24-6965
No.______________

IN THE SUPREME COURT OF THE UNITED STATES

ROCCO MALANGA,

Petitioner, v.

UNITED STATES OF AMERICA,

Respondent.

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

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Rocco Americo Malanga

Pro Se Petitioner

5753 Highway 85N PMB 4941

Crestview, Florida 32536

407.906.7188

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rocco Americo Malanga, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, which, in a divided 2-1 decision, affirmed an inflated $1.8 million loss calculation under U.S.S.G. § 2B1.1—based on non-binding commentary misclassifying loans as 'government benefits' and speculative enhancements—contrary to Supreme Court precedent and forensic evidence of zero harm. The ruling compounds a due process violation by upholding a bank fraud conviction under 18 U.S.C. § 1344 for conduct the CARES Act, enacted March 27, 2020, did not expressly criminalize, relying instead on SBA Procedural Notice 5000-20078, issued January 15, 2021, after Petitioner's spring 2020 loans, to retroactively expand liability without fair notice. This decision deepens a circuit split on loss calculations, implicates separation of powers post-*Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and threatens uniform justice in thousands of fraud prosecutions nationwide.

QUESTIONS PRESENTED

1. Does the Due Process Clause bar criminal liability and sentencing enhancements based on agency guidance issued after the alleged conduct, especially when lacking statutory authority, as reinforced by *Loper Bright Enterprises v. Raimondo*?

2. Must courts calculate loss under U.S.S.G. § 2B1.1 based on actual financial harm to ensure sentencing uniformity across circuits, particularly given stark disparities in fraud prosecutions nationwide?

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The opinion of the United States Court of Appeals for the Third Circuit, issued in a divided 2-1 decision, is unpublished but available at United States v. Malanga, No. 23-1602, slip op. (3d Cir. Sept. 3, 2024) (App A). The majority affirmed the district court's inflated loss calculation and sentencing enhancements, relying on non-binding Sentencing Guidelines commentary and a speculative 'diminution of capital' theory despite uncontested forensic proof of legitimate use (App. C), which the district court also ignored in adopting the government's loss calculation, treating the full Paycheck Protection Program loan amount as loss without evidence of financial harm. Judge Paul Matey dissented, sounding an urgent alarm: he would vacate and remand for the district court to reconsider its loss calculation under U.S.S.G. § 2B1.1(b), arguing that United States v. Kopp, 951 F.2d 521 (3d Cir. 1991), requires the government to offer facts sufficient to calculate loss to lenders—facts the United States failed to prove here—and deeming resort to Application Note 3(F)(ii) commentary 'impermissible' per United States v. Banks, 55 F.4th 246, 258 (3d Cir. 2022). His dissent signals a Third Circuit in disarray, imploring this Court to resolve this chaos and clarify deference and loss calculation standards in light of Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), which reinforces judicial independence from commentary exceeding congressional intent. The judgment of the United States District Court for the District of New Jersey was entered in United States v. Malanga, No. 2:22-cr-00438-001 (D.N.J. Mar. 22, 2023) (Judge Julien X. Neals) (App B). Both decisions are reproduced in the appendices for the Court's reference.

JURISDICTION

The Third Circuit's judgment was entered September 3, 2024, with rehearing denied November 4; 2024. This petition, filed March 26, 2025, is timely under Rule 13.1 and an extension granted to April 3, 2025. Jurisdiction lies under 28 U.S.C. § 1254(1).

This case presents pressing constitutional questions regarding the Due Process Clause's limitations on retroactive agency guidance and judicial deference in criminal sentencing, affecting thousands of fraud prosecutions nationwide.

