No. _____

In The

Supreme Court of the United States

BERNARD GADSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kisor v. Wilkie*, the Court clarified that "the possibility of deference [to commentary or agency interpretation] can arise only if a regulation is genuinely ambiguous . . . after a court has resorted to all the standard tools of interpretation." 139 S. Ct. 2400, 2414 (2019). The courts of appeals are deeply divided regarding the deference owed to the commentary of unambiguous Sentencing Guidelines under *Kisor*. Mr. Gadson's sentence was enhanced due to Sentencing Guidelines commentary that expanded the definition of "loss"—an unambiguous term—to include "intended loss." Had Mr. Gadson been in one of the circuits holding that deference to commentary is inappropriate where a Guideline's text is unambiguous, his Guidelines sentencing range would have been two to four levels lower. Indeed, the Third Circuit has already invalidated the Guideline application note that was used to enhance Mr. Gadson's sentence.

The question presented is as follows:

Does deference to the Sentencing Commission's commentary to USSG § 2B1.1, cmt. n.3(A), expanding the meaning of "loss" to include "intended loss," violate the applicable limitations on deference to agency interpretations?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

U.S. Court of Appeals for the First Circuit:

United States v. Gadson, Nos. 22-1444 and 22-1449 (Aug. 9, 2023)

U.S. District Court for the District of Maine:

United States v. Gadson, No. 2:19-cr-122 (May 26, 2022, amended June 1, 2022)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bernard Gadson respectfully prays that this Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit appears at Appendix 1a-15a to the petition and is reported at 77 F.4th 16. App. 1a-15a. The District Court's sentencing pronouncements are unreported. App. 37a-48a.

JURISDICTION

The United States Court of Appeals for the First Circuit issued its judgment on August 9, 2023. App. 1a. On November 1, 2023, Justice Jackson extended the time within which to file a petition to and including January 6, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT GUIDELINES PROVISIONS

USSG § 2B1.1(b) provides an increase in offense level based on the amount of loss, instructing, "If the loss exceeded $6,500, increase the offense level as follows . . . ," ranging from less than $6,500, where

no increase in level is provided, to more than $550,000,000, which provides for a 30 point increase.

Application Note 3 to USSG § 2B1.1 states, "This application note applies to the determination of loss under subsection (b)(1)." Note 3(A) provides the "general rule," which states: "Subject to the exclusions in subdivision (D) [irrelevant here], loss is the greater of actual loss or intended loss." "'***Actual loss***' means the reasonably foreseeable pecuniary harm that resulted from the offense." "'***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

In 2021, Bernard Gadson pleaded guilty in the District of Maine to three crimes: (1) attempted bank fraud, in violation of 18 U.S.C. §§ 2, 1344(2); (2) aiding and abetting aggravated identity theft, in violation of 18 U.S.C. §§ 2, 1028A(1); and (3) criminal contempt, in violation of 18 U.S.C. § 401(3). App. 2a-3a. The facts underlying his plea were summarized by the court:

> Gadson and his coconspirators obtained the names and personal information (including dates of birth and social security numbers) of real individuals, and then used that information to apply for loans for themselves in

> those persons' names, with no intention of repaying the loans. To support the loan applications, Gadson and his coconspirators also created and used fraudulent supporting documents, such as counterfeit driver's licenses, pay stubs, and lease agreements. The specific conduct that formed the basis for the bank fraud and identity theft charges occurred in January 2019.

Id. at 3a.

Gadson's base offense level was seven. USSG § 2B1.1(a)(1). In addition to adding five levels for factors not at issue in this appeal, the court was required to enhance the offense level further based on the amount of "loss." USSG § 2B1.1(b).

The Guideline instructs the court that "[i]f the loss exceeded $6,500," it should enhance the offense level according to the gradations of "loss" amount set out in a table. *Id.* The Guideline itself never mentions "intended" loss—just "loss." But Application Note 3 expands the definition of loss, providing, in pertinent part, that "loss is the greater of actual loss or intended loss." USSG § 2B1.1, cmt. n.3(A). The commentary defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense[,]" and "intended loss" as "(I). . . . 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)." *Id*.

Following the application note and commentary, the district court added twelve levels for an intended "loss" of more than $250,000 but less than $550,000. App. 3a. The intended loss amount included transactions for which no money was ever disbursed and, therefore, was greater than the actual loss amount. Applying the actual loss amount would have justified at most a ten-level increase. App. 3a; *see* Gadson C.A. Br. Add. 31-34 (chart setting out intended versus actual losses).

