

No. _____

In the Supreme Court of the United States

RUSLAN KIRILYUK

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

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1. Whether *Stinson v. United States*, 508 U.S. 36 (1993), still accurately states the level of deference due to the commentary of the Federal Sentencing Guidelines. This is the question on which this Court granted certiorari in *Beaird v. United States*, No. 25-5343.

2. Whether U.S.S.G. § 2B1.1’s reference to “loss”—undefined in the Guideline text governing petitioner’s sentencing—may be read through Application Note 3(A) to include “intended loss” the defendant never realized.

Law Office of Gene Vorobyov

Respectfully submitted,

Attorney for Petitioner
RUSLAN KIRILYUK

PARTIES TO THE PROCEEDINGS

Petitioner is Ruslan Kirilyuk

Respondent is United States of America.

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Brief

Opinions Below

An unpublished 2–1 opinion of the United States Court of Appeals for the Ninth Circuit was filed October 30, 2025. (App-4). Appellant filed a timely rehearing petition, which the Ninth Circuit denied January 26, 2026. (App-24).

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing January 26, 2026 (App-24). Jurisdiction of this Court is thus timely invoked under [28 U.S.C. § 1254\(1\)](#).

**Constitutional and Statutory
Provisions Involved**

Under the pre-2024 version of the Guideline manual on which Petitioner was sentenced, [U.S. Sentencing Guidelines § 2B1.1](#) provides that “[i]f the loss exceeded \$6,500,” § 2B1.1(b)(1) provides for incremental offense-level increases based on the dollar amount of the loss.¹

¹ All further unassigned section references are to the U.S. Sentencing Guidelines.

The term “loss” was not defined in the guideline. However, Application Note 3(A) to the guideline stated that “loss” is the greater of actual or intended loss.

Statement of Facts and Procedural History

A jury convicted Petitioner of twenty-four counts of wire fraud (18 U.S.C. § 1343), two counts of mail fraud (18 U.S.C. § 1341), one count of aggravated identity theft (18 U.S.C. § 1028A), and one count of failure to appear (18 U.S.C. § 3146). In the first appeal, *United States v. Kirilyuk* (“*Kirilyuk I*”) 29 F.4th 1128 (9th Cir. 2022), the Ninth Circuit vacated Petitioner’s sentence and remanded for resentencing.

In the resentencing proceeding on remand, the district court calculated loss under § 2B1.1 based on the intended loss commentary, using \$3.4 million in intended loss rather than the \$1.4 million in actual loss to set the offense-level enhancement, and imposed a total prison term of 236 months. (App-4–5; App-30–31). Over the defense’s timely objection, the district court disagreed with Petitioner that under

Kisor v. Wilkie, 588 U.S. 558 (2019), and *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), the intended loss commentary to § 2B1.1 improperly expanded the definition of loss in the guideline, not interpreted it. The district court instead relied on *Stinson v. United States*, 508 U.S. 36 (1993), and the existing Ninth Circuit cases under *Stinson* deferring to the intended loss commentary. (App-20–22).

Petitioner renewed that objection on appeal. In a divided 2–1 unpublished disposition, a Ninth Circuit panel affirmed. (App-3–13). The majority reviewed the question de novo and applied the three-step *Kisor* framework to determine whether to defer to Application Note 3(A)’s definition of “loss” as “the greater of actual loss or intended loss.” (App-5–6). At step one, the majority held that “loss” in § 2B1.1 is genuinely ambiguous, relying on circuit precedent in *United States v. Yafa*, 136 F.4th 1194 (9th Cir. 2025). (App-5–6).

Next, at step two, it concluded the commentary’s reading was “reasonable” and within the “zone of am-

biguity,” pointing to circuit cases treating intended loss as “part and parcel” of “loss,” the historical lineage from § 2F1.1 (1987) through § 2B1.1, § 1B1.3(a)(3)’s reference to harm that “was the object of” the offense, and the Sentencing Commission’s 2024 amendment moving the loss definition into the guideline text itself. (App-6–8); see U.S.S.G. § 2B1.1(b)(1)(A) (2024) (App-25–28).

