No. 24-604

In the Supreme Court of the United States

XIAOQING ZHENG, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

SARAH M. HARRIS
Acting Solicitor General
Counsel of Record
JOSEPH P. MINTA
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court correctly determined the loss attributable to petitioner's offense for purposes of Sentencing Guidelines § 2B1.1 (2021).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statues, guidelines, and rules:

Statutes, guidelines, and rules—Continued: Page

In the Supreme Court of the United States

No. 24-604

XIAOQING ZHENG, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 113 F.4th 280.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2024. The petition for a writ of certiorari was filed on November 26, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of conspiring to commit economic espionage, in violation of 18 U.S.C. 1831(a)(5). Pet. App. 2a, 17a. The district court sentenced him to 24 months of imprisonment, to be followed by one year of supervised release. *Id.* at 21a. The court of appeals affirmed. *Id.* at 1a-42a.

1. a. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, Congress established the United States Sentencing Commission (Commission) "as an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Congress directed the Commission to promulgate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." 28 U.S.C. 994(a)(1) and (2). Congress also directed the Commission to "periodically * * * review and revise" the Sentencing Guidelines. 28 U.S.C. 994(*o*).

The Guidelines are structured as a series of numbered guidelines and policy statements followed by additional commentary. See Sentencing Guidelines § 1B1.6 (2021).[1] The Commission has explained, in a guideline entitled "Significance of Commentary," that the commentary following each guideline "may serve a number of purposes," including to "interpret the guideline or explain how it is to be applied." *Id.* § 1B1.7 (emphasis omitted). The Commission has further explained that "[s]uch commentary is to be treated as the legal equivalent of a policy statement." *Ibid.* And the Commission has instructed that, in order to correctly "apply[] the provisions of" the Guidelines, a sentencing court must consider any applicable "commentary in the guidelines." *Id.* § 1B1.1(a) and (b). Congress has similarly required district courts to consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" in imposing a sentence. 18 U.S.C. 3553(b)(1).

---

[1] Except as otherwise noted, all citations to the Guidelines refer to the 2021 edition used at petitioner's sentencing.

Under 28 U.S.C. 994(x), to promulgate or amend a guideline, the Commission must comply with the notice-and-comment procedures for rulemaking by executive agencies. See 5 U.S.C. 553(b) and (c). And under 28 U.S.C. 994(p), the Commission must "submit to Congress" any proposed amendment to the Guidelines, along with "a statement of the reasons therefor." Proposed amendments generally may not take effect until 180 days after the Commission submits them to Congress. *Ibid.* The guidelines cited above, regarding the salience of commentary, were themselves subject to both notice-and-comment and congressional-review procedures. See, *e.g.*, 52 Fed. Reg. 18,046, 18,053, 18,091-18,110 (May 13, 1987) (notice of submission to Congress of "Application Instructions" in Section 1B1.1 and "Significance of Commentary" in Section 1B1.7) (emphasis omitted).

Although Sections 994(p) and (x) do not apply to policy statements and commentary, the Commission's rules provide that "the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent. Comm'n R. 4.1. The rules similarly provide that the Commission "will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sent. Comm'n R. 4.3. And like amendments to the text of a guideline, an "affirmative vote of at least four members of the Commission" is required to promulgate or amend any policy statement or commentary. 28 U.S.C. 994(a); see U.S. Sent. Comm'n R. 2.2(b).

b. Before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines were "mandatory" and limited a district court's discretion to impose a non-Guidelines sentence, *id.* at 227, 233.

In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court addressed the role of Guidelines commentary and determined that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38.

In making that determination, the Court drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations. *Stinson*, 508 U.S. at 44. The Court stated that, under those principles, as long as the "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 45 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court acknowledged that the analogy was "not precise," but nonetheless viewed affording "this measure of controlling authority to the commentary" as the appropriate approach in the particular circumstances of the Guidelines. *Id.* at 44-45.