INTRODUCTION

Petitioner Rocco Malanga seeks review of a divided Third Circuit decision that sanctions a profound due process violation and intensifies a national crisis in fraud sentencing. Justice Gorsuch warned in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (Gorsuch, J., concurring), that "when judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop"—not on "stray asides" resembling "legislative commands."—a safeguard Petitioner lacked. The Third Circuit strayed far from this mandate. Despite undisputed, forensic proof that Petitioner used $1.8 million in Paycheck Protection Program loan proceeds to fully pay workers (App. C) in accordance with his contractual obligations—a feat unmatched in known fraud cases—it affirmed a 36-month sentence, triple that of profiteers granted probation (*United States v. VanScoyk*, No. 21-cr-01620 (D. Az.)). The majority ignored this record, embracing a speculative and factually unsupported "diminution of capital" theory and retroactive SBA guidance issued January 15, 2021 (App. D), after Petitioner's spring 2020 loans, to uphold a bank fraud conviction under 18 U.S.C. § 1344—conduct the CARES Act left uncriminalized. The CARES Act's silence on Paycheck Protection Program fraud penalties—unlike explicit criminal provisions for Economic Injury Disaster Loans (EIDL) and Pandemic Unemployment Aid (PUA)—signals Congress's intent for relief, not retroactive prosecution, which the Third Circuit ignored.

This ruling, post-*Loper Bright*'s rejection of judicial deference to agency overreach, deepens a circuit split on loss calculations, violates fair notice, and drives sentencing disparities across an $800 billion program. Petitioner, sentenced under a theory undefined at his arrest, received no judgment of the record, only an impermissible legislative gloss. This Court's intervention is urgent to restore due process, resolve national inconsistencies, and ensure justice reflects facts, not fiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

- **U.S. Constitution, Amendment V**: "No person shall be … deprived of life, liberty, or property, without due process of law."
- **U.S. Constitution, Article I, Section 1**: "All legislative Powers herein granted shall be vested in a Congress of the United States."
- **18 U.S.C. § 1344**: "Whoever knowingly executes … a scheme … (1) to defraud a financial institution; or (2) to obtain any of the moneys … under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises" commits bank fraud.
- **18 U.S.C. § 3553(a)(6)**: "The court, in determining the particular sentence to be imposed, shall consider … the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."
- **U.S. Sentencing Guidelines § 2B1.1**: This guideline governs the calculation of loss in fraud cases, which is central to determining the offense level and sentencing range.
- **Application Note 3(F)(ii) to U.S.S.G. § 2B1.1**: Defines "loss" for fraud involving government benefits and instructs that the loss shall be considered the full amount of the benefits obtained or sought, regardless of actual harm.
- **SBA Procedural Notice 5000-20078**: Issued January 15, 2021, post-dating Petitioner's conduct. It states that borrowers who received excessive PPP loan amounts due to miscalculations were required to repay—not subject to automatic prosecution. The

government retroactively applied this nonbinding guidance as the basis for criminal charges and enhancements.

- **Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020):** Established the Paycheck Protection Program. The statute does not define bank fraud standards, provide criminal penalties for borrower eligibility certifications, or delegate to the SBA the power to impose retroactive criminal liability.
- **Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1114, 134 Stat. 281, 326 (2020)**: Imposes penalties for false statements in EIDL emergency advance applications.
- **Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2102(h), 134 Stat. 281, 316-17(2020):** Criminalizes false statements to obtain pandemic unemployment assistance.

These provisions collectively underscore the constitutional and statutory errors below: the prosecution of Petitioner under a fraud statute not grounded in the CARES Act's text, despite explicit criminal provisions elsewhere in the Act (e.g., §§ 1114, 2102(h)) for other programs; the reliance on retroactive SBA guidance in violation of due process, where Congress signaled relief over punishment for Program borrowers; judicial deference to agency overreach that contravenes *Loper Bright*'s limits; and inconsistent loss calculations that flout the uniformity mandated by federal sentencing law. The relevant portions of the CARES Act and the SBA's procedural guidance are reproduced in Appendices D (SBA Procedural Notice), E (Pandemic Unemployment Insurance (PUA)) and F (Paycheck Protection Program).

