No. 24-

IN THE

Supreme Court of the United States

GLENN E. DIAZ,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether a district court can completely bar defense counsel from cross-examining a key government witness on an issue probative of bias and motive.

2. Whether this Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) implicitly overruled its earlier decision in *Stinson v. United States*, 508 U.S. 36 (1993), in which the Court held that Commentary in the Sentencing Guidelines is to be considered "authoritative" when interpreting ambiguous guidelines.

1. The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED CASES

United States of America v. Glenn E. Diaz, No. 23-30751, United States Court of Appeals for the Fifth Circuit. Judgment on Petition for Rehearing entered on March 11, 2025.

United States of America v. Glenn E. Diaz, No. 23-30751, United States Court of Appeals for the Fifth Circuit. Judgment on Appeal entered on January 21, 2025.

United States of America v. Glenn E. Diaz, et al, No. 2:2-CR-179-1, United States District Court for the Eastern District of Louisiana. Amended judgment of conviction and sentence entered on January 29, 2024.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Glenn E. Diaz respectfully petitions this Honorable Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming Glenn Diaz's conviction and sentence.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not reported but is attached at App. 1a. The judgment of the Court of Appeals for the Fifth Circuit denying rehearing *en banc* is not reported but is attached at App. 4a.

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Louisiana had jurisdiction over the criminal proceedings pursuant to 28 U.S.C. § 3231. The Court of Appeals for the Fifth Circuit had jurisdiction over Diaz's appeal pursuant to 28 U.S.C. §§ 1291 and 1294. That court denied Diaz's petition for rehearing *en banc* on March 11, 2025. This petition for a writ of *certiorari* is therefore timely, and this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;. . . .

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

> No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

1. Introduction

Glenn Diaz was one of fourteen defendants prosecuted for bank fraud in conjunction with 2017 failure of the First NBC Bank (FNBC) of New Orleans. Diaz and his two co-defendants were the targets of the last of seven separate prosecutions. All three were convicted following a jury trial in April, 2023. In October 2024 Diaz was sentenced to 87 months imprisonment, and subsequently ordered to pay $850,055.92 in restitution.

Diaz's appeal to the Fifth Circuit Court of Appeals raised the Constitutional Confrontation Clause issue presented in this petition, as well as the Sentencing Guidelines issue. While that appeal was pending, this Court handed down its opinion in *Loper Bright*

Enterprises, et al. v. Gina Raimondo, Secretary of Commerce, et al., 603 U.S. 369 (2024). Diaz promptly supplemented his briefs with a letter in accordance with FRAP 28j to bring that opinion to the attention of the Court of Appeals. The 28j letter argued that *Loper Bright* changed the standard regarding the judicial deference to be given to Commentary in the Sentencing Guidelines, and that the Commentary no longer controlled. Oral argument was granted and held on November 4, 2024.

On January 21, 2025, a panel of that Court affirmed Diaz's conviction and sentence in an unpublished opinion, consisting of less than two full pages of text. A petition for rehearing, and rehearing *en banc* was timely filed. It was denied on March 11, 2025.

STATEMENT OF FACTS

A. Facts Relevant to the Confrontation Clause Issue

1. The prosecution of Glenn Diaz

The Government prosecuted Glenn Diaz for conspiracy[2] to commit bank fraud[3], substantive counts of bank fraud[4], and conspiracy to commit money-laundering.[5] The indictment alleged that Diaz, Peter Jenevein, and Mark Grelle submitted false documents to FNBC—false because the documents misrepresented that funds had

2. 18 U.S.C. §1349.

3. 18 U.S.C. § 1344(2).

4. 18 U.S.C. § 1344(2).

5. 18 U.S.C. § 1956(a)(1)(B)(i).

been or were going to be used on Diaz's Florida warehouse. Purportedly this caused FNBC to honor the overdraft checks described in the Government's indictment. The indictment further alleged that Diaz, Jenevein, and Grelle conspired to conduct financial transactions involving the proceeds from the alleged bank fraud. Diaz and his co-defendants pled not guilty and proceeded to trial on April 17, 2023.

2. Diaz's trial and the testimony of William "Bill" Bennett

At trial, Diaz contended he did not know his co-defendant (Jenevein) submitted false statements to FNBC, that the false statements were not "material" to FNBC, nor did they "cause" FNBC to honor the overdraft checks, *i.e.* the statements were not the "means" by which Diaz obtained FNBC's monies. *See* 18 U.S.C. § 1344(2). The question of *why* FNBC honored the overdrafts was therefore critical to both the prosecution and Diaz's defense.

