and the "ordinary meaning," of loss within that context resolved any ambiguities that existed, making resort to the commentary unnecessary and improper. *Id.* at 257-258. Importantly, it found that the concept of intended loss "expand[ed] the definition of 'loss,' " and thus, it "accord[ed] the commentary no weight." *Id.* at 258.

In contrast, the Sixth Circuit in *United States v. You,* 74 F.4th 378, 397 (6th Cir. 2023), *reh'g. en banc denied,* 2023 WL 6532608 (Sept. 7, 2023), and *United States v. Smith,* 79 F.4th 790, 799 (6th Cir. 2023), found that a genuine ambiguity existed in §2B1.1's fraud table guideline which triggered deference to the commentary. Applying *Kisor,* the Sixth Circuit found that the text of §2B1.1 in light of the guidelines' relevant conduct principles in §1B1.3, created a genuine ambiguity in §2B1.1. *You,* 74 F.4th at 397; *Smith,* 79 F.4th at 799. This ambiguity arose because the term "loss" could have many meanings, and although a "dictionary definition of the term "loss" [did] not contemplate anything close to intended loss," the relevant conduct guideline appeared to contemplate harms that were akin to the intended loss concept. *You,* 74 F.4th at 397; *Smith,* 79 F.4th at 799. This along with the "context and purpose" as stated in §2B1.1's background commentary to use loss as a proxy for culpability indicated that "loss" in the context of §2B1.1 could include "intended loss."

You, 74 F.4th at 397. Section 2B1.1's purpose, moreover, was consistent with the rest of the guidelines, e.g., relevant conduct §1B1.3, that defined criminal culpability very broadly, thus making "intended loss" a reasonable interpretation within the "zone of ambiguity." *You,* 74 F.4th at 398. The Sixth Circuit concluded that the interpretation of §2B1.1 to include "intended loss" comported with the Commission's official position, expertise, and "fair and considered" judgment. *Id.* at 398. Accordingly, it found that the loss calculated through §2B1.1 included "intended loss." *You,* 74 F.4th at 397; *Smith,* 79 F.4th at 799.

II. The Third Circuit's Approach Adheres to *Kisor's* Commands.

This Court should resolve the circuit split in accordance with the Third Circuit's approach because it more faithfully applies Kisor's requirements.

A. The Plain and Ordinary Meaning of U.S.S.G. §2B1.1 Does Not Include "Intended Loss."

Kisor requires that courts utilize traditional statutory tools to determine if a guideline has a genuine ambiguity that would necessitate deferring to commentary. As established in the Third Circuit's *Banks* decision, U.S.S.G. §2B1.1 does not. The text of §2B1.1 does not hint at the expansive concept of "intended loss," and under normal interpretive guidelines, "intended loss" would not apply. The best indication of what a Sentencing Guideline means is its text. See *Bedroc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). ("The preeminent canon of statutory interpretation requires" courts to "begin[] with the statutory text. . . . "). Consequently, a court

cannot add words into a text that are not there. *Bostock v. Clayton County Georgia*, 140 S.Ct. 1731 (2020) (courts cannot "add to, remodel, update, or detract from" the text of a law); *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000), ("[T]he role of the judicial branch is to apply statutory language, not to rewrite it."). A simple look at §2B1.1 reveals, "intended loss" is not in the text of §2B1.1. Under fundamental statutory tools, the courts cannot add "intended loss" into the guideline.

To the extent that word "loss" in §2B1.1 raises any ambiguity, another fundamental rule of interpretation requires courts to apply its "ordinary meaning." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012) (hereinafter "Scalia & Garner"). Both the Third Circuit in *Banks* and the Sixth Circuit in *Smith* looked to dictionary definitions of "loss" and concluded that the "ordinary meaning" of "loss" did not include "intended loss." *Banks* 55 F.4th 258 (*citing to Webster's*, *American Heritage*, and *Oxford* dictionaries); *You* 74 F.4th at 799 (acknowledging that "dictionary definition[s] of the term 'loss' [did] not contemplate anything close to intended loss."). And that is because, even though the term "loss" has many variations, those variations require some type of resulting harm, diminution of value, or detriment. Even indirect losses, intangible losses, and unrealized losses represent an adverse outcome or diminution in value of a right, benefit, or asset. No ordinary definition of "loss" describes losses that failed to exist, failed to arise, were mere thoughts or wishes of a wrongful-thinking individual, or were "impossible or unlikely to occur." U.S.S.G. §2B1.1, cmt. n. 3(A)(ii). That is

why dictionaries that list multiple definitions for the term "loss" do not include a definition for "intended loss." Rather, intended loss is a completely different concept because it assigns value to losses that never actually existed at any time, even when those imagined losses were impossible or unlikely to occur. U.S.S.G. §2B1.1, cmt. 3(A)(ii). Under *Kisor,* the plain guideline text and the ordinary meaning rule of statutory interpretation compel the conclusion that §2B1.1 does not have a genuine ambiguity. Therefore, no deference should be given to the "intended loss" commentary set out in §2B1.1, Note 3(A).