PROCEDURAL HISTORY

Petitioner Rocco Malanga was arrested on November 19, 2020, and charged with bank fraud under 18 U.S.C. § 1344 in the District of New Jersey, stemming from loans obtained through the CARES Act in spring 2020. He pleaded guilty, contesting the government's loss calculation. On March 22, 2023, the district court (Judge Julien X. Neals) sentenced him to 36 months' imprisonment and 36 months' supervised release, adopting a $1.8 million loss figure, unsupported by evidence, under U.S.S.G. § 2B1.1 (*United States v. Malanga*, No. 2:22-cr-00438-001, App. B). The sentence was stayed pending appeal. On September 3, 2024, a divided Third Circuit panel affirmed in an unpublished 2-1 decision (*United States v. Malanga*, No. 23-1602, App. A), with Judge Paul Matey dissenting, urging reconsideration of the loss calculation and stating that resort to the commentary appended to § 2B1.1 was "impermissible". Rehearing and rehearing en banc were denied on November 4, 2024, and the mandate issued November 12, 2024. This petition, filed March 26, 2025, follows a 60-day extension under Supreme Court Rule 13.1, making it timely by April 3, 2025.

STATEMENT OF THE CASE

This case stems from Petitioner Rocco Malanga's prosecution for bank fraud under 18 U.S.C. § 1344, tied to Paycheck Protection Program loans obtained in 2020. The government prosecuted Petitioner under 18 U.S.C. § 1344 for conduct the CARES Act did not criminalize, later invoking SBA guidance from January 2021 to justify it, while courts imposed an inflated sentencing enhancement without evidence of financial harm—errors upheld by a divided Third Circuit, deepening a circuit split, creating intra-circuit chaos, and conflicting with this Court's rulings. These rulings violate due process, defy precedent, and exacerbate sentencing disparities, necessitating this Court's intervention.

I. The Paycheck Protection Program's Ambiguous Framework

Enacted under the Coronavirus Aid, Relief, and Economic Security Act *Pub. L. No. 116-136, 134 Stat. 281 (2020)*, the Paycheck Protection Program aimed to deliver swift relief to small businesses battered by the COVID-19 pandemic. Unlike traditional government benefits (e.g., welfare, Medicaid), loans were forgivable, bilateral contractual agreements, funded by the Small Business Administration (SBA) but disbursed through private banks acting as intermediaries. Businesses could borrow up to 2.5 times their average monthly payroll, with forgiveness contingent on performance—using funds for payroll, rent, utilities, or other approved costs. Lenders bore no financial risk as the SBA directly provided the funds—while earning substantial origination fees for processing applications.

Congress designed the Program for speed, not scrutiny. Lenders relied on borrower certifications with minimal verification, and the CARES Act offered no specific fraud definition or loss calculation method for misstatements. This ambiguity left borrowers like Petitioner vulnerable to shifting interpretations. At the Program's close in August 2020, over $133 billion remained undistributed, belying claims of scarcity or harm from any single loan. Yet, prosecutors later wielded this loose framework to pursue fraud charges, retrofitting rules that emerged only after the fact.

II. Petitioner's Conduct

Petitioner, owner of Cedar Grove Transportation, secured loans in spring 2020 to sustain his business amid pandemic disruptions. An undisputed forensic analysis by EisnerAmper LLP confirmed that 100% of the funds were used for legitimate business purposes—payroll, operational costs (with no funds used to the benefit of Petitioner or his family) (App C)—fully aligning with the Program's goals. Petitioner never sought forgiveness, issued promissory notes to lenders, and recorded the loans as liabilities, indicating no intent to defraud. At the time, no SBA guidance barred his eligibility. Yet, in November 2020, he was arrested for bank fraud based on alleged misstatements regarding payroll and eligibility. Two months later, on January 15, 2021, the SBA issued Procedural Notice 5000-20078, stating that "excess loan amount errors" from miscalculations should trigger repayment, not prosecution. App. E. This guidance, unavailable during Petitioner's conduct, underscored the Program's remedial—not punitive—approach. Nonetheless, prosecutors ignored it, retroactively applying a fraud theory undefined in 2020.

