DOCKET NO. 25-6464

In The Supreme Court of the United States

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DJONIBEK RAHMANKULOV,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER THE DISTRICT COURT'S LOSS CALCULATION WHICH INCLUDED INTENDED LOSSES AND LOSSES ATTRIBUTED TO OTHERS WAS ERRONEOUS

In his petition requesting certiorari, Mr. Rahmankulov asks this Court to review his claim – whether the district court erred in including the "intended loss" and losses attributed to his alleged co-conspirators when calculating the loss amount for Sentencing Guidelines calculation purposes – because it has been the subject of a great deal of debate among members of the judiciary and there is currently a split in the Circuit Courts of Appeals that is in need of resolution by this Court to ensure even-handed justice for all criminal defendants regardless of in which jurisdiction they are convicted.

In its memorandum in opposition to Mr. Rahmankulov's petition for a writ of certiorari, the government concedes that there is a split on this issue among the circuits and, rather than defending on the merits the Second Circuit Court of Appeals' decision in this case (and others upon which it relied), the government raises procedural barriers including several recent denials of requests for writs of certiorari on this identical claim, the recent amendment to U.S.S.G. §2B1.1 and its application note in the 2024 Sentencing Guidelines Manual, and the fact that Mr. Rahmankulov's Guidelines calculation may not be changed even if the intended loss amount is removed. The government makes these arguments in an obvious effort to avoid having to address the merits of the issue and the error committed by the

sentencing court when including the "intended loss" and losses attributed to Mr. Rahmankulov's alleged co-conspirators when calculating the loss amount for Sentencing Guidelines.

It has long been recognized that "One of this Court's roles, in justiciable cases, is to resolve major legal questions of national importance and ensure uniformity of federal law." Trump v. Casa, Inc., 145 S. Ct. 2540, 2571 (2025). And if it is serious in succeeding in its mission to achieve such "uniformity of federal law," this Court cannot stand by and refuse to address splits among the Circuits.

That is precisely why Mr. Rahmankulov is before this Court seeking certiorari so that this Court can address the obvious split among the Circuit Courts of Appeals regarding whether the Sentencing Guidelines application note defining "loss" to include intended losses should have been applied here. Although in United States v. Rainford, the Second Circuit, along with the First, Fifth, Seventh, Eighth and Tenth Circuits, has held that U.S.S.G. §2B1.1's commentary is authoritative, and thus the term "loss" as used in §2B1.1(b)(1), includes both actual and intended losses [United States v. Rainford, 110 F.4th 455 (2d Cir. 2024)], there is another circuit that has disagreed. The Third Circuit, in United States v. Banks, 55 F.4th 246, 258 (3d Cir. 2022), held that "the ordinary meaning of the word 'loss' is the loss the victim actually suffered... [b]ecause 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."). This is clearly a break from what the other Circuits

have held and is not an anomaly (or an "outlier" as the government labels the decision) as the Third Circuit has now repeatedly held that the term "loss," as used in U.S.S.G. §2B1.1, was not "genuinely ambiguous" and, as a result, has refused to defer to the Guidelines commentary for guidance. United States v. Banks, 55 F.4th at 262; see also United States v. Barkers-Woode, 136 F.4th 496, 501 (3rd Cir. 2025) (Third Circuit, citing Banks, found plain error where the district court applied a fourteen-point enhancement based on an intended loss greater than $550,000, holding that it must do so "in light of Banks, where we held that 'loss' within the meaning of §2B1.1(b)(1) means actual loss, not intended loss"); United States v. Cammarata, 23-2110 (3d Cir. July 22, 2025) ("[T]his Court has held that loss under the Guidelines is limited to 'the loss the victim[s] actually suffered'"). The Third Circuit further held that §2B1.1's commentary "impermissibly expands the word 'loss'" and must be given "no weight" because "The Guideline does not mention 'actual' versus 'intended' loss; that distinction appears only in the commentary. That absence alone indicates that the Guideline does not include intended loss." United States v. Banks, 55 F.4th at 255.

In support of its decision that breaks ranks with its sister Circuits, the Third Circuit cited Kisor v. Wilkie, 588 U.S. 558 (2019), finding that it should apply §2B1.1's plain text (which directs the district courts to apply an enhancement based on "loss") because courts must consider a Guideline's plain text before turning to the Guidelines commentary for guidance. United States v. Banks, 55 F.4th at 255. To proceed any other way impermissibly expands the Guideline using the commentary which is not law, but rather was meant to

provide assistance in the form of clarifications, definitions and guidance in implementing the statutes. Based on that reasoning, the Third Circuit became the first appellate court to categorically reject the commentary's intended loss approach when it affirmatively held that loss under the Guidelines is limited to "the loss the victim[s] actually suffered." Id. at 258. And based on the findings of other circuits, including the Second Circuit in this case and others, there is a clear split that requires resolution by this Court.