The prosecution presented only one witness purporting to have personal knowledge as to why FNBC honored the overdrafts: former FNBC banker William "Bill" Bennett. Bennett testified, at least eighteen (18) times, that certain representations were "significant" or "relied" upon by the bank. During closing argument, the prosecution emphasized Bennett's importance on this issue:

> "[Defense counsel] [t]alked about whether or not Mr. Bennett mattered. Mr. Bennett. The banker. They wanted to hear from everyone up the chain at the bank. Ask yourself how many

> more bank employees did you need to hear from and sit and listen to to hear that this was important to them, because . . . Mr. Bennett explained over and over these were important"

Bennett's testimony provided a critical link for the prosecution's argument that the representations at issue were both "material" to FNBC and the "means" by which the defendants obtained FNBC's monies.

Diaz sought to challenge Bennett's testimony, in part, by demonstrating Bennett's bias and motive for testifying for the prosecution. On cross-examination, Bennett acknowledged multiple instances in which he failed to disclose, on FNBC's internal records, that loan proceeds were being used to pay FNBC interest on Diaz's other loans, *i.e.* the bank was paying itself profit from Diaz's loans. Bennett characterized such omissions as simply "an error."

But unbeknownst to the jury, the same prosecutors for whom Bennett was testifying had recently prosecuted and convicted two of Bennett's FNBC colleagues, William Burnell and Robert Calloway, for, *inter alia*, concealing that loan proceeds were being used to pay the borrower's other loans—what Bennett had just admitted to doing in Diaz's case.

Diaz's counsel approached the bench and notified the district court that he intended to question Bennett on his knowledge of his colleagues' prosecutions, arguing it "goes to [Bennett's] bias, if he is trying to please the government" and "keep himself out of hot water and in the government's good graces."

The government objected to this line of questioning and the district court sustained the objection, ruling: "I'm not going to allow it. I think you have spent a great deal of time crossing him [Bennett] on the failure to include that [information]. I think that's sufficient. Thank you." In effect, the court limited cross-examination to the fact that Benett omitted information from loan documents and excluded any follow-up questioning designed to show that Bennet was at risk of being prosecuted for the omissions and therefore, biased in favor of the prosecution.

In his appeal, Diaz argued the district court violated his Sixth Amendment right to cross-examination by preventing him from questioning Bennett on issues tending to show bias or motive and that this error was not harmless.

The panel's opinion resolved the Constitutional issue in one sentence, citing to the district court's discretionary authority under the Federal Rules of Evidence: "The district court justifiably limited the extent to which [Diaz] could cross-examine William Bennett. *See* Fed. R. Evid. 403."

A. Facts Relevant to the *Loper Bright* Issue

1. The factual source of the issue

Of the thirteen defendants convicted of fraud in the seven FNBC prosecutions, only one received a longer sentence than Glenn Diaz—Ashton Ryan, the president of FNBC. This is true even though Glenn Diaz had the lowest "loss" amount of any defendant—by many millions of dollars. This is because the district court used "intended

loss" instead of "actual loss" to determine Diaz's offense severity level under the loss table found at § 2B1.1(b)(1) of the Sentencing Guidelines.

The district court relied upon Application Note 3(A) of the then-applicable version of the guideline,[6] which called for a sentencing court to use the "General Rule" that "Subject to the exclusions in subdivision (D), **loss is the greater of actual loss or intended loss."** (emphasis added).

Diaz unsuccessfully challenged the use of "intended loss" in the district court, and in his appeal Diaz again contended that that "loss" as used in the Sentencing Guidelines must mean actual loss, *i.e.*, that the Commentary's directive should not be given any weight, because the term "loss" was not ambiguous.

At oral argument in the Fifth Circuit, counsel for Diaz first argued that a new trial was warranted because Diaz's Sixth Amendment rights had been violated. With regard to the second issue, counsel conceded[7] that the panel had to treat the Sentencing Guidelines Commentary as "authoritative," because of the Fifth Circuit's *en banc* opinion in *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023)(*en banc*). However, counsel asserted that this

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6. At the time Glenn Diaz was sentenced, Application Note 3(A) of § 2B1.1(b)(1) of the Sentencing Guidelines called for a sentencing court to use the "General Rule" that "Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss."