III. Sentencing Errors and The Birth of the "Diminution of Capital" Fallacy

Petitioner pleaded guilty, contesting the government's loss calculation. At sentencing on March 22, 2023, the District Court for the District of New Jersey (Judge Julien X. Neals) deemed the full $1.8 million loan amount as loss under U.S.S.G. § 2B1.1, adopting a "diminution of capital" theory:

> *"The bank is an individual that has money funneled through it that is, in turn, giving it to another individual who has applied to them under the PPP program...there are other people who could have gone to that particular bank who didn't receive because of what he obtained from that bank."*

This assumption—that Petitioner's loans deprived others—lacked evidence. The Program's $133 billion surplus and the absence of any identified victim (bank or borrower) debunked it. Banks, as SBA conduits, suffered no harm; they disbursed federal funds, earned fees, and benefitted from the ongoing banking opportunities the loans created. The court's reliance on the loan's full amount as loss, without proof of financial impact, inflated Petitioner's Guidelines range far beyond a zero-loss reality. By ignoring forensic proof of zero harm and *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991), which requires actual loss, the court sidestepped Rule 32(i)(3)(B)'s fact-finding duty, inflating Petitioner's sentence.

IV. Third Circuit's Divided Ruling

On appeal, the Third Circuit affirmed 2-1 on September 3, 2024 (*United States v. Malanga*, No. 23-1602, App. A). The majority upheld the loss calculation, misclassifying Petitioner's loans as "government benefits" under U.S.S.G. § 2B1.1 commentary, despite no financial harm and advancing the "diminution of capital" fallacy. Judge Paul Matey dissented, arguing the majority wrongly relied on commentary over statutory text, cementing intra-circuit conflict with Kopp, Banks, and Nasir, and a broader split with circuits like the Second (United States v. Binday, 804 F.3d 558 (2015)) and Eleventh (United States v. Takhalov, 827 F.3d 1307 (2016)), which demand actual harm for loss. Rehearing was denied November 4, 2024.

V. Need for Review

This case epitomizes a due process breach: criminalizing conduct under guidance issued after the fact, absent fair notice. It flouts *Loper Bright*'s ban on deference to agency overreach, as Judge Matey's rejection of commentary deference reflects, and deepens a circuit split on loss calculation. The Third Circuit's break from *Kopp*, *Banks*, and *Nasir* creates intra-circuit chaos, while its outlier stance against other circuits fuels sentencing disparities. Petitioner's sentence—inflated by a baseless "diminution" theory—dwarfs those of similarly situated defendants, violating 18 U.S.C. § 3553(a)(6). Petitioner, with no financial harm and full compliance with the Program's goals, received a far harsher sentence than many defendants nationwide—a stunning reversal where fully paying workers with $1.8 million earned 36 months, triple the punishment of profiteers granted probation (*United States v. VanScoyk*, No. 21-cr-01620 (D. Az.), despite others often using loan proceeds for personal gain. This Court's intervention is urgent to clarify loss, intent, and deference, ensuring fairness in a post-*Loper Bright* era.

REASONS FOR GRANTING THE WRIT

This case presents urgent constitutional and statutory issues warranting certiorari. The Third Circuit's divided ruling violates due process by upholding a bank fraud conviction under 18 U.S.C. § 1344, bolstered by retroactive agency guidance, deepens a circuit split on loss calculation under U.S.S.G. § 2B1.1, and fosters sentencing disparities in fraud cases nationwide—errors compounded by judicial deference now invalidated by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Only this Court can restore fair notice and uniformity.