However, in an effort to deter this Court from addressing the obvious split, the government here calls the Third Circuit's decision "an outlier decision," and bizarrely claims that it "does not furnish any substantial basis for further review in this case." Resp. Opp. at p. 3.[1] A split in the decision of the Circuits cannot be ignored by the government (or this Court) simply because the outcome may be different than what the government wants it to be. This conflict is direct and irreconcilable and needs to be addressed by this Court. It cannot be true that it is permissible for defendants convicted of financial crimes in New York/Connecticut (Second Circuit) receive different treatment than those that are convicted in Pennsylvania (Third Circuit). To so allow flies in the face of one of the core purposes of this Court which is to ensure evenhanded justice for all regardless of their location in the nation.

Next, the government argues that review of this claim is not warranted "because [the

[1] "Resp. Opp." refers to the Memorandum in Opposition submitted by the Solicitor General to this Court on behalf the government.

Guidelines commentary at issue] has been removed from the Sentencing Guidelines." Resp. Opp. at p. 3. That is, the government seeks to convince this Court that because the definition of 'loss' has been moved from the commentary to the Guideline itself in the 2024 Guidelines Manual, there is no problem that needs to be addressed. Although that may be true going forward, the issue remains for those defendants like Mr. Rahmankulov who were sentenced by district courts that relied upon this commentary in calculating the loss amount under U.S.S.G. §2B1.1(b)(1) to include "the greater of actual loss or intended loss" based on U.S.S.G. §2B1.1, comment. (n.3(A)). Thus, even if it is true that the amendment to the Guidelines eradicated the problem for defendants facing this issue now and into the future, for Mr. Rahmankulov and other similarly situated criminal defendants who were sentenced by district courts who relied upon that commentary (before it was amended), review is needed to address the problem that existed before the amendment took effect.

Indeed, the government's acknowledgment here that "The Commission adopted that amendment specifically to resolve the division of authority created by the Third Circuit's outlier decision, by moving the definition of 'loss' 'from the commentary to the guideline itself'" [Resp. Opp. at p. 4 *citing* 88 Fed. Reg. 89,142, 89,143-89,144 (Dec. 26, 2023)] clearly demonstrates that there was a problem with the Guideline and its commentary that needed to be fixed. The fact that it was amended in the 2024 Guidelines Manual to fix the problem (and the split among the Circuits regarding its use) does not, as the government claims here, prove that there was no problem here. To the contrary, the converse is actually

true. Rather than looking at the amendment as a cure for the obvious problem with this Guideline and its commentary, it should be viewed as being illustrative of Mr. Rahmankulov's point which is that if the text of U.S.S.G. §2B1.1 already encompassed intended loss, then no amendment would have been necessary. The Commission's decision to move this definition up from the commentary and into the Guideline itself should instead by interpreted as a tacit admission that the commentary impermissibly expanded the text and a clear indication that "intended loss" was intentionally omitted when drafted and this 2024 amendment was meant to eliminate any perceived need to rely on the commentary in calculating loss under §2B1.1. In short, it demonstrates that the reliance on the Guidelines commentary by the district courts while it was in effect was improper.

Moreover, the prospective amendment does nothing to remedy past errors. The fact that the amendment was not made retroactive further demonstrates the need for review by this Court as there are defendants like Mr. Rahmankulov who were sentenced under the 2021 Guidelines manual who were sentenced using the commentary who are not entitled to relief unless this Court steps in and rights this wrong.

Finally, the government argues that this claim is not worthy of certiorari because Mr. Rahmankulov acknowledges that the removal of the intended loss amount may not change his Guidelines range because the co-conspirator funds alone exceed $9.5 million. Resp. Opp. at pp. 4-5 *citing* Petition for Certiorari at p. 23. The government is wrong. As argued in Mr. Rahmankulov's initial petition [Id.], in accordance with this Court's decision in Molina-

Martinez v. United States, 578 U.S. 189, 200 (2016), the Guidelines serve as "the starting point for every federal sentencing proceeding" and "the lodestar" for district courts. And, although instructive, since they are now purely advisory [United States v. Booker, 543 U.S. 220 (2005)], the district courts have a great deal of discretion to move off of that Guidelines starting point. Thus, an incorrect Guidelines calculation must be deemed prejudicial because the Guidelines calculation is the anchor of the district court's sentencing analysis. Here, the district court's analysis commenced with a grossly over-inflated loss figure that improperly included intended losses. That error infected every subsequent step in the sentencing process and likely resulted in a sentence that was higher than it would have been without consideration of the intended loss. Thus, the government's alternative harmless error finding – that the district court would have imposed the same sentence anyway – cannot cure this procedurally flawed Guidelines calculation.

CONCLUSION

For the reasons set forth above and in his initial petition, Djonibek Rahmankulov respectfully requests that this petition for a Writ of Certiorari be granted in its entirety.

Respectfully Submitted,

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