With the twelve-level enhancement, "the court calculated a total offense level of twenty-seven for bank fraud and criminal contempt, yielding a Guidelines sentencing range of 100–125 months." App. 5a. "The court then imposed a downward-variant sentence of 80 months for those counts, to run consecutively with the mandatory minimum sentence of 24 months for identity theft and a 6-month sentence pursuant to 18 U.S.C. § 3147 for committing a new offense while on pretrial release." App. 5a. Accordingly, the court imposed a final sentence of 110 months in prison, which fell right in the middle of Gadson's Guidelines range for bank fraud. App. 3a, 5a.

The First Circuit affirmed Gadson's sentence. App. 2a. The Court found that the district court did not plainly err in calculating "loss" based on "intended loss." App. 13a.

REASONS FOR GRANTING THE PETITION

This Court should resolve the circuit split and hold that reading "loss" to mean "intended loss," based only on deference to the relevant agency, violates the separation of powers and the rule of lenity.

The district court enhanced Mr. Gadson's sentence based on Sentencing Guidelines commentary that expanded the definition of the unambiguous term "loss" to include sums not lost by anyone. Had Gadson been prosecuted in Pennsylvania or New Jersey and not Maine, his GSR would have been two to four levels lower.

A. Post-*Kisor*, the "winds have changed"[1] and courts may not reflexively defer to Guidelines commentary.

The Sentencing Guidelines are treated as legislative rules, and the commentary is treated as an agency's interpretation of its own legislative rules, meant to "assist in the interpretation and application of those rules." *Stinson v. United States*, 508 U.S. 36, 44-45 (1993). Historically, courts deferred to the Sentencing Commission's interpretation of its own Guidelines in the commentary, as they deferred to other agencies' interpretations of their own regulations.[2] *See*

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[1] *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (Bibas, J., concurring).

[2] *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Company*, 325 U.S. 410 (1945).

id. at 46-47; USSG § 1B1.7. In *Kisor*, however, this Court made clear that a regulation must be "genuinely ambiguous" before the Court will defer to the agency's interpretation. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). If the Guideline or regulation is not genuinely ambiguous, it "just means what it means—and the court must give it effect[.]" *Id*. at 2415. Anything else would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id*. (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

Furthermore, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction" including analyzing "the text, structure, history, and purpose of a regulation[.]" *Id*. If the Court finds genuine ambiguity does exist, the agency's interpretation must still be "reasonable." *Id*.

Since 2019, circuit courts have increasingly acknowledged *Kisor*'s application to the Sentencing Guidelines, prohibiting reliance on commentary that expands unambiguous Guideline text at the expense of liberty. Indeed, the government itself has acknowledged that *Kisor* is the controlling precedent.[3] And multiple circuits have specifically held that the application note at issue here—redefining "loss" to include "intended loss"—is invalid under *Kisor*'s approach. Yet other circuits have adhered to their deferential

[3] *See* Br. in Opp. at 14, *Ratzloff v. United States*, No. 23-310 ("The government has accordingly taken the position . . . that *Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference.").

approach even in the face of *Kisor*, and have refused to consider whether the Guideline term "loss" forecloses the application note's redefinition as "intended loss."

As the Third Circuit held in a similar case, "[o]ur review of common dictionary definitions of 'loss' point to an ordinary meaning of 'actual loss.' None of these definitions suggest an ordinary understanding that 'loss' means 'intended loss.'" *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022). And the Guideline's text says nothing about intended loss—indeed, nothing that would depart from the ordinary meaning of "loss" at all. "That absence alone indicates that the Guideline does not include intended loss." *Id.* at 257; *see also United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (Bibas, J., concurring) ("In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference: agency interpretations might merit deference, but only when the text of a regulation is truly ambiguous.").

More generally, several other circuits have held that *Kisor* applies to the Guidelines and invalidated Guidelines commentary that contradicts the unambiguous meaning of the operative text. For instance, the en banc Eleventh Circuit held that, because the Guideline term "controlled substance offense" was unambiguous, *Kisor* does not permit deference to commentary that expands the definition of a "controlled substance offense" to inchoate offenses. *United States v. Dupree*, 57 F.4th 1269, 1276-79 (11th Cir. 2023); *accord, e.g.*, *United States v. Castillo*, 69 F.4th 648, 657-58 (9th Cir. 2023).