B. The Context, Structure and Purpose of the Guidelines Does Not Support the Inclusion of "Intended Loss."

Under *Kisor's* test, the courts may also consult the overall context, structure, and purpose of the guidelines to determine whether an ambiguity exists. In the instance of §2B1.1, such an analysis reinforces the conclusion that §2B1.1's guideline text is not ambiguous and does not include "intended loss."

First, other subsections of §2B1.1(b) indicate that §2B1.1's fraud loss table does not include "intended loss" or an intent requirement for loss. When particular language is used in one section of a law, but is omitted in another section of the same law, it is generally presumed that the disparate inclusion or exclusion is purposeful. *See Barnhart v. Sigmon Coal Co.*, 543 U.S. 438, 452 (2002). Two other subsections in §2B1.1(b) include intent requirements; they are: U.S.S.G. §2B1.1(b)(14) ("If . . . . the defendant knew or intended . . . "); §2B1.1(b)(18) ("If . . . . the [defendant's] offense

involved an intent to obtain personal information."). These other sections clearly show that the Commission had no difficulty in including intent requirements directly into the text of §2B1.1(b) when it wanted to do so. As with these other subsections, the fraud table could have plainly stated that the enhancement reached a defendant's "intended loss exceeding $6,500" or was a loss that the "defendant knew or intended" would exceed $6,500. However, the text does not include this intent element.

Moreover, the relevant conduct guideline U.S.S.G. §1B1.3 and the background commentary to §2B1.1 do not create an ambiguity. The Sixth Circuit relied heavily on the relevant conduct guideline §1B1.3 to create an ambiguity in §2B1.1. However, its analysis is flawed. The relevant conduct provision, U.S.S.G. §1B1.3(a)(3) states that defendants are criminally liable for "harms" that "resulted from [their] acts and omissions" and harms that were "the object" of their acts and omissions. *Id*. Notably, (a)(3) does not define "harms," and it does not specify whether the designated harms are included even if they fail to come into existence or even if they were impossible. Nor does the text of (a)(3) purport to define "loss" for any specific guideline. Moreover, (a)(3) must be read within the larger framework of §1B1.3 which includes "reasonable forseeability" principles. Reasonable forseeability is a concept that counsels against "intended loss," because "intended loss" encompasses losses that are nonexistent, impossible, and improbable. Thus "intended loss" is, by definition, not reasonably foreseeable.

In light of these differences between §1B1.3's "harms" and the "intended loss,"

concept, the relevant conduct guideline §1B1.3(a) cannot jettison the plain text of §2B1.1. Moreover, when parsing a specific provision within the backdrop of more generalized provisions, traditional statutory tools, dictate that generalized provisions must give way to more specific provisions to avoid superfluity of specific provisions. *See Radlax Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (applying general/specific cannon to avoid superfluity of specific provisions and preserve "the cardinal rule" to give every clause and word effect.). Thus, §1B1.3(a)(3) cannot supplant 2B1.1(b)(1)'s plain text.

In addition, the Sixth Circuit's attempt to use §2B1.1's background commentary (2B1.1, cmt. background) to bootstrap-in additional commentary (2B1.1, cmt. n.3(A)) is a flawed approach that cannot be condoned through proper statutory construction principles. *See United States v. Kennert*, App.No. 22-1998, 2023 WL 4977456, *5 (6th Cir. 2023) (Murphy, J., concurring; *criticizing United States v. You*, 74 F.4th 378 (July 11, 2023), *cert. pet. dismissed*, 2024 WL 1320323 (March 2024), *citing to Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011)). There is no contextual reason to disregard the plain guideline language of 2B1.1(b)(1).