7. The opinion of the Fifth Circuit erroneously describes counsel's position as a "waiver" of the issue. As the recording of oral argument makes clear, it was most certainly not a waiver.

Court's decision in *Loper Bright* required the Fifth Circuit to reconsider its decision in *Vargas*; or alternatively, that *Loper Bright* called for this Court to reconsider its decision in *Stinson v. United States*, 508 U.S. 36 (1993). Because the Court of Appeals rejected the first proposal, counsel is now seeking review by this Court.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's resolution of the confrontation clause issue in this case is not only contrary to Supreme Court precedent, but it sanctions a significant departure from the accepted and usual course of proceedings by a lower court, so as to call for an exercise of this Court's supervisory power.

Over nearly a century, this Court has repeatedly affirmed a defendant's right to *some* opportunity to cross-examine a witness on the issue of bias. The Court has made equally clear that, although trial courts enjoy discretion in limiting cross-examination, that discretion cannot be used to exclude *all* inquiry into a witness' potential bias.

In *Alford v. United States*, the Court held that a trial court must allow some cross-examination of a witness to show bias. *Alford v. United States*, 282 U.S. 687 (1931). The Court recognized that "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court." *Id.* at 694. Still, the Court held that the trial court abused its discretion[8]

8. Although the Court reversed in *Alford* based on an abuse of discretion and prejudicial error, the Court subsequently emphasized

by "cut[ting] off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination," emphasizing the defendant "was entitled to show by cross-examination that [the witness'] testimony was affected by fear or favor growing out of his detention." *Id.* at 693-94.

In *Davis v. Alaska*, the Court held that the Sixth Amendment's Confrontation Clause ensured the defendant's right to show bias on the part of a prosecution witness. *Davis v. Alaska*, 415 U.S. 308 (1974). The Court reaffirmed that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination"; *Id.* at 315 (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)); and that "the exposure of a witness' motivation in testifying is a proper and important function" of this right. *Id.* at 316-17 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). Consistent with these principles, the Court held that defense counsel must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318.

Years later, in *Delaware v. Van Arsdall*, the Court reaffirmed *Davis*, holding that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could

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that "the constitutional dimension of our holding in *Alford* is not in doubt." *Davis v. Alaska*, 415 U.S. 308, 318 n.6 (1974) (citing *Smith* v. *Illinois*, 390 U.S. 129, 132-133 (1968)).

appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (quoting *Davis*, 415 U.S. at 318; ellipsis in original). As in *Alford*,[9] the Court acknowledged that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits"[10] on "defense counsel's inquiry into the potential bias of a prosecution witness." *Id.* at 679. But again, the Court emphasized that such discretion does not justify excluding all questioning into a potential source of bias or motive for testifying, holding that a trial court's "prohibit[ing] *all* inquiry" and "cutting off all questioning about an event . . . that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony . . . violated respondent's rights secured by the Confrontation Clause." *Id.* (emphasis in original)

The district court's exclusion of all questioning into Bennett's potential bias stands in direct contravention of these precedents. The questions Diaz's counsel sought to ask were undoubtedly relevant to the issues of Bennett's bias and motive for testifying. Bennett's being at risk of prosecution by the very individuals for whom he was testifying constituted a "prototypical form of bias" that Diaz was Constitutionally entitled to explore so as "to expose to the jury the facts from which jurors . . . could

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9. *See Alford*, 282 U.S. at 694.

10. Notably, the trial court in *Van Arsdall* relied on Delaware Rule of Evidence 403 in excluding the line of questioning. *Id.* at 676. This Court recognized that rule was "virtually identical" to Federal Rule of Evidence 403—the rule the Court of Appeals cited as justification for excluding Diaz's proposed line of questioning. *See Id.* at 676, n.2.

appropriately draw inferences relating to the reliability of [Bennett].'" *See Van Arsdall*, 475 U.S. at 680; *see also Alford*, 282 U.S. at 693 ("petitioner was entitled to show by cross-examination that [the witness'] testimony was affected by fear or favor . . . ").

