NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL FOREMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the administrative law principles articulated in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), limit the deference owed to the United States Sentencing Commission's commentary on the Sentencing Guidelines?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Russell Foreman, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on February 12, 2024.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Foreman*, No. 22-1255, 2024 WL 548644 (10th Cir. 2024) appears in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction in this criminal case under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The circuit entered judgment on February 12, 2024. (Appendix at A1.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

U.S.S.G. § 2B1.1(b)(1) provides an increase in offense level based on gradations of the amount of loss, instructing that "[i]f the loss exceeded $6,500, increase the offense level as follows . . . ", providing a table with loss amounts ranging from less than $6,500, where no increase in offense level is provided, to, as relevant here, an increase of 12 offense levels if the loss is between $250,000 and $550,000, and an increase of 14 offense levels when the loss is between $550,000 and less than $1,500,000.

Application Note 3 to U.S.S.G. § 2B1.1 currently provides that "[t]his application note applies to the determination of loss under subsection (b)(1). Note 3(A) then provides the "general rule" applicable here, which states, in pertinent part:

> "Subject to the exclusions in subdivision (D) [not relevant 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

Petitioner Russell Foreman pleaded guilty to wire fraud and money laundering, violations of 18 U.S.C. § 1343 and § 1957 respectively, in relation to fraudulently obtaining COVID-19 pandemic relief funds. Under the relevant Sentencing Guideline, U.S.S.G. § 2B1.1, Mr. Foreman's base offense level was seven, but the court also was required to enhance that level based on the amount of "loss." § 2B1.1(a)(1), (b)(1). Specifically, the Guideline instructs the court that "[i]f the loss exceeded $6,500," it should enhance the offense level according to an escalating table of loss. *See* § 2B1.1(b)(1).

The Guideline itself speaks only of the amount of "loss" that the offense involved. The commentary to the Guideline, however, goes further, expanding the definition of loss to include, in pertinent part, that "loss is the greater of actual loss or intended loss." U.S.S.G. § 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.*

At sentencing here, the key issue was the amount of "loss." The parties agreed that Mr. Foreman had received $367,552.00, and advocated that he should received a 12-level increase, because that amount was between $250,000 and $550,000. *See* 2B1.1(b)(1)(H). The district court, however, disagreed. It observed that § 2B1.1's commentary included "intended" loss in its definition of "loss," and reasoned that because Mr. Foreman *also* submitted fraudulent applications for another $220,000.00, which were never paid, he had intended a total loss to the government of $587,552.00. That calculation corresponded to a higher, 14-level increase.

Mr. Foreman objected to the court's reliance on the commentary's "intended loss" theory based on *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). He explained that while courts historically deferred to the guidelines commentary "unless it [was] plainly erroneous or inconsistent with the regulation," *Stinson v. United States*, 508 U.S. 40-41 (1993), this was no longer so. Rather, in *Kisor*, the Supreme Court limited the deference afforded to an agency's interpretation of its own regulation, explaining that a court's deference is unwarranted "unless the regulation is genuinely ambiguous," and even then, deference was only permissible if the regulation fell within the "zone of ambiguity" identified by the court. 139 S. Ct. at 2415-16. Thus, he argued, *Kisor* requires an ambiguity in the guidelines before a court may even *begin* to consider resorting to the commentary.

Moreover, Mr. Foreman observed, the word "loss" as used in § 2B1.1 was not ambiguous at all—it meant what the SBA *actually lost*, $367,552. By defining "loss" as "the greater of actual loss *or intended* loss," § 2B1.1 cmt. n.3 (emphasis added), therefore, the commentary "impermissibly expand[ed] the Guideline text" to include "a wildly counterintuitive definition of the word 'loss.'" Mr. Foreman further urged that even *if* some ambiguity existed, deference to the commentary was improper because it was not a reasonable interpretation of the guidelines. Accordingly, he argued, under *Kisor* his offense level turned on what the government *actually* lost.

