

No. 25-7322

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

REPLY TO BRIEF IN OPPOSITION (RULE 15.6)

Gene D. Vorobyov (SCt Bar # 292878)
2309 Noriega Street, # 46
San Francisco, CA 94122
415 425-2693
gene.law@gmail.com

Attorney for Petitioner
RUSLAN KIRILYUK

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REPLY BRIEF FOR PETITIONER

Pursuant to [Rule 15.6](#), petitioner Ruslan Kirilyuk replies to the Memorandum for the United States filed in this case on August 21, 2026, and addresses developments in *Beaird v. United States*, No. 25–5343, that have occurred since the petition was filed.

The Government agrees that this petition should be held for *Beaird*. Petitioner does not disagree that a hold is the minimum appropriate disposition for this petition. But the Government’s memorandum, and the posture *Beaird* has since assumed, together confirm that a hold and remand alone will not resolve this case. The Court should instead grant the petition now and set it for argument this Term, following *Beaird*.

I. The Government Does Not Contest the Second Question Presented and Identifies No Obstacle to Plenary Review.

The Government’s memorandum recites petitioner’s alternative request that the Court “grant the petition in order to interpret Section 2B1.1.” Mem. 1. The memorandum then says nothing else about that question.

But the Government does not dispute that the courts of appeals are divided over whether Application Note 3(A) permissibly defines “loss” in U.S. Sentencing Guideline § 2B1.1 to include intended loss. It does not dispute that the Third Circuit and the Eleventh Circuit have reached opposite conclusions about what the guideline text itself means. The Government also does not contend that the November 1, 2024 amendment moots the question for the many defendants sentenced under earlier Manuals. And it identifies no vehicle defect—no forfeiture, no harmless-error problem, no jurisdictional obstacle—that would stand in the way of plenary review. Hence, the petitioner’s argument for plenary review of the second question presented is unrebutted.

What the memorandum does reveal is instructive. The Government describes this case entirely in the vocabulary of deference—*Kisor*, *Stinson*, *Beaird*—as though the intended-loss question would be resolved once the Court decides the proper level of deference in *Beaird*. Mem. 1–2.

Yet it is not at all clear that resolution of deference question, alone, will provide a definitive answer to the second question presented. For example, the Third Circuit resolved the intended-loss question at *Kisor*'s first step, before any question of deference arose. *United States v. Banks*, 55 F.4th 246, 257–258 (3d Cir. 2022). The Eleventh Circuit resolved it through the text of § 1B1.3(a)(3), without deference at all. *United States v. Horn*, 129 F.4th 1275, 1299–1300 (11th Cir. 2025). Neither route ran through *Stinson*.

II. Though *Beaird* Is Vital to the Resolution of the Second Question Presented, It Will Not Automatically Resolve It, Whichever Way the Court Decides It

The Court granted certiorari in *Beaird* limited to a single question: whether *Stinson* still correctly states the rule of deference owed to Guidelines commentary. That question is antecedent to the second question presented here, and it matters a great deal to the resolution of the second question presented. The decision below rests on nothing

but *Kisor*-refined *Stinson* deference, App-5–8, and *Beaird* will decide whether that framework survives. To that extent the Government is right that this petition should be held.

But *Beaird* will only decide what deference is owed to Guidelines commentary. It will not decide the more specific (but not less vital) question what “loss” means in § 2B1.1. Those are different (though related) questions, and the second is the one presented here.

If the Court reaffirms *Stinson*, the § 2B1.1 conflict persists. The Second, Fifth, Seventh, Eighth, and Tenth Circuits will continue to defer to Application Note 3(A); the Third Circuit will continue to hold that “loss” unambiguously excludes intended loss, a holding that does not depend on the deference standard at all. That side of the conflict is current, not historical: the Third Circuit reaffirmed *Banks* last year and reversed a fourteen-level intended-loss enhancement as plain error. *United States v. Barkers-Woode*, 136 F.4th 496 (3d Cir. 2025).

And if the Court overrules or narrows *Stinson*, the conflict persists in a different form and becomes more urgent. Courts will then confront the question the Ninth Circuit majority answered at *Kisor* step one and that Judge Bumatay answered the other way: whether “loss” in § 2B1.1 is genuinely ambiguous. App-5–6, App-11–13. The Third and Eleventh Circuits have already taken opposite positions on that precise question, and the Eleventh Circuit’s § 1B1.3(a)(3) route would survive the abrogation of *Stinson* entirely.

The courts of appeals are meanwhile continuing to decide the question. Three weeks before the Government filed its memorandum in this case, the Eighth Circuit affirmed an intended-loss enhancement over the argument that *Stinson* no longer states the governing rule. *United States v. Currie*, No. 25–2666, 2026 WL 2252203 (8th Cir. Aug. 5, 2026). The panel acknowledged this Court’s grant of certiorari in *Beird* and applied circuit precedent anyway. That is the ordinary course, and it will continue:

circuits remain bound by their own precedent until this Court speaks, and a decision addressed only to the deference framework will not tell them what “loss” means.

Either way, the conflict this petition presents in the second question outlives *Beird*. A decision resolving the framework does not resolve the most litigated application of it.