2. Petitioner, who was an engineer at GE Power in Schenectady, New York, conspired with his nephew in China to misappropriate trade secrets from GE Power with the intent to benefit the People's Republic of China (PRC) and instrumentalities of the PRC. See Pet. App. 3a-5a & n.2. Petitioner had immigrated to the United States from the PRC in 1993 and had become a naturalized U.S. citizen in 2004, before joining GE Power in 2008. *Id.* at 3a. He came to the attention of federal law enforcement authorities in 2017, during the course of an unrelated investigation, after giving a presentation in

China that federal officials suspected "might have contained proprietary GE information." *Ibid.* Federal officials alerted GE Power, which launched an internal investigation. *Id.* at 3a-4a.

In its internal investigation, GE Power discovered that petitioner's work computer contained hundreds of encrypted, password-protected files, as well as encryption software that petitioner had downloaded from the internet. Pet. App. 4a. Unbeknownst to petitioner, GE Power installed software on petitioner's work computer to monitor and record future uses of the encryption software. *Ibid.* Three weeks later, on July 5, 2018, GE Power's monitoring software recorded petitioner "encrypt[ing] 40 files relating to the design and testing of carbon seals for GE's ground-based turbines," which petitioner then embedded into another file to appear as though the files were merely an innocuous picture of a sunrise. *Ibid.* Petitioner emailed the sunrise image and embedded hidden files to himself at his personal email address, with the subject line, "nice view." *Id.* at 4a-5a (citation omitted).

The day after sending that email, petitioner traveled to the PRC. Pet. App. 5a. When he returned several weeks later, federal agents executed a warrant to search his home in New York, and petitioner was arrested. *Ibid.* A subsequent investigation revealed that petitioner had surreptitiously emailed valuable GE trade secrets—for example, "manufacturing drawings for turbine blades used in GE's gas turbines," *id.* at 14a—to his personal email account on multiple occasions, using encryption and other techniques to mask his exfiltration of the files. See *id.* at 14a-15a; Gov't C.A. Br. 13-15. Petitioner had then, in turn, used his personal

email account to email GE trade secrets to his nephew in the PRC. Pet. App. 14a.

The investigation also revealed petitioner's extensive business dealings in the PRC. In 2016, while still employed at GE Power, petitioner had formed a business entity in the PRC with his nephew to develop aero engines and turbine technologies (and thus potentially compete with GE Power). Pet. App. 2a, 8a-9a. Petitioner also served as general manager of another, similar company in the PRC. *Id.* at 9a. Both companies partnered with and received funding from local governments in the PRC. *Id.* at 10a-13a. And in addition to the governmental support for his business ventures, petitioner himself had been selected to participate in a Chinese government program that encourages individuals "engaged in research and development in the United States to transmit that knowledge and research * * * to China." *Id.* at 8a (brackets and citation omitted).

3. In 2021, a grand jury in the Northern District of New York charged petitioner with 14 counts, including one count of conspiring to commit economic espionage, in violation of 18 U.S.C. 1831(a)(5). Pet. App. 5a. The case proceeded to trial, and the jury found petitioner guilty on the conspiracy count. *Id.* at 17a. The jury found petitioner not guilty on four other counts and was unable to reach a unanimous verdict on the remaining counts. *Ibid.*

Under the now-advisory Sentencing Guidelines, the base offense level for a violation of Section 1831(a)(5) is six. Sentencing Guidelines § 2B1.1(a)(2). The Guidelines prescribe an increase in the offense level if the "loss exceeded $6,500," *id.* § 2B1.1(b)(1), with the level of the increase depending on the loss calculation. In the 2021 edition of the Guidelines applicable at petitioner's

sentencing, the commentary accompanying the loss guideline stated that "loss is the greater of actual loss or intended loss," *id.* § 2B1.1, comment. (n.3(A)), and that "'[i]ntended loss' * * * means the pecuniary harm that the defendant purposely sought to inflict," *id.* § 2B1.1, comment. (n.3(A)(ii)) (emphasis omitted).

The Probation Office determined, based on the value of the trade secrets that petitioner had conspired to misappropriate, that the loss in this case "exceeded $1,500,000, but was less than $3,500,000." Presentence Investigation Report (PSR) ¶ 12. Section 2B1.1(b)(1) prescribes a 16-level increase for such a loss. *Ibid.* Taking into account that increase and other adjustments, the Probation Office calculated petitioner's total offense level to be 28, resulting in a recommended sentencing range of 78 to 97 months. PSR ¶ 51.