Without being able to probe Bennett's knowledge of the fact that his former colleagues had been prosecuted for the same acts he admitted to doing, Diaz's "counsel was unable to make a record from which to argue *why* [Bennett] might have been biased or otherwise lacked the degree of impartiality expected of a witness at trial." *Davis*, 415 U.S. at 318 (emphasis in original). By prohibiting "*all* inquiry" and "cutting off all questioning" into Bennett's knowledge of his colleague's prosecutions, the district court "violated [Diaz's] rights secured by the Confrontation Clause." *See Van Arsdall*, 475 U.S. at 679 (emphasis in original). The district court's exclusion of this line of questioning constituted a significant departure from this Court's well-established precedents.

The Court of Appeals departed even further from these precedents by citing to a trial court's discretionary authority under the Federal Rules of Evidence as justification for the district court's curtailment of Diaz's right to cross-examination. This Court, however, made clear in *Alford* and *Van Arsdall* that the district court's discretionary authority does not permit excluding *all* inquiry and *all* questioning into issues tending to show a witness' bias or motive for testifying. *See Alford*, 282 U.S. at 694; *Van Arsdall*, 475 U.S. at 679. But the ruling of the Court of Appeals turns this Court's well-established precedent on its head, effectively determining that a defendant's right to cross-examination yields entirely to

the discretion of a trial court. Review by this Court is necessary to correct this Constitutional error.

2. There is an irreconcilable conflict in the Circuits regarding the judicial deference to be given to the Commentary to the United States Sentencing Guidelines. Not only are the Circuits divided at the circuit level, but individual circuits are internally divided, as is illustrated by the Fifth Circuit's *en banc* decision in *United States v. Vargas*. The confusion in the Circuits has only increased since this Court's decision in *Loper Bright*. Thus the question of whether the Commentary in the Sentencing Guidelines should continue to be treated as "authoritative" by the district courts is an important question that has not been but should be settled by this Court.

A. Introduction

In 1984, the this Court handed down its decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), creating a judicial doctrine that came to be known as "*Chevron* deference." In the words of the Court, the doctrine was defined thusly: "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013).

Nine years after *Chevron*, this Court handed down its opinion in *Stinson v. United States*, 508 U.S. 36 (1993), in which it held that commentary in the Sentencing Guidelines is to be considered "authoritative [by a federal

court] unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." While the Supreme Court found "inapposite an analogy to an agency's construction of a federal statute that it administers," citing *Chevron*, it did agree that the "commentary [should] be treated as an agency's interpretation of its own legislative rule." *Stinson, supra*, p. 44, 45.

But *Chevron* and *Stinson* antedate *United States v. Booker*, 543 U.S. 220 (2005) and *Kisor v. Wilkie*, 588 U.S. 558 (2019). And while a number of circuit courts have found that *Kisor* weakened the deference to be given to the Commentary's interpretation of the Sentencing Guidelines,[11] the Fifth Circuit is not among them. As that court made clear in its *en banc* opinion in *United States v. Vargas*:

> Some of our sister circuits contend the Supreme Court replaced *Stinson*'s highly deferential standard with a less deferential one in *Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 204 L.Ed.2d 841 (2019). Others disagree and continue to apply *Stinson.* We agree with the second group. *Stinson* sets out a deference doctrine distinct from the one refined by *Kisor.* Until the Supreme Court overrules *Stinson*, then, our duty as an inferior court is to apply it faithfully.

11. *See United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (*en banc*); *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); and *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (*en banc*).

United States v. Vargas, 74 F.4th 673, 678 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 828 (mem) (2024).

However, as Judges Oldham and Jones noted in their concurring opinion in *Vargas*, " . . . the *Booker* Court held that the Guidelines were *not* binding on federal courts. *See* 543 U.S. at 245. So if we were free to predict what the Supreme Court would do today, one might reasonably guess that *Stinson* would fall." *Vargas, supra*, p. 699. Tellingly, these judges ended their concurrence as follows:

> Post-*Booker*, the world is topsy-turvy. The Sentencing Guidelines are not binding, but the commentary is. The Federal Rules are binding, but the Advisory Committee's notes are not. Regardless, until the Supreme Court overrules *Stinson*, we are bound to follow it.

United States v. Vargas, *supra*, p. 701.

To put Diaz's argument most concisely: if *Booker* and *Kisor* weakened the judicial deference to be given to agency determinations, and to the Commentary to the Sentencing Guidelines, *Loper Bright* eliminated it completely. As every judge in the *Loper Bright* majority noted, the interpretation of ambiguous statutes is a task the Constitution assigns to Article III judges, and any reallocation of that task "violates our Constitution's separation of powers. . . ." *Loper Bright, supra*, p. 413, Thomas, J., concurring.