Finally, at step three, it held the Commission’s interpretation was entitled to controlling weight as its official, longstanding position reflecting substantive expertise and fair and considered judgment. (App-8).

Judge Bumatay dissented. (App-10–13). In his view, although “loss” can carry a range of meanings, every recognized sense—actual, economic, intangible, even unrealized—shares a “common denominator”: each refers to “a diminution that *actually happened*.” (App-11). Surveying *Black’s Law Dictionary* and ordinary usage, he reasoned that “when ordinary speakers of the English language say ‘loss,’ they mean something that actually occurred.” (App-11) (quoting

United States v. Boler, 115 F.4th 316, 333 (4th Cir. 2024) (Quattlebaum, J., dissenting)). § 1B1.3(a)(3), he explained, supplies general application principles for inchoate offenses and does not expand the permissible meaning of “loss” in § 2B1.1, which addresses economic and property offenses. (App-12). Because an “intended loss” never happened, Application Note 3(A) is not a reasonable interpretation of “loss,” falls outside the zone of ambiguity, and is not entitled to deference under *Kisor*. (App-13).

Petitioner timely petitioned for rehearing en banc, but the Ninth Circuit denied the petition January 26, 2026. (App-24).

Reasons for Granting Certiorari

This petition presents an issue of national importance on which this Court granted certiorari just six days before this petition was filed. In *Beaird v. United States*, No. 25–5343 (cert. granted Apr. 20, 2026), the Court will decide whether *Stinson v. United States*, 508 U.S. 36 (1993), still accurately states the level of deference owed to the Commentary of the Federal

Sentencing Guidelines after this Court’s decisions in *Kisor v. Wilkie*, 588 U.S. 558 (2019), and *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).²

That is precisely the threshold question on which the Ninth Circuit’s 2–1 decision below turned. (App-5–6). This Court should grant the petition, hold it pending the decision in *Beird*, or grant, vacate, and remand for reconsideration in light of that decision.

In the alternative, plenary review is warranted in this case because it presents the entrenched circuit conflict over the intended-loss commentary to U.S.S.G. § 2B1.1 in a posture that *Beird* itself does not. This makes this case a uniquely apt companion vehicle for resolving the most consequential downstream application of the deference question.

² A cert petition in *Bey v. United States*, to be filed today in a Fourth Circuit decision, is likely to seek cert on the same or similar issues as the one presented here.

I. The Court’s Grant of Certiorari in *Beaird* Independently Warrants, at Minimum, a Hold and GVR

Six days before this petition was filed, this Court granted certiorari in *Beaird v. United States*, No. 25–5343. That grant was limited to the question whether *Stinson* still correctly states the rule of deference owed to the Commentary of the Federal Sentencing Guidelines.

The Ninth Circuit’s decision below rests on the proposition—contested in the lower courts and now before this Court—that *Stinson* deference, as refined by *Kisor*, still supplies the framework for evaluating Application Note 3(A)’s definition of “loss.” (App-5). The court accepted the Commission’s commentary as “controlling weight” only after marching through *Kisor*’s three steps. (App-8). Whether that framework even governs is now squarely teed up for this Court’s decision. See [Lawrence v. Chater](#), 516 U.S. 163, 167 (1996) (per curiam) (GVR appropriate where inter-

vening developments “reveal a reasonable probability that the decision below rests upon a premise” this Court will reject).

A decision in *Beaird* is expected by June 2027. In the interim, holding this petition costs nothing and protects against the risk that Petitioner will serve years of imprisonment under a deference regime this Court is poised to alter or abandon. Whichever way *Beaird* is decided, the disposition will materially affect the analysis of the § 2B1.1 question presented here. If the Court holds that *Stinson* no longer supplies controlling weight, the Ninth Circuit’s entire deference rationale collapses, and Petitioner’s sentence—driven by \$2 million of intended but never-realized loss—cannot stand.