Petitioner objected to the loss calculation in the presentence report, claiming instead that "[t]he loss is zero." Sent. Tr. 4; see Addendum to PSR 30. Petitioner maintained that the term "loss" as used in Section 2B1.1 is unambiguously limited to "[a]ctual loss" and cannot include intended loss, as referenced in the commentary. Sent. Tr. 16. Petitioner therefore contended that it would be improper to calculate "loss" based on the intended loss to GE Power that would have occurred had his two PRC business ventures been successful in developing the stolen technologies and then competing with GE Power. *Id.* at 15-17. And petitioner contended that, to the extent that the court of appeals had previously approved the use of "intended loss" as contemplated in the commentary, its precedents had been abrogated by this Court's decision in *Kisor* v. *Wilkie*, 588 U.S. 558 (2019). See Sent. Tr. 15-16, 24, 26, 36.

The district court rejected petitioner's argument that his offense involved no loss at all, see Sent. Tr. 44-46, expressing the view that *Stinson* "continues to apply to the commentary," notwithstanding this Court's decision in *Kisor*, *id.* at 44. But the court disagreed with the Probation Office's loss calculation (which had been based on the value of the misappropriated trade secrets), finding instead that the intended loss to GE Power from petitioner's offense conduct was $1,058,800. *Id.* at 46, 52. That figure was based on the net profits that one of petitioner's PRC business ventures had forecasted earning, which the court treated as a proxy for the profits that GE Power would have lost had petitioner succeeded in getting his competing businesses off the ground. *Id.* at 51-52. Based on a loss of $1,058,800, the court determined that petitioner's Guidelines range was 63 to 78 months. *Id.* at 55. The court imposed a below-Guidelines sentence of 24 months, to be followed by one year of supervised release. *Id.* at 58.

4. The court of appeals affirmed. Pet. App. 1a-42a. Petitioner "d[id] not challenge the district court's actual calculation of the intended loss in this case," and the court of appeals itself perceived "no error" in that calculation or the resulting increase in petitioner's offense level. *Id.* at 40a-41a. Instead, petitioner's sole objection to his Guidelines range was his continued claim that "loss" as used in Section 2B1.1 "unambiguously means actual loss" and that deference to the Commission's commentary defining the term to encompass intended loss is unwarranted under *Kisor*. *Id.* at 40a. The court found those contentions foreclosed by its then-recent decision in *United States* v. *Rainford*, 110 F.4th 455 (2d Cir. 2024), in which the court of appeals had determined "to

treat the Guidelines commentary as authoritative" pursuant to *Stinson* "for two reasons." Pet. App. 40a (citing *Rainford*, 110 F.4th at 475 n.5). First, "only [this] Court may overrule its own decisions, and [this Court] has not overruled *Stinson*." *Ibid.* (citing *Rainford*, 110 F.4th at 475 n.5). Second, "because the Sentencing Commission adopts the Guidelines and the commentary as 'a reticulated whole,' that should be read as such, the commentary qualifies as an authoritative source of interpretation under *Kisor*." *Ibid.* (citing *Rainford*, 110 F.4th at 475 n.5).

ARGUMENT

The court of appeals correctly affirmed the district court's finding that petitioner is responsible under Section 2B1.1 of the Sentencing Guidelines for a "loss" of at least $1,058,800. That finding was based on a reasonable estimate of the lost profits that petitioner's employer, GE Power, would have suffered if petitioner had succeeded in using the trade secrets that he misappropriated from GE Power to launch his own competing business ventures in the PRC—with the support and to the benefit of the government there. Petitioner does not dispute that finding in this Court.