Although the United States Sentencing Commission is "an independent commission in the judicial branch. . . ." 28 U.S.C. § 991(a), and judges sit on the commission, they do

not do so in their Article III capacity, adjudicating "Cases" or "Controversies." In short, as the Supreme Court said in *Mistretta v. United States*, 488 U.S. 361, 384 (1989), "[t]he Sentencing Commission unquestionably is a peculiar institution within the framework of our Government."

But ultimately, it is a commission, not a judge, and its pronouncements on ambiguous statutes should no longer be given any judicial deference. A grant of *certiorari* is appropriate here, if only to eliminate the confusion that now reigns in the lower courts.

B. The Circuits are divided on this issue

As can be seen from even a cursory review of two recent relevant circuit court decisions, there is much disagreement regarding the extent to which *Loper Bright* undermined the holding in *Stinson*.

In *United States v. Poore*, the Seventh Circuit rejected the defendant's argument that after *Loper Bright, Stinson* was no longer good law:

> Poore now asserts that [*United States v.*] *White*'s [97 F.4th 532 (7th Cir. 2024)] decision to continue applying *Stinson* (i.e., deferring to the Commission's commentary) is inconsistent with *Loper Bright*'s teachings. He does not contend that *Loper Bright* implicitly overruled *Auer* [*v. Robbins*, 519 U.S. 452 (1997)]. Instead, he insists that *Loper Bright* requires us to revisit the question of whether *Kisor* [*v. Wilkie*, 588 U.S. 558 (2019)] modified *Stinson*. In his view, *White*'s answer—no—is incompatible with *Kisor* and *Loper Bright*.

In effect, Poore asks us to reconsider our decision in *White*, but he does not provide a compelling reason to upset recent precedent. *See White*, 97 F.4th at 538. The grounds for continuing to apply *Stinson*, which we explained in *White*, apply with equal force here. First, Poore's argument that the overruling of *Chevron* requires us to reconsider our case law applying *Auer* deference rejects the rationale of *Stinson*. There the Court explained that analogizing Guidelines commentary to an agency's interpretation of its own legislative rules was imprecise. *White*, 97 F.4th at 538 (citing *Stinson*, 508 U.S. at 44). Further, in deciding that the Guidelines commentary was entitled to *Auer* deference, the Court explicitly rejected an argument that the commentary should receive *Chevron* deference instead. *See Stinson*, 508 U.S. at 44. By arguing that *Loper Bright* affects how we should read *Kisor*, Poore blurs this distinction between *Auer* deference and *Chevron* deference.

Second, the Supreme Court in *Loper Bright* did not purport to overrule or even modify *Auer* or *Stinson* nor to explain the effect of the decision (if any) on *Kisor*. And we follow the Court's instruction to resist finding its decisions overruled by implication. *See White*, 97 F.4th at 539 (citing *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023)). We must follow a controlling Supreme Court decision even if it "appears to rest on reasons rejected in some other line of decisions." *Agostini v. Felton*, 521

> U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)).
>
> Third, as in *White*, it makes little sense for us to switch sides of an entrenched circuit split about Application Note 1's authority. *See White*, 97 F.4th at 539. We have cautioned that when a circuit split is closely balanced, "it is best to leave well enough alone" and avoid switching sides.
>
> *Buchmeier v. United States*, 581 F.3d 561, 565–66 (7th Cir. 2009) (en banc). Because we have already twice declined to switch sides in the closely divided circuit split, *see White*, 97 F.4th at 535, there is no compelling reason to change course now. *See Buchmeier*, 581 F.3d at 565–66 (explaining why switching sides in an entrenched circuit split is disfavored). Therefore, we continue to follow *Stinson*.

United States v. Poore, No. 22-3154, 2025 WL 1201946, at *3 (7th Cir. Apr. 25, 2025).