And even if the Court reaffirms *Stinson* in some form, its articulation of the governing standard will likely reshape the § 2B1.1 inquiry that the panel below resolved against Petitioner by a divided vote. At a minimum, this Court should hold the petition pending *Beaird*.

II. Plenary Review is Warranted Because the Intended-Loss Commentary Has Produced an Entrenched Circuit Conflict, Including Two Irreconcilable En Banc Decisions

Supreme Court Rule 10(a) identifies as a leading ground for certiorari that “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” This is that case. Whether Application Note 3(A) permissibly defines “loss” in § 2B1.1 to include intended loss has produced an acknowledged, mature conflict among the courts of appeals.

On one side, the Third Circuit in *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), held that “loss” in § 2B1.1 unambiguously means actual loss and that the commentary’s intended-loss definition impermissibly expands the Guideline. *Id.* at 257–58. *Banks* applied the *Kisor* ambiguity-first framework to reach that conclusion at step one of the ambiguity analysis.

Similarly, the Fourth, Sixth, Ninth, and Eleventh Circuits apply the *Kisor* model—ambiguity first, then

deference to a reasonable interpretation of any ambiguous guideline. *United States v. Boler*, 115 F.4th 316, 322–23 (4th Cir. 2024); *United States v. Riccardi*, 989 F.3d 476, 484–88 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648, 655–56 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023).

Notably, even with these circuits that attempt to harmonize *Kisor* and *Stinson*, there is an entrenched conflict about how that framework applies to intended loss commentary to § 2B1.1. Many of these decisions are 2–1 splits.

For example, the Third Circuit holds that the guideline definition unambiguously does *not* include intended loss while the Eleventh Circuit holds that it unambiguously does.

However, the Fourth and Sixth Circuits do find the commentary generally ambiguous, but also find inclusion of intended loss a reasonable interpretation of the loss definition.

And the Ninth Circuit’s jurisprudence is internally inconsistent. Compare *Kirilyuk I*, 29 F.4th at 1138 (loss in § 2B1.1 must be interpreted based on the loss caused by the crime); and *Yafa*, 136 F.4th 1194 (“loss” in § 2B1.1 is ambiguous enough to cover gain to the defendant as a form of actual loss, but may not be ambiguous enough to include intended loss); *but see United States v. Diop*, No. 24–3774, 2025 WL 2602277 (9th Cir. Sept. 9, 2025) (intended loss is a reasonable interpretation of ambiguity of loss definition in § 2B1.1).

On the other side, the Fifth Circuit, sitting en banc in *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023), held that *Stinson* survives *Kisor* wholly intact. *Id.* at 678. The Tenth Circuit (*United States v. Maloid*, 71 F.4th 795, 805 (10th Cir. 2023)), the Second Circuit (*United States v. Zheng*, 113 F.4th 280, 289–90 (2d Cir. 2024)), and the Seventh Circuit (*United States v. Ponle*, 110 F.4th 958, 961 (7th Cir. 2024)) likewise continue to apply *Stinson* without the threshold ambiguity inquiry *Kisor* requires.

The result is exactly the geographic sentencing disparity Congress designed the Sentencing Reform Act to eliminate. See [28 U.S.C. § 994\(f\)](#). A defendant who attempts a \$3 million fraud that yields no actual loss faces no § 2B1.1(b)(1) loss-table enhancement in the Third Circuit, *Banks*, [55 F.4th at 258](#), but a 16-level enhancement in the Fifth, Second, Seventh, and Tenth Circuits—a swing translating into many years of additional imprisonment. Because the Guidelines “anchor” federal sentencing even after *United States v. Booker*, [543 U.S. 220, 259–60 \(2005\)](#), the conflict is not theoretical. It assigns identically situated economic-crime defendants dramatically different sentences solely on the basis of geography.