Instead, petitioner contends (Pet. 10-25) that this case implicates a division of authority in the courts of appeals concerning the degree of deference that the Commission's commentary to the Guidelines should receive after *Kisor* v. *Wilkie*, 588 U.S. 558 (2019). That contention does not warrant further review, especially in this case. Any distinction between *Kisor* and *Stinson* v. *United States*, 508 U.S. 36 (1993), would make no difference to the outcome here because the commentary would be treated similarly under either approach. Moreover, the Commission has already amended the

Guidelines to transfer the relevant definition of "loss" from the commentary to the text of Section 2B1.1. Those amendments (which postdate petitioner's offense and do not apply to this case) ensure that any dispute about the validity of the prior commentary lacks prospective importance. The amendments also illustrate that the Commission is capable of, and proactive in, resolving controversies about the validity of particular commentary. This Court has repeatedly denied petitions for writs of certiorari seeking review of similar *Kisor*-based challenges to the Guidelines commentary.[2] It should follow the same course here.

1. The district court's Guidelines calculation was correct. Under the version of Sentencing Guidelines § 2B1.1(b)(1) applicable to petitioner's sentencing, the offense level for his violation of 18 U.S.C. 1831(a)(5) was in part a function of the "loss" attributable to the viola-

---

[2] See, *e.g.*, *Gadson* v. *United States*, 144 S. Ct. 823 (2024) (No. 23-736); *Ratzloff* v. *United States*, 144 S. Ct. 554 (2024) (No. 23-310); *Lomax* v. *United States*, 143 S. Ct. 789 (2023) (No. 22-644); *Moses* v. *United States*, 143 S. Ct. 640 (2023) (No. 22-163); *Carviel* v. *United States*, 142 S. Ct. 2788 (2022) (No. 21-7609); *Duke* v. *United States*, 142 S. Ct. 1242 (2022) (No. 21-7070); *Guillory* v. *United States*, 142 S. Ct. 1135 (2022) (No. 21-6403); *Wynn* v. *United States*, 142 S. Ct. 865 (2022) (No. 21-5714); *Lario-Rios* v. *United States*, 142 S. Ct. 798 (2022) (No. 21-6121); *Smith* v. *United States*, 142 S. Ct. 488 (2021) (No. 21-496); *Melkonyan* v. *United States*, 142 S. Ct. 275 (2021) (No. 21-5186); *Wiggins* v. *United States*, 142 S. Ct. 139 (2021) (No. 20-8020); *Kendrick* v. *United States*, 141 S. Ct. 2866 (2021) (No. 20-7667); *Lewis* v. *United States*, 141 S. Ct. 2826 (2021) (No. 20-7387); *O'Neil* v. *United States*, 141 S. Ct. 2825 (2021) (No. 20-7277); *Sorenson* v. *United States*, 141 S. Ct. 2822 (2021) (No. 20-7099); *Lovato* v. *United States*, 141 S. Ct. 2814 (2021) (No. 20-6436); *Tabb* v. *United States*, 141 S. Ct. 2793 (2021) (No. 20-579); *Broadway* v. *United States*, 141 S. Ct. 2792 (2021) (No. 20-836).

tion. The text of the guideline did not, at the time, define the term "loss." The Commission's commentary—specifically, Application Note 3(A)—stated that "loss is the greater of actual loss or intended loss," Sentencing Guidelines § 2B1.1, comment. (n.3(A)), where "'[i]ntended loss' * * * means the pecuniary harm that the defendant purposefully sought to inflict," even if that harm "would have been impossible or unlikely to occur," *id.* § 2B1.1, comment. (n.3(A)(ii)) (emphasis omitted).

The Commission's commentary is a reasonable interpretation of the term "loss"—indeed, it reflects the best interpretation of that term in the context of the Guidelines read as a whole. A separate guideline instructs that the defendant's offense level "shall be determined on the basis of * * * all acts and omissions committed * * * by the defendant" personally or, in the case of a conspiracy like the one at issue here, "all acts and omissions of others that were * * * within the scope" of the conspiracy, in furtherance of it, and reasonably foreseeable. Sentencing Guidelines § 1B1.3(a)(1)(A) and (B). The same guideline further instructs—in its text, not in the commentary—that the offense level shall be determined on the basis of "all harm that resulted from the acts and omissions specified in subsection[] (a)(1) * * * and all harm that was *the object* of such acts and omissions." *Id.* § 1B1.3(a)(3) (emphasis added).