But several circuits continue to hold out.[4] Notably, the Fifth and Tenth Circuits have determined that they will continue to apply *Stinson* deference to Guidelines commentary—not just as a matter of following precedent, but also because they reject the relevant lenity and separation-of-powers concerns on the merits. *United States v. Vargas*, 74 F.4th 673, 697-98 (5th Cir. 2023) (en banc); *United States v. Maloid*, 71 F.4th 795, 805-08, 809-13 (10th Cir. 2023) ("The Commission is neither an executive agency nor strictly limited by the APA. . . . [J]udicial agencies are different. . . ."). And both circuits then expressly applied their deferential view to reject challenges to the intended-loss application note. *United States v. Smart*, No. 22-20409, 2023 WL 6892071, at *1 (5th Cir. Oct. 19, 2023) (challenge to treating intended loss as loss "is foreclosed by our recent decision in [*Vargas*]," which "held that *Kisor*'s less deferential framework does not govern the Guidelines and its commentary"); *United States v. Prince*, No. 23-1225, 2023 WL 6843703, at *4 (10th Cir. Oct. 17, 2023) ("Because we held in *Maloid* that *Kisor* does not apply to Guidelines commentary," that decision "precludes Mr. Prince's argument" about treating intended loss as loss). Thus, there is a square circuit conflict not just on the general question whether *Kisor* applies to the Guidelines, but *on the specific Guidelines commentary at issue here*. There is no realistic possibility that the circuits that have rejected *Kisor*'s

[4] The Fourth Circuit is internally split. The first opinion on the issue, *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022) applies *Kisor*; a panel opinion issued shortly after does not. *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022).

applicability to the Guidelines—especially the Fifth Circuit, which considered the issue en banc—will reconsider its application to *this* Guideline, or any of them.

Deepening the split but not materially adding to the debate, the First, Second, Seventh, and Eighth Circuits have simply continued to apply pre-*Kisor* circuit precedent. App. 11a (citing pre-*Kisor* cases or cases that relied on pre-*Kisor* precedent, which looked to the Guidelines commentary for the definition of "loss"); *United States v. Lewis*, 963 F.3d 16, 22-25 (1st Cir. 2020); *United States v. Wynn*, 845 Fed. Appx. 63, 66 (2d Cir. 2021); *United States v. Tabb*, 949 F.3d 81, 87-88 (2d Cir. 2020); *United States v. Smith*, 989 F.3d 575, 584-85 (7th Cir. 2021); *United States v. Rivera*, 76 F.4th 1085, 1091 (8th Cir. 2023).

As a result, courts of appeals widely acknowledge that the circuits are "fractured" and "split" and that the issue is "hotly debated" at the appellate level. *Maloid*, 71 F.4th at 798, 804 & n.12; *Vargas*, 74 F.4th at 684. And since those decisions were issued, the arguments for leaving the split untouched have only weakened. The government has specifically acknowledged that—contrary to holdings that "*Kisor* does not reach the Sentencing Commission," *Maloid*, 71 F.4th at 805 (boldface and capitals omitted)—"*Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference." Note 3, *supra*. And, as noted, there is now a split about the application of the particular term ("loss") at issue in this case.

Only this Court can resolve the divide.

B. Enhancing a sentence for "intended loss" impermissibly expands the definition of "loss" beyond that contained in the Guideline.

In a case involving forms of theft, fraud, larceny, or embezzlement, the Guidelines establish a base offense level depending on the amount of the "loss" over $6,500. USSG § 2B1.1(b).

The Guideline itself refers only to "loss." It does not mention "actual" or "intended" loss. Only the commentary expands the Guideline by providing that "loss is the greater of actual loss or intended loss." USSG § 2B1.1, cmt. n.3(A).

Because the term "loss" is not ambiguous, "[t]he [Guideline] then just means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. at 2415. "[I]f there is only one reasonable construction of a [Guideline]—then a court has no business deferring to any other reading, no matter how much the [Sentencing Commission] insists it would make more sense." *Id*. Because the plain meaning of "loss" is "actual loss," it is improper to refer to the commentary and expand the meaning of the term.

Alternatively, even if the meaning of the word "loss" is "genuinely ambiguous," the "agency's reading must still be 'reasonable[,]'" and thus "must come within the zone of ambiguity the court has identified

after employing all its interpretative tools." *Id*. at 2415-16.