The Third Circuit, on the other hand, finds *Loper Bright* "instructive" when it comes to interpreting the Sentencing Guidelines, and concluded that the Court's view of the meaning of a statute should take precedence over the Sentencing Commission's view of that same statute:

> Whatever else the Commission may be empowered to do, it plainly "may not replace

a controlling judicial interpretation of an *unambiguous* statute with its own construction (even if that construction is based on agency expertise)[.][footnote omitted] [*United States v.*] *Adair*, 38 F.4th at 361[3rd Cir. 2022] (emphasis added). And on retroactivity, the change to § 924(c) is not the least ambiguous. Congress made the change non-retroactive. No matter how well-intentioned, the Policy Statement cannot change that.

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned the long-standing rule that courts must defer to agency interpretations of statutes within an agency's expertise. The Court said such so-called *Chevron* deference was the "antithesis" of "the traditional conception of the judicial function[,]" especially when "it forces courts to [defer] even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is 'unambiguous.'" ___ U.S. ___, 144 S. Ct. 2244, 2263, 2265, 219 L.Ed.2d 832 (2024) (citing *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)). That ruling was made when considering the Administrative Procedures Act, which, admittedly, is not what we look to when considering actions of the Commission. *See United States v. Berberena*, 694 F.3d 514, 527 (3d Cir. 2012) ("Congress decided that the . . . Commission would not be an 'agency' under

> [that Act] when it established the Commission as an independent entity in the judicial branch." (internal quotation marks omitted)). But *Loper Bright* is still instructive as we assess the assertion that the Commission's view of a statute should trump our own.

United States v. Rutherford, 120 F.4th 360, 378–79 (3d Cir. 2024).

This view of the significance of *Loper Bright* is no doubt due to the Third Circuit's belief that *Kisor* lessened the deference to be paid to any agency determination. The Third Circuit expressed its understanding of *Kisor* in its *en banc* opinion in *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc), which it decided just three years before *Rutherford*:

> Congress has delegated substantial responsibility to the Sentencing Commission, but, as the Supreme Court emphasized in *Kisor*, the interpretation of regulations ultimately "remains in the hands of the courts." 139 S.Ct. at 2420. In light of *Kisor*'s limitations on deference to administrative agencies, and after our own careful consideration of the guidelines and accompanying commentary, we conclude that inchoate crimes are not included in the definition of "controlled substance offenses" given in section 4B1.2(b) of the sentencing guidelines. Therefore, sitting en banc, we overrule *Hightower*, and, accordingly, Nasir is entitled to be resentenced without being classified as a career offender.

United States v. Nasir, 17 F.4th 459, 472 (3d Cir. 2021) (*en banc*).

The Third Circuit's decision in *Nasir* has been cited at least 80 times in the various circuit courts. Of greatest relevant to this petition is the Third Circuit's opinion in *United States v. Banks*, 55 F. 4th 246 (3d Cir. 2022), in which the court, relying on *Nasir*, concluded that the language of the commentary was not entitled to any weight:

> Our 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." To be sure, in context, "loss" could mean pecuniary or non-pecuniary loss and could mean actual or intended loss.[55] We need not decide, however, whether one clear meaning of the word "loss" emerges broadly, covering every application of the word. Rather, we must decide whether, in the context of a sentence enhancement for basic economic offenses, the ordinary meaning of the word "loss" is the loss the victim actually suffered. We conclude it is.
>
> 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. Banks is thus entitled to be resentenced without the 12-point intended-loss enhancement in § 2B1.1.

United States v. Banks, 55 F.4th 246, 258 (3d Cir. 2022) (footnotes omitted).

When the *en banc* decision of the Fifth Circuit in *United States v. Vargas, supra* is added to this "mix" of cases, it is plain that nothing is clear in the Circuits—they cannot agree on whether *Stinson* is based on *Auer* deference or *Chevron* deference, nor can the Circuits agree on whether *Kisor* undermined *Stinson*, nor whether *Loper Bright* should have any impact at all on this important question. Given the significant role that Commentary plays in most federal sentencings, review by this Court is appropriate.

C. The Government is asking this Court to review a closely related, but narrower issue

In the *Rutherford* case cited above, a petition for a writ of certiorari was docketed on February 3, 2025, as *Daniel Rutherford v. United States*, #24-280. In that case, Rutherford seeks review on the following issue:

> Whether the court of appeals correctly determined that petitioner had failed to identify "extraordinary and compelling reasons" that supported reducing his sentence under 18 U.S.C. 3582(c)(1)(A)(i), where his motion relied on a statutory sentencing amendment to 18 U.S.C. 924(c) that specifically does not apply to preexisting sentences.

(Pet., p.I).