Accordingly, when a sentencing court assesses "loss" under Section 2B1.1, it does so under overarching instructions to ensure that the defendant's offense level is determined on the basis of both actual harm and also the harm that was the "object" of the offense. And the word "object" refers to the intended result—*i.e.*, "[t]he purpose, aim, or goal of [the] specific action or effort."

The American Heritage Dictionary of the English Language 1214 (5th ed. 2016); see, *e.g.*, *Black's Law Dictionary* 1286 (12th ed. 2024) (*Black's*) (defining "object" as "[s]omething sought to be attained or accomplished; an end, goal, or purpose"); cf. *Voisine* v. *United States*, 579 U.S. 686, 691-692 (2016) (stating that a person acts "intentionally" with respect to an action when he "ha[s] that result as a 'conscious object'") (citation omitted).

Especially against that backdrop, the term "loss" is a natural way to encompass both actual and intended pecuniary harms. Although "loss" can refer to losses that have already occurred, the term can also be used more broadly to refer to unrealized losses and other harms that did not or have not yet come to pass. See, *e.g.*, *Black's* 1129-1131 (distinguishing "actual loss" from "indirect loss," "paper loss," and "unrealized loss," but listing all four as forms of "loss") (emphases omitted); *Merriam-Webster's Dictionary of Law* 300-301 (1996) (similar). Application Note 3(A) reflects that "loss" is best understood in this particular context to encompass both actual loss and the losses that the defendant intended to cause, which may be a more accurate proxy for the defendant's culpability in some circumstances.

To take a concrete example, the loss table in Section 2B1.1 would undisputedly distinguish between a defendant who intentionally stole $10,000 and one who intentionally stole $100,000. See Sentencing Guidelines § 2B1.1(b)(1) (prescribing increased offense levels of two and eight, respectively, based on those loss amounts). If a third defendant intentionally stole $1,000,000 but was apprehended in the course of his getaway, the actual loss from the offense may be zero. If petitioner were correct that "loss" necessarily means "actual loss," the third defendant would be treated more leniently under Section

2B1.1 than the other two, even though the third defendant in fact intended to cause far greater pecuniary harm to the victim. No obvious penological purpose would be served by drawing such a distinction.

Presumably for that reason, the Commission has long recognized that the harms that were the object of the defendant's conduct can be a more accurate measure of culpability in some circumstances than the harms that actually occurred, which can be affected by happenstance. And that has been the Commission's consistent approach since the term "loss" first appeared in Section 2B1.1. In the first version of the Guidelines, which the Commission submitted to Congress in 1987, Section 2B1.1 applied only to theft offenses. See 52 Fed. Reg. at 18,058. The original version of Section 2B1.1 contained a table of increased offense levels, but the increases were based on "the value of the property taken." Sentencing Guidelines § 2B1.1(b)(1) (1987). In 1988, after notice and comment and congressional review, the Commission amended the table in Section 2B1.1 to refer to "loss" rather than to the value of the stolen property, while also adding commentary to make clear that, for "partially completed conduct," the term "loss refers to the loss that would have occurred" had the conduct been completed. Sentencing Guidelines § 2B1.1(b)(1) & comment. (n.2) (1989); see Sentencing Guidelines App. C, Amend. 7 (June 15, 1988); 53 Fed. Reg. 15,530, 15,532 (Apr. 29, 1988).

Accordingly, from the very first appearance of the word "loss" in Section 2B1.1(b), the Commission has made clear that the word should be understood to encompass, as appropriate, either actual loss or the loss that would have occurred had the defendant achieved his object. The relevant commentary was revised in 2001, when the Commission expanded Section 2B1.1 to

cover additional fraud offenses that had previously been subject to a separate, fraud-specific guideline. See Sentencing Guidelines App. C, Amend. 617 (Nov. 1, 2001); 66 Fed. Reg. 30,512, 30,529, 30,540 (June 6, 2001). In the 2001 amendments, which were promulgated after notice and comment and congressional review, see 66 Fed. Reg. at 30,513, the Commission revised the commentary to Section 2B1.1 to state that "loss is the greater of actual loss or intended loss," and to define "intended loss" in the same way as in the commentary at issue here, Sentencing Guidelines § 2B1.1, comment. (n.2(A)(ii)) (2001). The Commission explained that, in consolidating the theft and fraud guidelines, it had decided to "*retain*[] the core rule that loss is the greater of actual and intended loss." 66 Fed. Reg. at 30,542 (emphasis added). The 2001 amendments thus underscore that "loss" has been understood in the context of Section 2B1.1(b) to encompass intended loss for the entirety of the time that term has appeared in the guideline.[3]

