No. 24-6965

IN THE SUPREME COURT OF THE UNITED STATES

ROCCO MALANGA,

Petitioner, v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER

DENYING CERTIORARI

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Citations to appendices (e.g., App. A, C, D) refer to materials submitted with Petitioner's original petition for certiorari, filed March 26, 2025.

Introduction

Petitioner respectfully seeks rehearing of the order denying certiorari on the basis of substantial grounds not previously presented, including a direct intra-circuit conflict compounded by this Court's controlling decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which the Third Circuit failed to apply correctly below.

The denial of certiorari on May 5, 2025, in *Malanga v. United States*, No. 24-6965, overlooked a deeply fractured legal issue—one that divided not only the circuits but also the Third Circuit panel itself. Dissenting from the majority's decision, Judge Paul Matey would have vacated and remanded for reconsideration of the loss calculation under U.S.S.G. § 2B1.1. He explained that although Application Note 3(F)(ii) states that:

> *"[i]n a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses...,"* resort to the commentary appended to § 2B1.1 is impermissible. See *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022). (App. A, Matey, J., dissenting).

The panel further noted that, in Judge Matey's view:

> *"The United States argued before the District Court that Malanga's lenders suffered losses as the victim of his actions. And to Judge Matey, United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) requires the United States to offer facts sufficient to calculate the loss to those lenders."*

But the United States offered no such facts. In fact, it completely ignored and presented no rebuttal whatsoever to Mr. Malanga's forensic analysis, which demonstrated full compliance with the Paycheck Protection Program and the legitimate use of all funds received. Judge Matey's dissent is not merely interpretive; it identifies a direct intra-circuit conflict with *United States v. Banks*, where the Third Circuit held that "[i]f the commentary and the text of the Guideline are inconsistent, the text controls."

The majority's reliance on Application Note 3(F)(ii), despite the absence of statutory or evidentiary support, constitutes improper deference to commentary expressly disavowed in *Banks*. As Judge Matey underscored, the government's failure to prove actual loss rendered such reliance impermissible under both *Banks* and *Kopp*, deepening the interpretive fracture within the Third Circuit itself. His dissent highlights a growing and unresolved divide, both intra- and inter-circuit, in how § 2B1.1 is interpreted and applied in fraud prosecutions nationwide.

The majority's reliance on Application Note 3(F)(ii) to presume a $1.8 million loss despite unrebutted evidence of zero pecuniary harm conflicts not only with Judge Matey's dissent but with the Third Circuit's own precedent, including:

- *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991) (requiring realistic economic harm);
- *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022) (loss must be supported by evidence); and
- *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc) (rejecting judicial deference to commentary lacking textual basis).

It also deepens an inter-circuit split with:

- The Second Circuit (*Binday*), rejecting speculative loss and requiring "realistic economic harm";
- The Eleventh Circuit (*Takhalov*), requiring loss to reflect foreseeable pecuniary harm; and
- The Fifth Circuit (*Olis*), demanding a logical nexus between conduct and actual loss.

These doctrinal inconsistencies have real and recurring sentencing consequences. In PPP fraud prosecutions, now numbering in the thousands, § 2B1.1 loss calculations drive Guideline ranges but yield wildly divergent outcomes depending on jurisdiction and interpretive approach.

While not the foundation of the panel split, this Court's decision in *Loper Bright Enterprises v. Raimondo* underscores the urgent need for recalibration. *Loper Bright* prohibits judicial deference to non-binding agency interpretations absent clear statutory authority. Continued reliance on Application Note 3(F)(ii), a commentary provision with no textual support in § 2B1.1, raises precisely the separation-of-powers concern *Loper Bright* resolved.

Petitioner respectfully requests that the Court grant rehearing and issue a GVR so that the Third Circuit may reconsider its holding in light of binding intra-circuit precedent, a well-developed inter-circuit split, and evolving interpretive standards. The record is settled, the legal error is clear, and this case is an ideal candidate for targeted correction.

Grounds for Rehearing

I. This Case Warrants a GVR in Light of Loper Bright and the Circuit Split on § 2B1.1 Loss

The Court should reconsider its denial of certiorari because this case presents a textbook scenario for granting a writ of certiorari (GVR): an intervening decision, *Loper Bright*, undermines the legal rationale used by the court below, and the issue affects a wide array of federal sentencing outcomes.

A. Third Circuit's Reliance on Invalid Commentary

As Judge Matey's dissent explains, the panel majority's use of Application Note 3(F)(ii) directly contradicts binding Third Circuit precedent in *Banks*. There, the Court held that commentary cannot override the text of the Guidelines, yet here, the majority did precisely that. This is not just an error; it is an *intra-circuit defiance* of controlling law.

Petitioner was sentenced to 36 months in prison based on a presumed $1.8 million "loss" calculated using Application Note 3(F)(ii) to § 2B1.1. This commentary, never passed by Congress, treats any disbursed funds from a "government benefit" program as actual loss, regardless of whether the recipient caused any financial harm. But the PPP was not a "benefit" program; it was a bilateral lending agreement that involved fully repayable loans, only forgivable after certain performance conditions had been met, issued by private lenders and backstopped by the SBA. Congress declined to include any fraud penalties in the PPP section of the CARES Act, unlike with other COVID-era programs. Moreover, Petitioner submitted unrebutted forensic evidence showing no pecuniary loss to the government, lenders, or taxpayers.

Nevertheless, the Third Circuit applied the Application Note to presume full loss based solely on the loan amount, deeming that the capital had been "diminished" without citing any statutory text to support that conclusion.