In its brief, the United States wrote:

> The question presented by petitioner is the same as the question presented in the petition for a writ of certiorari in *Carter v. United States*, No. 24-860 (filed Feb. 11, 2025). In conjunction with its filing of this response, the government is filing a response to the petition in *Carter* in which it takes the position that the issue warrants this Court's review in that case. See Gov't Cert. Br. at 10-20, Carter, supra (No. 24-860). For the reasons explained in that response, the best course is for the Court to grant certiorari in Carter and hold the petition in this case pending the Court's decision on the merits. See id. at 19-20.

(Brief for the United States, pp. 10-11).

Unquestionably, the petition for *certiorari* in *Carter v. United States*, No. 24-860 presents the issue more broadly, framing it as a one regarding the scope of the Sentencing Commission's delegated authority:

> Whether the Sentencing Commission acted within its expressly delegated authority by permitting district courts to consider, in narrowly cabined circumstances, a nonretroactive change in law in determining whether "extraordinary and compelling reasons" warrant a sentence reduction.

(Pet., p.1).

But neither of the above petitions reaches the deeper issue that is at the center of this petition—the one described by Justice Thomas in his concurring opinion in *Loper Bright*: whether Congress has erroneously reallocated a task originally assigned to Art. III judges—sentencing—by turning it over to the Sentencing Commission, and courts have mistakenly accepted that reallocation by giving judicial deference to its determinations.

CONCLUSION

Wherefore this Court is respectfully urged to grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, vacate the opinion of that Court, and remand the matter to that Court for further proceedings.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 21, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-30751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GLENN E. DIAZ,

Defendant-Appellant.

January 21, 2025, Filed

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CR-179-1

Before JONES, BARKSDALE, and HO, *Circuit Judges*.

PER CURIAM:*

With his friends' help, Glenn Diaz obtained loans from now-defunct First NBC Bank ("FNBC") using fabricated

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

documents and phony transactions. A jury convicted him of bank-fraud and money-laundering offenses. Diaz now raises evidentiary, sentencing, and restitution-based challenges on appeal. We see no error and thus affirm.

Diaz challenges two of the district court's evidentiary rulings, claiming that they violated various constitutional rights. But the record cuts against him. The district court justifiably limited the extent to which he could cross-examine William Bennett. *See* FED. R. EVID. 403. And the court followed applicable law in prohibiting evidence and argumentation about FNBC's negligence. *See United States v. Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980). *See also Loughrin v. United States*, 573 U.S. 351, 362-63, 134 S. Ct. 2384, 189 L. Ed. 2d 411 (2014).

Diaz next challenges the length of his sentence. Yet the district court calculated his base offense level correctly.[1] The record reveals that Diaz was indifferent to loan repayment and that FNBC's ability to collect was speculative. So it was appropriate to use a non-zero intended-loss calculation without deducting collateral value. *See United States v. Goss*, 549 F.3d 1013, 1017-18 (5th Cir. 2008). *See also United States v. Henderson*, 19 F.3d 917, 928 (5th Cir. 1994). And we see no problem with basing that calculation on loss stemming from conspiracy-related conduct. *See United States v. Reinhart*, 357 F.3d 521, 526 (5th Cir. 2004). The court also did not commit clear error

1. Diaz waived one issue at oral argument—whether the district court was permitted to increase his offense level based on the amount of "loss" he "intended" to cause. *See* Oral Arg. 12:57-13:47. We thus refrain from addressing that issue here.

in applying the "sophisticated means" enhancement. *See United States v. Valdez*, 726 F.3d 684, 695 (5th Cir. 2013).

Lastly, Diaz challenges the amount he owes in restitution. But the district court read the Mandatory Victims Restitution Act correctly. *See* 18 U.S.C. § 3664(j)(1). Republic Credit One LP was thus entitled to restitution. And the court did not err in basing Diaz's total restitution amount on the conduct underlying his conspiracy conviction. *See United States v. Chaney*, 964 F.2d 437, 451-52 (5th Cir. 1992).

We affirm.

APPENDIX B — JUDGMENT DENYING REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 11, 2025

No. 23-30751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GLENN E. DIAZ,

Defendant-Appellant.

March 11, 2025, Filed

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CR-179-1

ON PETITION FOR REHEARING EN BANC

Before JONES, BARKSDALE, and HO, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service

requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.