The Government will likely respond that the Eleventh Circuit’s recent decision in *United States v. Horn*, [129 F.4th 1275 \(11th Cir. 2025\)](#), forecloses the conflict by reading U.S.S.G. § 1B1.3(a)(3)’s “object of” language to make § 2B1.1’s “loss” textually include intended loss without resort to commentary deference. *Id.* at 1299–1300.

But *Horn* stands alone on that route, and stands alone for reason. No other circuit has adopted *Horn*'s § 1B1.3 theory; every other post-*Kisor* decision upholding the intended-loss commentary has done so through commentary deference, treating § 2B1.1 as ambiguous and the commentary as a permissible resolution. See, e.g., *Boler*, 115 F.4th at 322–25; *You*, 74 F.4th at 397–98. Even Judge Marcus, concurring in *Horn* itself, recognized that other courts have treated § 1B1.3(a)(3) only as evidence of ambiguity in “loss,” not as a textual command supplying its meaning. 129 F.4th at 1306–07.

Horn's reading also collides with the structure of the Guidelines Manual: it makes § 2T1.1(c)(1)'s express “object of the offense” formulation for tax loss surplusage, makes the Commission's longstanding intended-loss commentary in Application Note 3(A) pointless, and would render Amendment 827 unnecessary. In short, *Horn* does not narrow the conflict; it

deepens it by adding a third route to the same destination, while every other circuit fights over the *Stinson/Kisor* deference question that *Beaird* will resolve.

III. The Question is Recurring, Important, and Not Mooted by the 2024 Guideline Amendment

§ 2B1.1 governs the largest single category of federal sentencings—fraud, theft, identity theft, mail and wire fraud, bank and securities fraud, and related offenses. In nearly all such cases, the loss-table enhancement under § 2B1.1(b)(1) is the single most consequential factor in the advisory range. The question whether intended loss controls—particularly where a defendant’s scheme produced little or no actual loss—recurs in thousands of federal sentencings each year. Rule 10(c) plainly applies: this is “an important question of federal law” that has “not been, but should be, settled by this Court.”

The Sentencing Commission’s November 1, 2024 amendment to § 2B1.1, which moved the “greater of actual or intended loss” rule from commentary into the Guideline text itself, does not moot the question

for cases sentenced under the prior Guidelines. See U.S.S.G. § 2B1.1(b)(1)(A) (2024) (App-25–28). The amendment is prospective only; it has not been designated for retroactive application under U.S.S.G. § 1B1.10(d). Petitioner was sentenced on May 30, 2024 under the 2023 Manual. (App-30). Hundreds of defendants in his position are currently in pending appeals, on collateral review, or otherwise contesting pre-amendment sentences. See, e.g., *United States v. Rao*, 123 F.4th 270 (5th Cir. 2024); *United States v. Yafa*, 136 F.4th 1194 (9th Cir. 2025); *United States v. Hackett*, 123 F.4th 1005 (9th Cir. 2024). For all those defendants, the answer to the question presented determines years of imprisonment.

If anything, the 2024 amendment confirms the question’s importance. The Commission expressly responded to the post-*Kisor* circuit conflict by relocating the intended-loss rule into the Guideline text, see U.S.S.G. App. C, Amend. 827, but it could not retroac-

tively rescue thousands of pre-amendment sentences whose validity depends on the deference question now before this Court in *Beaird*.

And the Commission’s own corrective action underscores the broader concern animating the Sixth Circuit’s analysis in *Riccardi*: that commentary, which need not be promulgated through the procedures applicable to Guidelines themselves, see [28 U.S.C. § 994\(p\), \(x\)](#), should not be permitted to expand the substantive reach of the Guidelines on the strength of judicial deference alone. 989 F.3d at 488. Concerns of lenity reinforce that conclusion. See [Guedes v. ATF](#), [140 S. Ct. 789, 790 \(2020\)](#) (Gorsuch, J., respecting denial of certiorari) (deference has “no role to play when liberty is at stake”).

IV. This Case is an Excellent Vehicle to Address the Intended Loss Application of Any Revision to the Current Interplay Between *Kisor* and *Stinson*

Petitioner’s case presents the [§ 2B1.1](#) intended-loss question on a uniquely clean record. The objection was preserved at sentencing and renewed on appeal.