The court overruled the objection for two reasons. First, the court held that *Kisor*'s framework did not apply to the Sentencing Guidelines. Second, even if *Kisor* applied, the court believed the term "loss" in § 2B1.1 was ambiguous, and, therefore, concluded that "it is appropriate for the Commission to say what it means[.]" With the court's *intended* loss calculation included, Mr. Foreman's guideline range increased to 63 to 78 months, rather than the 51 to 63 months that applied based on the money ($367,552) the government *actually* lost. The district court sentenced Mr. Foreman to 66 months' incarceration.

Mr. Foreman appealed. In briefing, both he (Opening Br. at 6-10) and the government (Answer Br. at 11-15) agreed that *Kisor*, provided the analytical framework for his challenge to the Sentencing Guidelines' commentary to U.S.S.G.

§ 2B1.1(b)(1). Their dispute was again whether that commentary, specifically note 3, which defines the term "loss" as used in § 2B1.1(b)(1) to include the concept of "intended loss," warranted deference under *Kisor*'s framework. (Opening Br. at 10-15; Answer Br. at 15-29.)

While his case was pending, however, the Tenth Circuit reached a different conclusion about the framework governing such challenges. Specifically, in *United States v. Maloid*, the circuit held that *Kisor* does not extend to Guidelines commentary. 71 F.4th 795, 808-09 (10th Cir. 2023). Rather, the court explained, the standard announced in *Stinson v. United States*, 508 U.S. 36 (1993), continues to control. *Id.* at 798, 813-14. That is, Guidelines commentary governs unless it either "runs afoul of the Constitution or a federal statute or is plainly erroneous or inconsistent with the guideline provision it addresses." *Id.* at 798. That decision deepened a circuit split on the question of whether *Kisor* applies to the Sentencing Guidelines.

Because Mr. Foreman's claim turned on application of *Kisor*, he acknowledged that *Maloid* foreclosed his appeal. He pressed his challenge for preservation purposes, and the circuit issued a short opinion, affirming that *Maloid* barred his *Kisor* claim, and, accordingly, upholding his sentence. (Appendix at 1-3.) This petition follows.

REASONS FOR GRANTING THE WRIT

The Court should resolve the now-entrenched circuit split regarding *Kisor*'s application to the Sentencing Guidelines.

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. *See id.* at 46-47. 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.* (citation omitted).

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 considered *Kisor's* application to the Sentencing Guidelines. Many, relying on *Kisor*, have prohibited district courts from relying on commentary that expands unambiguous Guideline text, including specifically the application note at issue here—note 3(A)'s (re)defining of "loss" to include "intended loss." For example, 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, or about anything that would warrant departure from the ordinary meaning of "loss" at all. "That absence alone indicates that the Guideline does not include intended loss." *Id.* at 257.

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).

In contrast, the Fifth and Tenth Circuits have held that they will continue to apply *Stinson* deference to Guidelines commentary. *See 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). Based on those decisions, both circuits also have then rejected challenges to the intended-loss application note at issue here. *See 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 [defendant's] argument" about treating intended loss as loss).

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. *See 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).

All told then, there is a clear circuit conflict not just on the general question whether *Kisor* applies to the Guidelines, but also on the specific Guidelines commentary at issue here. The split is pronounced and fully developed, and there is no chance it will resolve on its own. Because not only is there a split, but three courts of appeals have decided the issue *en banc*, and those *en banc* decisions themselves have *also* reached conflicting positions. *Compare, e.g.*, *United States v. Dupree*, 57 F.4th 1269, 1275-76 (11th Cir. 2023) (en banc) (concluding that *Kisor*'s limitations apply in deciding whether to defer to guidelines commentary); *United States v. Nasir*, 17 F.4th 459, 470-72 (3d Cir. 2021) (en banc) (same) *with United States v. Vargas*, 74 F.4th 673, 681-85 (5th Cir. 2023) (en banc) (concluding *Kisor* does not apply to the guidelines).