The district court correctly applied the guideline to the facts of this case, and the court of appeals reviewed that finding and found no abuse of discretion or legal

---

[3] The fraud guideline referred to "intended loss" in its text when it was first promulgated in 1987, although that reference was deleted shortly thereafter in favor of the more general term "loss." Compare Sentencing Guidelines § 2F1.1(b)(1) (1987) (specifying increased offense levels for fraud offenses based on "estimated, probable or *intended* loss") (emphasis added), with Sentencing Guidelines § 2F1.1(b)(1) (June 1988) (table based on "loss"). As with Section 2B1.1, the fraud guideline's reference to "loss" was understood from the beginning to include intended loss. See Sentencing Guidelines § 2F1.1, comment. (n.7) (June 1988) ("[I]n keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss.").

error. Pet. App. 40a-41a. The district court observed at sentencing that it "believe[d] that there was actual loss" to the victim in this case but that the precise amount of actual loss "simply cannot [be] compute[d]" on these facts, including because of the difficulty of assessing the diminution in the value of GE Power's intellectual property caused by petitioner's conduct. Sent. Tr. 45; see *id.* at 46, 49-51. The court therefore calculated loss based on an estimated $1,058,800 in lost profits that petitioner's scheme would have siphoned from GE Power—a figure derived from petitioner's own business proposal for one of his Chinese business ventures, and a finding that he does not challenge. *Id.* at 51-52; see Pet. App. 40a-41a.

2. Petitioner does not identify any compelling basis for further review. In the lower courts, petitioner maintained that the term "loss" as used in Section 2B1.1 refers only to actual loss, not intended loss—leaving no ambiguity for the Commission to resolve through its commentary. Pet. C.A. Br. 34-35; see p. 7, *supra*. He does not reprise that argument in this Court. Indeed, petitioner does not address the text of Section 2B1.1, its history and purpose, or the broader context in which it operates within the Guidelines. Petitioner instead focuses (Pet. i, 10-25) on the methodological question of whether *Kisor* or *Stinson* provides the more appropriate framework for addressing a challenge to the validity of the Commission's commentary. That question does not warrant further review.

a. In *Kisor*, this Court considered whether to overrule *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and thus "discard[] the deference" afforded under those decisions to "agencies' reasonable readings of genuinely

ambiguous regulations." *Kisor*, 588 U.S. at 563; see *Auer*, 519 U.S. at 461 (stating that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'") (quoting, indirectly, *Seminole Rock*, 325 U.S. at 414). The Court took *Kisor* as an opportunity to "restate, and somewhat expand on," the limiting principles for deferring to agency's interpretation of its own regulation. 588 U.S. at 574. Among other things, the Court emphasized that "a court should not afford *Auer* deference" to an agency's interpretation of a regulation "unless the regulation is genuinely ambiguous." *Ibid.*

Notwithstanding those clarifications, the Court pointedly declined to overrule *Auer* or *Seminole Rock*—let alone the "legion" of other precedents applying those decisions, including *Stinson*. *Kisor*, 588 U.S. at 568 n.3 (opinion of Kagan, J.) (identifying *Stinson*, 508 U.S. at 44-45, as one of numerous examples); see *id.* at 587 (majority opinion) (citing this "long line of precedents" as a reason not to overrule *Auer*) (citation omitted); cf. *id.* at 591 (Roberts, C.J., concurring in part). The Court explained that it had "applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts ha[d] done so thousands of times," and that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." *Id.* at 587 (majority opinion). And the Court adhered to *Auer* on stare decisis grounds in part to avoid "allow[ing] relitigation of any decision based on *Auer*," with the attendant "instability" that would result from overturning precedent in "so many areas of law, all in one blow." *Ibid.*