I. Retroactive Agency Guidance Violates Due Process

The government's prosecution of Petitioner hinges on SBA Procedural Notice 5000-20078, issued January 15, 2021—months after his spring 2020 loan applications—retroactively redefining permissible conduct under the CARES Act. This notice, which suggested repayment rather than prosecution for 'excess loan amount errors' (App. E), emerged long after Petitioner acted, yet the government later relied on it to justify prosecuting alleged misstatements under 18 U.S.C. § 1344, despite the CARES Act's failure to criminalize such conduct. Imposing liability based on guidance unavailable at the time of his conduct denies fair notice, a core due process protection under the Fifth Amendment. As this Court held in *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964), 'an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law,' violating 'the requirement that a criminal statute give fair warning of the conduct which it prohibits.' Here, the Third Circuit's affirmance sanctions an analogous executive overreach, amplifying the constitutional breach. The CARES Act, enacted March 27, 2020, offered no specific fraud definition or eligibility bar that Petitioner's actions clearly transgressed. Its rushed implementation prioritized speed over clarity, leaving borrowers to rely on lender certifications without detailed SBA rules. Only after Petitioner's loans—fully utilized for legitimate payroll and operations, per forensic analysis—did the SBA issue its 2021 notice, shifting the legal landscape. This retroactive pivot mirrors the due process violation in *Marks v. United States*, 430 U.S. 188, 192 (1977), where this Court struck down a conviction based on a post-conduct reinterpretation, noting "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice … of what the law intends to do if a certain line is passed." Petitioner received no such notice; the SBA's remedial guidance was twisted into a punitive trap.

Justice Gorsuch's vision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), exposes the Third Circuit's error. By ending judicial deference to agency overreach—guidance like the SBA's Procedural Notice 5000-20078 (App. E), issued post-conduct with no statutory anchor—*Loper Bright* demands courts reject such retroactive traps, safeguarding congressional intent under Article I. The CARES Act delegated no authority to retroactively criminalize loan applications where the borrower indeed used the proceeds as required, yet the Third Circuit deferred to this post-hoc gloss, bypassing Article I's vesting of legislative power in Congress. This dual violation—due process and separation of powers—affects not just Petitioner, but the many thousands of borrowers prosecuted under these shifting standards, as well as thousands more annually who are exposed to fraud loss calculations. This Court's precedent in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), underscores the stakes: vague or retroactive laws "trap the innocent by not providing fair warning." Without this Court's intervention, such prosecutions will persist, eroding constitutional safeguards in an era of emergency legislation.

Compounding this error, Petitioner faced charges in November 2020—months before SBA Procedural Notice5000-20078 existed. Without this later guidance, the government lacked a basis to allege fraud under then-existing law, relying instead on vague ineligibility claims retroactively justified by rules absent during Petitioner's loan application, approval, and lawful payroll use. In other words, the government did not wait for the SBA to define what conduct was prohibited, and ignored Congress' original, intentional omission—it acted first, charged Petitioner under a theory unanchored in any defined rule, and only later relied on the SBA's post-hoc notice to validate its claims. This is the precise type of retroactive prosecution this Court has condemned: one that imposes punishment based not on statutory violation, but on evolving executive interpretation after-the-fact.

II. A Circuit Split and Intra-Circuit Conflict Demand Loss Calculation Clarity

The federal courts are deeply divided over how to calculate loss in financial fraud cases. Some circuits require actual financial harm to trigger enhancements under U.S.S.G. § 2B1.1, while others, like the Third Circuit in this case, presume total loss based on commentary. This conflict affects thousands of federal sentences annually and is now compounded by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which prohibits deference to agency-created rules that lack statutory support.