B. Loper Bright Prohibits This Deference

In *Loper Bright*, the Court made clear: "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." 144 S. Ct. at 2252. The Guidelines' commentary has long lacked such authority, an issue underscored in *Kisor v. Wilkie*, 588 U.S. 558 (2019), and now confirmed by *Loper Bright*. The Application Note used here lacks textual support in § 2B1.1 itself, which defines "loss" as "*pecuniary harm that the defendant purposely sought to inflict.*" Nowhere does the statute suggest that merely receiving funds, particularly ones used for legitimate business purposes, constitutes loss.

C. Deepening Circuit Split

The circuits remain divided on whether sentencing courts may presume intended or actual loss based on loan amounts absent financial harm:

- Second Circuit: *Binday*, 804 F.3d 558 (2015) – requires "realistic economic harm."
- Eleventh Circuit: *Takhalov*, 827 F.3d 1307 (2016) – loss must reflect "pecuniary harm" foreseeable by defendant.
- Fifth Circuit: *Olis*, 429 F.3d 540 (2005) – demands "logical relationship" between conduct and actual loss.
- Third Circuit: *Malanga* – diverges by affirming speculative loss based on disbursed PPP amounts despite zero economic harm.

The conflict is no longer abstract: *Malanga* reopens issues *Banks* settled and applies commentary *Banks* forbade. This internal fracture compounds the inter-circuit split and makes

uniform sentencing impossible. Additionally, *Malanga* is internally inconsistent with the Third Circuit's own holdings:

- *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991) – loss must reflect actual economic injury.
- *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022) – rejected deference to commentary unsupported by text.
- *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc) – emphasized limits on judicial deference under the Guidelines.

D. Ideal GVR Candidate

This case presents an especially strong candidate for a GVR under this Court's established criteria. A GVR is appropriate where an intervening decision undermines the rationale of the lower court's judgment and where further consideration may be warranted in light of new legal authority.

Several factors make this Petition particularly well-suited for a GVR:

- *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), was decided after the Third Circuit issued its opinion but before this Court denied certiorari;
- The panel majority in *Malanga* relied on an interpretive framework, Application Note 3(F)(ii), that *Loper Bright* now renders impermissible absent clear statutory authority;
- The decision below also conflicts with binding intra-circuit precedent, *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), which held that commentary cannot override the text of the Guidelines;
- The factual record is closed and clear, including unrebutted forensic evidence demonstrating that all loan proceeds were used for legitimate business expenses with no actual or intended loss;
- No further factual development is required on remand, as the question is now one of legal application in light of clarified principles; and
- A remand would permit the Third Circuit to resolve its own internal conflict and reconsider its decision under both *Loper Bright* and its preexisting precedents, including *Banks* and *Kopp*.

Accordingly, a GVR would promote judicial consistency, ensure compliance with this Court's separation-of-powers jurisprudence, and restore uniformity in the interpretation of U.S.S.G. § 2B1.1 across a fractured circuit landscape.

II. The Sentencing Disparity Demonstrates the Real-World Impact of the Doctrinal Error

Petitioner's sentence illustrates how the Third Circuit's flawed interpretation inflates punishment arbitrarily. Despite being a zero-point offender with no criminal history, and despite using all PPP funds for legitimate business purposes (App. C), Petitioner received a 36-month prison term based on a fabricated $1.8 million loss.

In contrast:

- *VanScoyk* (D. Ariz.): $594,000 in actual fraud received 2 years' probation
- *Williams* (N.D. Ohio): $3.5 million in fraud received time served (1 day)
- *Zhang* (W.D. Wash.): $1.5 million in fraud received 60 days
- *Venning* (S.D. Fla.): $454,000 in fraud received time served

These disparities violate 18 U.S.C. § 3553(a)(6)'s directive to avoid unwarranted sentence disparities. The root cause is the Third Circuit's uncritical deference to Application Note 3(F)(ii), a commentary provision that *Banks* already rejected as impermissible when it lacks textual support. This departure from controlling precedent is what drove the inflated sentence. If Application Note 3(F)(ii) is removed from the equation, the sentence collapses.

III. Conclusion

The denial of certiorari in this case overlooks a clear and compounding legal error at the heart of the Third Circuit's decision. The majority relied on Application Note 3(F)(ii) to presume a $1.8 million loss, despite unrebutted forensic evidence of zero harm, no identified victim, and

no statutory basis to treat PPP loans as government benefits. That reliance not only conflicts with the interpretive standards this Court reaffirmed in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024); it also violates binding Third Circuit precedent.

In *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022), the Third Circuit held that commentary lacking textual support cannot override the Guidelines. Yet the panel here applied precisely the kind of commentary-driven gloss that *Banks* forbids. As Judge Matey recognized, this is not just a matter of interpretive disagreement; it is an intra-circuit conflict between binding precedent and panel practice. That conflict now infects sentencing within the Third Circuit and deepens the national split among courts applying § 2B1.1.

This petition presents a clean vehicle for targeted correction. The factual record is closed. The legal issue is sharply framed. No further development is needed. Rehearing is warranted to vacate the denial of certiorari and remand for reconsideration under *Banks*, *Loper Bright*, and longstanding principles of due process. The interpretive error is clear. The constitutional stakes are high. And the consequences for uniform sentencing and judicial integrity demand the Court's attention.

Petitioner respectfully requests that the Court grant rehearing, vacate the order denying certiorari, and remand the case to the United States Court of Appeals for the Third Circuit for reconsideration in light of *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and binding intra-circuit precedent in *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022).

Respectfully submitted,

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