b. This Court's decision in *Kisor* now provides the governing standards for determining whether a court must defer to an executive agency's interpretation of a

regulation. 588 U.S. at 573-580. And the Court's earlier decision in *Stinson* reasoned that—by "analogy," albeit "not [a] precise" one—the Commission's commentary interpreting the Guidelines should be treated the same way, 508 U.S. at 44; see *id.* at 44-46. The government has accordingly taken the position, including in this case, that *Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference. See Gov't C.A. Br. 66-67. Any distinction between *Kisor* and *Stinson*, however, has no bearing on the correct disposition of this case or the application of Section 2B1.1.

As the Second Circuit has previously recognized and its decision in this case confirms, Section 2B1.1's reference to "loss" would include both actual and intended loss under either the *Stinson* or *Kisor* framework. See *Rainford*, 110 F.4th at 475 n.5 (observing that "the guidelines commentary" on intended loss "would meet the *Kisor* standard in any event"); Pet. App. 40a (adhering to *Rainford*). Indeed, nearly every court of appeals to consider the issue has rejected petitioner's view that the "intended loss" commentary is invalid, whether under *Kisor* or *Stinson*. See *United States* v. *Rao*, 123 F.4th 270, 283 (5th Cir. 2024) (applying *Stinson* and concluding that "the term 'loss' in § 2B1.1(b)(1) continues to mean the greater of the 'intended loss' or the 'actual loss,' as set forth in the Guidelines commentary and this court's longstanding interpretation of that provision"); *United States* v. *Boler*, 115 F.4th 316, 323-328 (4th Cir. 2024) (applying *Kisor* and concluding that "loss" is genuinely ambiguous and that Application Note 3(A) is a reasonable interpretation); *United States* v. *Ponle*, 110 F.4th 958, 961-963 (7th Cir. 2024) (stating that "the district court correctly utilized 'the greater of

the actual loss or intended loss' to calculate [the defendant's] offense level as *Stinson* requires"); *United States* v. *You*, 74 F.4th 378, 397 (6th Cir. 2023) (applying *Kisor* and "defer[ring] to the Sentencing Commission's interpretation of 'loss'"); see also *United States* v. *Gadson*, 77 F.4th 16, 19-22 (1st Cir. 2023) (applying *Kisor* and finding no plain error in district court's reliance on Application Note 3(A)), cert. denied, 144 S. Ct. 823 (2024); *United States* v. *Verdeza*, 69 F.4th 780, 793-794 (11th Cir. 2023) (same).

Those courts, including the court below, are correct to give effect to Application Note 3(A). The term "loss" is susceptible of multiple meanings in different contexts, and the Commission's longstanding commentary reasonably resolved any ambiguity about how the term should be applied when the defendant intended to cause greater losses than actually occurred. That interpretation is the Commission's "authoritative" and "official" position, *Kisor*, 588 U.S. at 577 (citation omitted), having been included in the Guidelines Manual since the term "loss" first appeared in Section 2B1.1. See pp. 13-14, *supra*. The commentary also implicates the Commission's "substantive expertise." *Kisor*, 588 U.S. at 577. Indeed, this Court has recognized that the Commission's commentary "assist[s] in the interpretation and application of [the guidelines], which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce." *Stinson*, 508 U.S. at 45. And the particular commentary here reflects the Commission's "fair and considered judgment," not an ad hoc position of convenience adopted for litigation. *Kisor*, 588 U.S. at 579 (citation omitted).

c. Only the Third Circuit has reached a contrary conclusion, see *United States* v. *Banks*, 55 F.4th 246 (2022) (cited at Pet. 10, 12), and its outlier decision does not furnish any substantial basis for further review in this case, particularly given the recent amendments discussed below. The panel in *Banks* acknowledged that dictionary definitions of "loss" show that in some contexts the term can mean "actual or intended loss," but nonetheless took the view that "in the context of a sentence enhancement for basic economic offenses," the term refers only to "the loss the victim actually suffered." *Id.* at 258. The panel did not address the history of the loss guideline or the relevance of the separate guideline directing a sentencing court to consider the harms that were the object of the defendant's conduct. And no other court of appeals has followed the Third Circuit's approach since *Banks*. See, *e.g.*, *You*, 74 F.4th at 397 ("*Banks*'s attempt to impose a one-size-fits-all definition [of 'loss'] is not persuasive.").