The Third Circuit's presumption that the full $1.8 million in loan proceeds constitutes loss under § 2B1.1—despite forensic evidence of zero financial harm (App. C)—and its reliance on a speculative "diminution of capital" fallacy mark a stark departure from both other circuits' actual-loss standards and its own precedent, creating a deep circuit split and internal inconsistency. The majority endorsed the district court's theory that Petitioner's loans deprived others of funds ("other people who could have gone to that particular bank who didn't receive," a notion unsupported by evidence given the Program's $133 billion surplus and the absence of harm to banks or the SBA. This approach defies United States v. Kopp, 951 F.2d 521, 531 (3d Cir. 1991), which requires loss to reflect "the loss [a defendant] could have occasioned"—a realistic harm standard unmet here. The Third Circuit's dual error—categorical loss and baseless diminution—further clashes with circuits demanding tangible economic impact. The Second Circuit in United States v. Binday, 804 F.3d 558, 595 (2015), rejected an inflated loss calculation, holding that "intended loss" under § 2B1.1 must reflect "the amount of money the victim stands to lose" based on "realistic economic harm," not speculative totals. Similarly, the Eleventh Circuit in United States v. Takhalov, 827 F.3d 1307, 1314 (2016), reversed a sentencing enhancement where defendants misrepresented services but caused no actual loss, insisting § 2B1.1 requires "pecuniary harm that the defendant knew or… reasonably should have known was a potential result." Justice Jackson, concurring in Ciminelli v. United States, 598 U.S. 306, 318 (2023), insisted that "the Government must still prove that a defendant's misrepresentations were material to obtaining property," ensuring "only culpable conduct is punished"—a standard the Third Circuit's baseless loss flouts. Petitioner's proper use (App. C) proves he "received" no property—only payroll was paid—rendering his misstatements immaterial under Ciminelli. Congress's omission of PPP-specific fraud penalties—unlike EIDL's explicit criminal provisions (§ 1114)—further undermines this loss, suggesting civil remedies, not criminal overreach, were intended, a distinction *Ciminelli*'s materiality requirement exposes as unmet here. Contrast GMI USA Corp., where the DOJ settled civilly for $1.47 million over $489,990 in excess PPP loans from false payroll claims (App G, S.D.N.Y., Dec. 11, 2024). Despite admitted misconduct, civil recovery sufficed—unlike Petitioner's 36-month sentence for misstatements, highlighting prosecutorial overreach absent CARES Act mandate."

The Fifth Circuit echoed this in *United States v. Olis*, 429 F.3d 540, 547 (2005), remanding a fraud case because "the Guidelines require a district court to find an actual or intended loss that bears a logical relationship to the fraudulent conduct." By contrast, the Third Circuit's 2-1 ruling in *Malanga* (App. A) doubled down, misclassifying Petitioner's loans as "government benefits" under Application Note 3(F)(ii) and advancing an unproven diminution theory—widening a national rift on this sentencing metric. This commentary lacks foundation in § 2B1.1's text, and under *Loper Bright*, courts may no longer defer to such overreach.

This Court's precedent further underscores the Third Circuit's error. In *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), deference to agency interpretations—like the Sentencing Commission's commentary—requires genuine ambiguity and a textually grounded reading, conditions unmet by Application Note 3(F)(ii)'s unsupported classification of Petitioner's loans as "government benefits." Likewise, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), limits deference to actions with congressional delegation and legal force, neither present here.

This split drives sentencing chaos. In *Binday*, a $16 million intended loss yielded 87 months; in *Takhalov*, zero loss cut the sentence to 36 months. Petitioner's 36-month term for $1.8 million—used legitimately—exceeds what circuits adhering to actual-loss standards, including *Kopp*, would impose, often probation. The Third Circuit's outlier approach rests on non-binding commentary and a "diminution" fallacy, a practice suspect post-*Loper Bright*, which mandates independent judicial interpretation. Other circuits recognize PPP loans as forgivable contracts, not benefits, isolating *Malanga*'s ruling.

Within the Third Circuit, the conflict is stark. *Kopp* ties § 2B1.1 to realistic harm—a standard Petitioner's zero-loss evidence satisfies. *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (en banc), cautions against commentary overreach, yet *Malanga*'s majority embraced a categorical rule. Judge Matey's dissent, consistent with *Kopp* and *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022), urged reconsideration, highlighting the government failed to prove loss—a position *Ciminelli* bolsters. This intra-circuit discord leaves district courts adrift, as Petitioner's inflated sentence versus lighter terms elsewhere in the circuit shows.

The stakes are high: § 2B1.1 governs thousands of fraud cases yearly, dictating years of liberty. The Third Circuit's reliance on commentary and speculation risks over-punishment, diverging from the text-bound approach *Loper Bright* demands. Only this Court can resolve this split, align sentencing with *Ciminelli*'s harm standard, and restore uniformity.