C. Intended Loss Is Not Within Kisor's "Zone of Ambiguity".

The intended loss concept is also ill-suited to be within the "zone of ambiguity" for purposes of giving §2B1.1 a reasonable interpretation. As applied through *Kisor*, deference to commentary is only possible to cure a guideline if the commentary comes within the "zone of ambiguity" that the court has identified after employing all its

interpretive tools. *Kisor*, 139 S.Ct. at 2415-2416. This means that the commentary must be "within the bounds of reasonable interpretation." *See Kisor*, 139 S.Ct. at 2415-2416. And *Kisor* has indicated that this reasonableness factor is a requirement that commentary "can fail." *See Kisor*, 139 S.Ct. at 2415-2416. With respect to U.S.S.G. 2B1.1(b)(1) and the "intended loss" commentary, this is a requirement that the "intended loss" commentary *does* fail.

Because the concept of "intended loss" under the guidelines encompasses improbable, nonexistent, and impossible losses, it fails to be a reasonable definition of "loss." As noted from the base-line dictionary definitions of "loss," it is clear that the guidelines' concept of "intended loss" is different from what is commonly understood. This is borne out in normal English usage of the word "loss." No English-speaking person would say that "loss" from a fraudulent activity "exceeded $6,500" if that person was attempting to describe what a scammer hoped to – but failed to – accomplish through a fraudulent scheme. *See Kennert*, App.No. 22-1998, 2023 WL 4977456 at *5. Likewise, no English-speaking person would say that "loss" included sums that were impossible to lose. Rather, anyone who heard that a "loss . . . exceeded" a certain amount would presume that the speaker was referring to the actual damage that resulted from the crime. *Id*. That is because the word "loss" when unadorned with qualifying adjectives refers to the actual amount lost, not a nonexistent loss that was impossible, imagined or wished for. *Id*.

Furthermore, the intended loss concept appears to be excluded from the fraud

table's text when the context of the guidelines as a whole is considered. Specifically, intended loss does not fit into the scheme of §2B1.1(b)'s other provisions which contain express intent elements when they are required, and it is the antithesis of "reasonable foreseeability" principles that undergird the relevant conduct guideline §1B1.3.

Rather, "intended loss" is a unique and atypical concept that would not, under normal circumstances, come to mind as a measure of "loss." It is hard to envision that non-existent and even impossible losses can "exceed" some hard, definite, non-imaginary number. The concept of "intended loss" is too far afield from normal conceptions of loss to be silently dropped into the guideline text, and it upsets the balance already struck with other guideline enhancements and principles. There is no linguistic or contextual source that plausibly suggests that loss can mean "intended loss." Therefore, the "intended loss" commentary in Note 3(A) does not come within *Kisor's* "zone of ambiguity," and it should not be accorded deference.

D. The Inclusion of "Intended Loss" is Not Supported by the Commission's Expertise or Considered Judgment.

The commentary Note 3(A) setting out intended loss also fails to meet *Kisor's* last factors as its inclusion is not supported by the Commission's official position, expertise or considered judgment. The "intended loss" concept was not derived from empirical data or the expertise of the Sentencing Commission. In formulating the guidelines, the Commission sifted through historical data related to sentencing

practices in fraud cases. Barry Boss and Kara Kapp, "*How the Economic Loss Guideline Lost Its Way, and How to Save It*," 18 Ohio St. J. Crim. L. 605, 608-09 (Spring 2021) (hereinafter "Boss and Kapp"). However, the Commission unilaterally decided to disregard approximately 50% of that fraud data because it was comprised of fraud cases that resulted in probationary penalties. *Id*. Thus, at the inception of the guidelines, when the Commission ran its calculations for the average fraud sentences, its numbers were detached from the empirical evidence. *Id*. Requiring the loss table to function on "intended loss" concepts that did not capture the actual losses created by the crime, and which included impossible and improbable loss figures further attenuated the loss penalty from the empirical data. Because of the disconnect between the loss enhancement in §2B1.1(b)(1) and the data, commentators have recognized that the loss enhancement penalties – like the drug quantity tables – fall outside the Commission's specialized area of expertise based on empirical data. *Id*. at 613.

* * *

This Court should resolve the Circuit split that exists between the Third and the Sixth Circuit concerning the viability of using "intended loss" in the §2B1.1 fraud loss calculations after *Kisor*. The issue is important because the difference between actual and intended loss is often significant, thus implicating significant liberty interests of defendants. Due to the circuit split, there are unwarranted disparities between the numerous defendants who receive fraud guideline sentences.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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