As discussed, the fraud Sentencing Guideline provides for offense level enhancements if the "loss" exceeds various thresholds, beginning at $6,500. USSG § 2B1.1(b). The commentary then expands the Guideline by providing that "loss is the greater of actual loss or intended loss." USSG § 2B1.1, cmt. n.3(A). The commentary further defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict . . . includ[ing] 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)." *Id*. This definition is unreasonable. Situations where no one suffered a financial loss at all, or where it is impossible that there could be any financial loss, illustrate the difference between "loss" and "intended loss." Thus, a definition of "loss" that includes "intended loss" would not be reasonable. Because the word "intended" appears only in the commentary, and not in the Guidelines text, the commentary expands the Guideline text; it does not interpret it. *Banks*, 55 F.4th at 258 ("Because the commentary expands the definition of 'loss' by explaining that generally 'loss is the greater of actual loss or intended loss,' we accord the commentary no weight."). This is impermissible, and, as in *Banks*, Mr. Gadson was entitled to a resentencing without the intended-loss enhancement. The First Circuit erred in finding otherwise.

C. Deference to commentary when applying unambiguous Guidelines violates the Constitution.

"[D]efining crimes and fixing penalties are legislative, not judicial, functions." *United States v. Evans*, 333 U.S. 483, 486 (1948). The Sentencing Commission, located in the judicial branch, may "promulgate binding Guidelines, which influence criminal sentences, because they must pass two checks: congressional review and 'the notice and comment requirements of the Administrative Procedure Act.'" *Lewis*, 963 F.3d at 28 (Torruella and Thompson, JJ., concurring). The commentary to the Guidelines, however, are not subject to the same requirements.

"The same principles that require courts to ensure that agencies do not amend unambiguous regulations in the guise of 'interpretation' ('without ever paying the procedural cost'), apply with equal (if not more) force to the Sentencing Guidelines and their commentary." *Id.* at 28 (Torruella and Thompson, JJ., concurring) (cleaned up). "If it were otherwise, the Sentencing Commission would be empowered to use its commentary as a Trojan horse for rulemaking. This it is surely not meant to do, especially when the consequence is the deprivation of individual liberty." *Id*. (cleaned up). *Cf. Kisor*, 139 S. Ct. at 2440-41 (Gorsuch, J., concurring) (under *Auer* and *Stinson* deference, "there is no fair hearing and no need for the agency to amend the regulation through notice and comment . . . the agency's failure to write a clear regulation winds up increasing its power, allowing it to both write and

interpret rules that bear the force of law—in the process uniting powers the Constitution deliberately separated and denying the people their right to an independent judicial determination of the law's meaning").

The concurring justices in *Lewis* indicated that relying on commentary to enhance prison sentences "raises troubling implications for due process, checks and balances, and the rule of law." *Lewis*, 963 F.3d at 28 ("By relying on commentary to expand the list of crimes that trigger career-offender status, which may well lead judges to sentence many people to prison for longer than they would otherwise deem necessary (as the district judge indicated was the case here), our circuit precedent raises troubling implications for due process, checks and balances, and the rule of law.").

That is precisely what happened here. The Sentencing Guideline refers simply to "loss." The commentary expands that definition beyond the plain meaning—actual loss—to encompass intended loss as well. Here, the intended loss far exceeded actual loss, so the commentary effectively increased Gadson's sentence by two to four levels based on an unreasonable interpretation of the Guideline, a practice the Supreme Court prohibited in 2019, three years before Mr. Gadson's sentencing.

"*Kisor* warned against judicial apathy regarding 'the far-reaching influence of agencies and the opportunities such power carries for abuse.' . . . These concerns are even more acute in the context of the

Sentencing Guidelines, where individual liberty is at stake." *Campbell*, 22 F.4th at 446 (internal citation omitted). "[A] holding that 'the commentary can . . . add to [the Sentencing Guidelines'] scope' would 'allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty." *Id.* (quoting *United States v. Nasir*, 982 F.3d 144, 159 (3d Cir. 2020), aff'd on remand, 17 F.4th 459 (3d Cir. 2021)). *See also Castillo*, 69 F.4th at 663-64 ("the Sentencing Commission's lack of accountability in its creation and amendment of the commentary raises constitutional concerns when we defer to commentary . . . that expands unambiguous Guidelines, particularly because of the extraordinary power the Commission has over individuals' liberty interests").