III. Sentencing Disparities Driven by Conflicting Loss Calculations Require This Court's Intervention

The Third Circuit's inflated loss calculation—deeming Petitioner's $1.8 million in legitimately used loan proceeds as total loss—produces stark sentencing disparities that violate 18 U.S.C. § 3553(a)(6)'s mandate to 'avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.' Petitioner's 36-month prison term towers over outcomes in comparable fraud cases where courts applied actual-loss standards. Among all PPP fraud cases nationwide, no other known defendant utilized the entirety of loan proceeds to pay workers, as Petitioner did with undisputed, forensic proof of zero harm, yet courts commonly imposed lenient sentences—even non-custodial ones—on defendants who diverted funds for personal gain. For instance, in *United States v. Jonathan VanScoyk*, No. 21-cr-01620 (D. Az.), a defendant fraudulently obtained $594,000 and falsified employee records, receiving two years' probation. In *United States v. Wyleia Nashon Williams*, No. 21-cr-00806 (N.D. Oh.), a $3.5 million PPP fraud scheme with kickbacks and falsified checks yielded time served (one day) and six months' home confinement. Similarly, in United States v. Marc Orival, No. 22-cr-246 (D.N.J.), the defendant received time served (one day) for wire fraud and money laundering involving approximately $75,000. By contrast, Petitioner—a zero-point offender with no prior record and forensic proof of zero harm—faces a harsher penalty under the Third Circuit's commentary-driven approach, untethered from economic reality. These disparities stem directly from inconsistent loss calculations under U.S.S.G. § 2B1.1, a problem magnified by the Third Circuit's new-found reliance on Application Note 3(F)(ii) and its 'diminution of capital' fallacy. This problem is exacerbated by lingering judicial deference to Sentencing Commission commentary—a practice that *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024), expressly disavowed by requiring courts to interpret legal text without relying on agency glosses lacking clear statutory support. Section 3553(a)(6) aims to ensure fairness across defendants nationwide, yet the Third Circuit's ruling flouts this statutory command. For instance, in *United States v. Fitzgerald*, No. 20-cr-0202 (E.D. Wis.), a defendant used fraudulent program funds from a dissolved company, receiving two years' probation. In *United States v. Matthew Jason Welch*, No. 20-cr-00103 (D. Mont.), fraudulent Program funds paid restitution in another crime, yet the sentence was five years' probation. In *United States v. Baoke Zhang*, No. 20-cr-00169 (W.D. Wash.), a $1.5 million fraudulent application resulted in 60 days' incarceration. These lighter sentences—often probation or under two years—reflect a growing consensus that Paycheck Protection Program fraud penalties should scale with actual damage, not loan amounts. Petitioner's case, however, exemplifies how the Third Circuit's outlier method over-punishes, creating a patchwork of justice that § 3553(a)(6) was designed to prevent.

The impact is national and pervasive. The Paycheck Protection Program disbursed over $800 billion across 11 million loans, spawning thousands of fraud prosecutions since 2020. The Department of Justice reported over 5,000 investigations by 2023, with sentences varying wildly due to inconsistent loss rules. In the Southern District of Florida, *United States v. Gary Venning*, No. 22-cr-60001 (S.D. Fl.), a $454,000 loan was used for kickbacks and cash withdrawals, yet the defendant received time served (one day) and one year of home confinement—contrasting sharply with Petitioner's 36 months with full legitimate use. This variance isn't mere judicial discretion; it's a systemic failure tied to the Third Circuit's departure from actual-loss principles upheld elsewhere (and internally). The *Malanga* majority's reliance on non-binding commentary—classifying Program loans as 'government benefits' despite their contractual nature—exacerbates this inequity, a practice now suspect post-*Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). *Loper Bright* demands courts interpret the Guidelines independently, yet the Third Circuit deferred to an unsupported gloss, inflating sentences beyond what Congress or the Guidelines intended.