Put simply, this Court must step in and provide clarity. Indeed, judges of the courts of appeals have called for guidance from this Court. *See Vargas*, 74 F.4th at 703 (Elrod, J., dissenting) ("We would benefit from further guidance in this area."); *Dupree*, 57 F.4th at 1286 (Grant, J., concurring in the judgment) (the relevant stare decisis considerations "should be weighed by the Supreme Court").

This Court's intervention is also warranted because the issue is important. The 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 had Mr. Foreman been prosecuted in Philadelphia rather than Denver, his recommended sentence would have been a year lower on the bottom end of the guideline range (51 months, compared to 63 months). This inconsistency starkly undermines the Guidelines' interest in uniformity and proportionality, and, as here, can significantly impact the sentence a defendant receives. *See id.* at 1907 (noting that "any 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"') (internal citations omitted).

And while the Sentencing Commission theoretically could address this broad circuit split, that theoretical possibility does not counsel denial of certiorari under the particular circumstances of this case. In *Braxton v. United States*, this Court observed that Congress "contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." 500 U.S. 344, 348 (1991). This, the Court suggested, "might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts." *Id.*

For two reasons, this general rule abstention is ill-suited the question presented here. First, the question turns not on the meaning of any particular guideline, per se, but on which of this Court's two cases, *Stinson* or *Kisor*, provide the appropriate framework for evaluating Guidelines' commentary. This Court, not the Sentencing Commission, is the proper forum to make that decision.

Second, to date, the Commission's efforts to address *Kisor*'s impact on the guidelines in some circuits have been targeted at a handful of specific guidelines on which the courts have splintered, not a wholesale approach to how other guidelines and their commentary should be approached. This includes, for example, a currently-pending amendment to move the definition of "loss" from the commentary to the text of § 2B1.1(b)(1). *See* U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines*, April 30, 2024 at 6 (eff. Nov. 1, 2024). While that proposed change would resolve the split at issue here by making the definitions part of the Guideline itself, it does not answer the larger question of *Kisor*'s application to the Guidelines, nor does it address the disparities in sentencing that have already resulted in the years since *Kisor*, including those sentences of individuals like Mr. Foreman whose cases remain on direct appeal. Accordingly, because the Commission has not systemically addressed the question underlying this important circuit split, and in many ways cannot resolve the question at the heart of

this split, any presumption of abstention should not govern here. *See Early v. United States*, 502 U.S. 920, 920 (1991) (White, J., dissenting from the denial of certiorari) (suggesting that *Braxton*'s presumption against certiorari is inapplicable where "[t]he United States Sentencing Commission has not addressed [a] recurring issue" that has divided the circuits).

And while Congress charged the Sentencing Commission with periodically reviewing and revising the Guidelines, it also imposed a duty on the courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This Court has recently reaffirmed that important function, and the intolerability of sentencing approaches that undermine the purposes of the Sentencing Reform Act and Sentencing Guidelines "to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences." *Hughes v. United States*, 584 U.S. 675, 688 (2018). It should, accordingly, grant review here to bring clarity and consistency to this important area of federal sentencing law.

* * *

The district court enhanced Mr. Foreman's sentence based on Sentencing Guidelines commentary that expanded the definition of the unambiguous term

"loss" to include amounts not actually lost by anyone. This result accorded solely due to the Tenth Circuit's precedent concluding that *Kisor* does not apply to the Sentencing Guidelines, and definitively would not have occurred in, for example, the Third Circuit. As noted, the courts of appeals have widely acknowledged that the circuits are "fractured" and "split" and that the general issue of *Kisor*'s application to the Guidelines is "hotly debated" at the appellate level. *Maloid*, 71 F.4th at 798, 804 & n.12; *Vargas*, 74 F.4th at 684. Only this Court can resolve the divide, and it should grant review in this case to do so.

CONCLUSION

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

Respectfully submitted,

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