The remaining decisions invoked by petitioner (Pet. 10-17) did not address the "intended loss" commentary to Section 2B1.1. Petitioner relies on them instead for the proposition that some courts of appeals have continued to apply *Stinson* in resolving challenges to the validity of commentary to the Guidelines, including on other issues concerning Section 2B1.1, while others have determined that *Kisor* is now the lodestar. As explained above, however, the choice between *Stinson* and *Kisor* would make no difference to the outcome here, as shown by the broad adoption of the approach in Application Note 3(A) irrespective of which framework was applied. See pp. 17-18, *supra*.

3. In any event, regardless of any circuit disagreement, this Court typically leaves the resolution of disputes about the proper interpretation of the Guidelines to the Commission. See, *e.g.*, *Guerrant* v. *United States*, 142 S. Ct. 640, 640-641 (2022) (statement of Sotomayor, J., respecting the denial of certiorari). The Commission has a "statutory duty 'periodically to review and revise' the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(*o*)) (brackets omitted). Congress thus "necessarily 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." *Ibid.* Given that the Commission can and does amend the Guidelines to eliminate conflicts or correct errors, this Court ordinarily does not review decisions interpreting the Guidelines. See *ibid.*; see also *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

The Court should adhere that practice here. Indeed, doing so is particularly warranted in this case because the Commission has already exercised its authority to address any question about whether intended loss is included in the Section 2B1.1 calculation. The Commission is in the midst of a "multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary, and possible consideration of amendments that might be appropriate." 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023) (statement of annual priorities) (emphasis omitted); see 89 Fed. Reg. 36,853, 36,857 (May 3, 2024) (observing

that the Commission is also considering "a comprehensive review of § 2B1.1 in a future amendment cycle"). And in 2024, after notice and comment and congressional review, the Commission amended Section 2B1.1 to make the inclusion of intended loss explicit in the text of the guideline itself. Sentencing Guidelines App. C Supp., Amend. 827 (Nov. 1, 2024); see 88 Fed. Reg. 89,142, 89,143-89,144 (Dec. 26, 2023) (proposed amendment); 89 Fed. Reg. at 36,855-36,857 (notice of submission to Congress).

As amended, the loss table in Section 2B1.1(b)(1) is now followed by a section entitled, "Notes to Table," which contains the pertinent text previously found in Application Note 3(A). Specifically, the amended guideline states that "[l]oss is the greater of actual loss or intended loss," with "[i]ntended loss" referring to "the pecuniary harm that the defendant purposefully sought to inflict." Sentencing Guidelines § 2B1.1(b)(1)(A) and (C)(ii) (2024) (emphasis omitted). The Commission has not made those amendments retroactive. But at least going forward, the Commission's amendments "ensure consistent loss calculation across circuits" with respect to actual and intended loss. 89 Fed. Reg. at 36,857. Notably, the Commission repudiated the Third Circuit's approach in *Banks*, explaining that all the "other circuit courts have uniformly applied the general rule in Application Note 3(A)" regarding intended loss. *Ibid.*

Petitioner contends (Pet. 11) that "[o]nly this Court" can address the question that he seeks to present. But questions about deference to the commentary only arise as a result of the Commission's decisions regarding what to address in the commentary rather than in the text of the Guidelines. Moreover, a specific guideline,

which was subject to notice and comment and congressional review, already provides instructions for applying commentary. See Sentencing Guidelines § 1B1.7 (discussed at pp. 2-3, *supra*); *Stinson*, 508 U.S. at 41 (relying on that guideline). And for any particular disputed commentary, the Commission can always pretermit questions about deference by revising the text of the Guidelines, as it just did for Section 2B1.1. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General
JOSEPH P. MINTA
Attorney

MARCH 2025