Without this Court's guidance, these disparities will continue to erode public confidence in the fairness of federal sentencing. CARES Act fraud prosecutions represent a unique intersection of emergency legislation, post-hoc regulatory interpretation, and now-invalidated judicial deference. The result is a patchwork of outcomes untethered from statutory text or real economic harm. Petitioner's case illustrates how a non-binding, commentary-driven interpretation can yield harsher punishment than cases involving clear fraud and misuse. The Constitution demands more. This Court's intervention is urgently needed to resolve the growing divergence in how § 2B1.1 is applied, ensure that sentences reflect actual culpability, and restore § 3553(a)(6)'s promise of equitable justice across the federal system.

IV. National Importance and Constitutional Stakes Warrant Certiorari

The Third Circuit's 2-1 ruling—upholding a bank fraud conviction and $1.8 million loss calculation despite forensic evidence of zero harm (App. C)—threatens fair notice, sentencing equity, and constitutional limits across thousands of prosecutions. This decision risks over-punishing defendants under vague, post-hoc standards, affecting not just Paycheck Protection Program cases but all fraud sentencings where loss drives punishment—a federal justice cornerstone impacting thousands annually.

The constitutional stakes are acute. Prosecuting Petitioner via SBA Notice 5000-20078 (App. D)—issued January 2021, months after his 2020 loans—violates due process by retroactively expanding liability absent clear CARES Act prohibition, defying *Bouie v. City of Columbia*, 378 U.S. 347 (1964). The Third Circuit's deference to this notice and Sentencing Guidelines commentary, misclassifying loans as "government benefits" and advancing a baseless "diminution of capital" theory, flouts *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which bars judicial reliance on agency rules lacking statutory roots. This executive overreach sidesteps Article I's legislative vesting, setting a precedent that could haunt future emergency programs with shifting rules.

Nationally, sentencing disparities compound the crisis. The Third Circuit's approach clashes with actual-loss standards in the Second, Fifth, Ninth, and Eleventh Circuits, yielding Petitioner's 36-month term while similar cases draw probation (*Venning*, *Zhang*, *VanScoyk*, supra Part III). Within the Third Circuit, chaos festers—its ruling defies *Kopp*, *Banks*, and *Nasir*, leaving district courts unmoored and sentencing inconsistent even locally. This patchwork—tied to jurisdiction, not culpability—violates 18 U.S.C. § 3553(a)(6) and erodes trust, especially as $78 billion in loans flagged as fraudulent (SBA, 2022) blur intent and harm. Congress's intent for Paycheck Protection Program relief, not criminalization—evidenced by explicit penalties elsewhere in the CARES Act (e.g., Pandemic Unemployment Assistance (PUA, § 2102(h))—magnifies this inequity, as prosecutions like Petitioner's exceed statutory design. Without uniformity, courts risk turning relief into retribution, chilling economic recovery efforts.

The Third Circuit's break from its own precedent (*Kopp*, *Banks*, *Nasir*) and sister circuits creates chaos—reaching far beyond the CARES Act—needing clarity for thousands of fraud sentencings. The due process breach, entwined with *Loper Bright*'s shift, tests how courts handle agency guidance in criminal law—a rising issue as emergency measures grow. Ongoing prosecutions and fraud dockets make this an ideal vehicle to harmonize sentencing, safeguard constitutional bounds, and ensure justice tracks harm, not geography. Certiorari is urgent to halt this national sentencing crisis and restore fairness.

CONCLUSION

This case presents an opportunity for the Court to restore consistency, fairness, and constitutional limits in federal sentencing. The Third Circuit's approach—misclassifying contractual loans, endorsing an unsupported "diminution of capital" theory, and departing from its own precedent—deferring to non-binding Sentencing Guidelines commentary—has created a split of authority and undermined basic due process protections.

Without this Court's intervention, sentencing disparities will continue to widen, and the constitutional safeguards of fair notice and separation of powers will erode. For these reasons, Petitioner respectfully prays that this Court grant the writ of certiorari to resolve these pressing statutory and constitutional questions of national importance.