D. This Court must step in and provide clarity.

The circuit split regarding deference to Sentencing Guidelines commentary is deep and irreconcilable, and the judges of the courts of appeals need guidance from this Court. *See Vargas*, 74 F.4th at 703 (Elrod, J., dissenting) ("We would benefit from further guidance in this area."); Order, *United States v. Moses*, No. 21-4067, at 6 (4th Cir. 2022) (Niemeyer, J., supporting denial of rehearing en banc) ("we would welcome the Supreme Court's advice on whether *Stinson* or *Kisor* controls the enforceability of and weight to be given Guidelines commentary, an issue that could have far-reaching results"); *see also Dupree*, 57 F.4th at 1286 (Grant, J., concurring in the judgment) (the relevant stare decisis

considerations "should be weighed by the Supreme Court").

The Sentencing Guidelines "assist federal courts across the country in achieving uniformity and proportionality in sentencing." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018). But Gadson's sentence is overly harsh when compared to similarly situated offenders (i.e., defendants who were sentenced after the *Kisor* decision and whose sentence turned on the definition of "loss"), as in *Banks*, and undermined the Guidelines' interest in uniformity and proportionality.

Finally, the fact that this argument involves a defendant's liberty interest matters. "To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake." *Barber v. Thomas*, 560 U.S. 474, 503 (2010) (Kennedy, J., dissenting). "'[A]ny amount of actual jail time' is significant, . . . and 'ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration[.]'" *Rosales-Mireles*, 138 S. Ct. at 1907 (internal citations omitted).

As this Court observed, "the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.'" *Id*. at 1908, quoting Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake

Forest L. Rev. 211, 215–216 (2012). The disparate treatment of the Sentencing Guidelines commentary between circuits undermines the consistency and fairness of the justice system and results in different treatment of defendants who are meant to be treated similarly. This Court must clarify that commentary may not be permitted to expand unambiguous Sentencing Guidelines. Where a Sentencing Guideline is unambiguous, it violates due process and separation of powers principles to enhance a defendant's sentence based on commentary that expands the reach of the Guideline.

E. Gadson is entitled to relief.

Like some other circuits, the First Circuit here reasoned that Gadson could not establish error that is "plain" because the First Circuit itself has not yet held that the "intended loss" note is unambiguously foreclosed by the text. But any holding by this Court would entitle Gadson to relief. That is because an error is "plain" if it is apparent "at the time of review." *Henderson v. United States*, 568 U.S. 266, 273-77 (2013); *accord Johnson v. United States*, 520 U.S. 461, 468 (1997) ("'plain' at the time of appellate consideration"). Even if the First Circuit had contrary precedent that this Court then overruled, the district court's error would still be "plain" on that basis. *Henderson*, 568 U.S. at 273-74. The government's brief in the court of appeals relied extensively on the "plain"ness prong, but neither the government nor the First Circuit disputed or even addressed *Henderson*'s holding that a timely

decision by this Court would render the law "plain" in the relevant sense. And, importantly, neither the government nor the First Circuit suggested that any other prong of the plain-error standard would bar Gadson from obtaining relief. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) ("When a defendant is sentenced under an incorrect Guidelines range . . . the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error" for plain-error purposes.).

Even if this Court were to conclude that Gadson's case is not a suitable vehicle, it should, at a minimum, hold the petition pending disposition of the other petitions raising the same issue. Given the "fractured" circuits, it is likely that the Court will grant one of the available petitions in the near future. The petition in *Ratzloff v. United States* is set for consideration at the January 5, 2024 conference at the time this petition is being sent to the printer; the forthcoming petition in *You v. United States* (*see* No. 23A474) will apparently raise the same issue. A plenary decision applying *Kisor* to the Guidelines plainly would entitle Gadson to a GVR and reconsideration by the First Circuit.

It is also possible that this Court's decisions speaking to agency deference on statutory questions in *Relentless, Inc. v. Department of Commerce*, No. 22-1219, and *Loper Bright Enterprises, Inc. v. Raimondo*, No. 22-451, will be relevant to the application of deference in the sentencing context as well. *Cf. Kisor*, 139 S. Ct. at 2415 (referring to *Chevron* as taking "the

same approach for ambiguous statutes"). The Court therefore may wish to hold the petition pending those decisions as well.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's consideration of other relevant cases, and then disposed of as appropriate in light of the Court's decision.

Respectfully submitted,

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