The Ninth Circuit reviewed the issue de novo (App-5); the panel reached the merits in a divided 2–1 disposition with a thoughtful dissent (App-3–13); and the en banc court declined to revisit the question only after no judge requested a vote (App-24). No procedural default, harmless-error, or jurisdictional obstacle stands in the way of plenary review.

The question is also outcome-determinative in a concrete and easily measured way. Petitioner’s offense level was driven by a \$3.4 million intended loss, even though the actual loss was \$1.4 million. (App-4–5). Under § 2B1.1(b)(1) (2023), the \$3.4 million intended-loss figure produced a 16-level enhancement under § 2B1.1(b)(1)(I); use of the \$1.4 million actual-loss figure would have produced a 14-level enhancement under § 2B1.1(b)(1)(J). That two-level swing reduced Petitioner’s total offense level from 36 to 34 and, with criminal history category I, lowered the advisory range on Counts 1–26 (the wire-fraud and mail-fraud convictions) from 188–235 months to 151–188 months. The court imposed 188 months on

those counts—the bottom of the higher range and the top of the lower one. Reliance on intended loss is therefore the difference between a sentence at the floor of the range the court selected and one at the ceiling of the range the correct calculation would have produced. Erroneous Guidelines calculations of this magnitude are presumptively prejudicial. *Molina-Martinez*, 578 U.S. at 200.

Petitioner’s case is also, in important respects, a better vehicle than *Beaird* for the issues most likely to recur after this Court resolves the threshold deference question. *Beaird* arises under § 2K2.1, where the application-note definition of “large capacity magazine” is widely understood to fall within at least some “zone of ambiguity” in the underlying Guideline. See [United States v. Trumbull](#), 114 F.4th 1114, 1119 (9th Cir. 2024).

By contrast, the § 2B1.1 intended-loss question implicates the harder threshold dispute on which the circuits are most sharply divided: whether the term “loss” in § 2B1.1 is genuinely ambiguous at all. As

noted earlier, two circuits are at the opposed ends of whether loss in § 2B1.1 textually covers intended loss (*Banks* says no, *Horn* says yes). And among the circuits that find the term at least somewhat ambiguous, the Fourth and the Sixth Circuit find the commentary a reasonable interpretation while the Ninth Circuit published decisions are arguably in the opposite camp.

The need for conflict resolution (through hold under *Beaird* or plenary review) is underscored by this case coming from a circuit in which decisions on validity of intended loss commentary are deeply divided. The published authority (*Kirilyuk I* and *Yafa*) would seem to favor a finding of the commentary at least not being a reasonable interpretation of ambiguity. The unpublished authority (the majority opinion here and *Diop*) find the commentary a reasonable interpretation of ambiguity at step three of *Kisor*. The decision here produced a 2–1 split on the relevant issue.

Whatever this Court says in *Beaird* about the deference framework, the § 2B1.1 question will remain

pressing—and unresolved—until this Court applies that framework to the most consequential and most-litigated commentary provision in the Guidelines Manual. Granting this petition in tandem with *Beaird*, or holding it for *Beaird* with an eye toward review thereafter, will allow that resolution to come on a record where the dispositive question is fully and squarely presented.

For these reasons, this Court should grant the petition; alternatively, it should hold the petition pending its decision in *Beaird v. United States*, No. 25–5343, and dispose of it as appropriate in light of that decision

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Respectfully submitted,

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Certificate of Compliance

1. This brief contains **3,104 words**, excluding the parts of the brief exempted by Supreme Court Rule, and complies with the word count limit of Supreme Court Rule 33(1)(g).

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Respectfully submitted,

Attorney for Petitioner
RUSLAN KIRILYUK

Certificate of Service

I, Gene David Vorobyov, hereby certify that on April 27, 2026, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis, Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit and the Appendix to the petition were served by U.S. mail and e-mail, addressed as follows:

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