III.No Party in *Beird* Defends the Analytical Framework on Which the Decision Below Rests.

On May 6, 2026, this Court appointed an amicus curiae to brief and argue in support of the position that *Stinson* still correctly states the rule of deference. That appointment reflects that the United States does not defend *Stinson* in this Court.

The decision below rests on nothing else. The panel majority deferred to Application Note 3(A) only after working through *Kisor*’s three steps and concluding that the Commission’s interpretation warranted controlling weight. App-5–8. That rationale is now unlikely to survive the Term.

When it falls, the question of what “loss” means in § 2B1.1—read without the aid of commentary deference—will be presented immediately, in this case and in hundreds of others, with no guidance from this Court.

That is a reason to take the second question presented now rather than later. The Court is already devoting a sitting this Term to the level of deference governing Guidelines commentary. *Beaird* is calendared for argument on October 13, 2026. The single most consequential application of the proper level of deference can be briefed and argued in the same Term, on a record where it is squarely and cleanly presented.

IV. Resolving Only the First Question Presented Would Return This Case to a Circuit Divided Against Itself, and Guarantee a Second Petition.

A grant, vacate, and remand disposition is appropriate where intervening developments reveal a reasonable probability that the decision below rests upon a premise the lower court would reject if given the opportunity for further consideration. *Lawrence v. Chater*, 516 U.S. 163, 167–168 (1996) (per curiam). The Court has also cautioned that a GVR is inap-

propriate where “the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court.” *Id.* at 168.

But this case will not likely fall into that category once *Beaird* is decided. *Beaird* is likely to supply the analytical structure, but not the ultimate answer to the second question presented. Instead, a GVR after *Beaird* will return the case to the one circuit least equipped to provide the answer.

The Ninth Circuit’s authority on this question points in both directions. Its published decisions suggest that “loss” in § 2B1.1 is tied to loss actually caused, *United States v. Kirilyuk*, 29 F.4th 1128, 1138–1139 (9th Cir. 2022) (§ 2B1.1 is driven by the amount of loss caused by the crime; it does not extend to presumed \$500-per-card-loss that did not actually happen), while leaving open whether the term is ambiguous enough to reach intended loss, *United States v. Yafa*, 136 F.4th 1194, 1199 & n. 5

(9th Cir. 2025) (holding that loss under § 2B1.1 is ambiguous enough to cover various measures of actual loss; declining to decide whether that holding applies to the intended loss commentary to § 2B1.1).

In contrast, the unpublished memoranda—the disposition in this case and *United States v. Diop*, No. 24–3774, 2025 WL 2602277 (9th Cir. Sept. 9, 2025)—point the opposite way. The disposition below was 2–1, and the en banc court declined to take up the question with no judge requesting a vote. App-24.

That a divided circuit has left the question to non-precedential dispositions is not a reason to withhold review; it is the disorder itself. On remand, the most likely course is a new panel disposition, a new rehearing petition, and a new petition for certiorari presenting this same question two or more years from now, on a record no better than this one.

This time gap is not costless to either petitioner or to similarly situated individuals. Petitioner’s offense level was driven by \$3.4 million in in-

tended loss where actual loss was \$1.4 million. App-4–5. Under § 2B1.1(b)(1) (2023), that difference is two offense levels—36 rather than 34—and, at criminal history category I, an advisory range on Counts 1–26 of 188–235 months rather than 151–188 months. The district court imposed 188 months: the floor of the range it used and the ceiling of the range the correct calculation would have produced. An error of that magnitude in the advisory range is presumptively prejudicial. *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). Every year that passes before the question is answered is a year served under a calculation that may be invalid.

And the harm is not limited to petitioner. Section 2B1.1 governs the largest single category of federal sentencings, and the loss table is ordinarily the single most consequential input into the advisory range. Pet. 14. The consequence of the conflict is geographic: a defendant who attempts a \$3 million fraud that yields no actual loss faces no loss enhancement in the Third Circuit and a sixteen-level enhancement in the Sec-

ond, Fifth, Seventh, Eighth, and Tenth. That disparity is being applied now. Within the last sixteen months the Third Circuit reversed a fourteen-level intended-loss enhancement as plain error while the Eighth Circuit affirmed one over an objection that *Stinson* no longer governs. [*Barkers-Woode*, 136 F.4th 496](#); [*Currie*, 2026 WL 2252203](#). Every sentencing conducted under the pre-2024 Manual in the interim is governed by whichever answer the defendant's circuit happens to have given. Given the importance of the question and the entrenched nature of the conflict, this Court should grant plenary review on the second question presented and set this case for argument this Term.

CONCLUSION

The petition should be granted on all issues presented for review and the case set for argument this Term following *Beaird v. United States*, No. 25–5343. In the alternative, the petition should be held pending the decision in *Beaird* and disposed of as appropriate in light of that decision.

Law Office of Gene Vorobyov
Respectfully submitted,

Attorney for Petitioner
RUSLAN KIRILYUK

Certificate of Compliance

I, Gene David Vorobyov, hereby certify that this brief complies with the page limit under Supreme Court Rule 33.2(b).

Respectfully submitted,

DATE: September 3, 2026

By: *s/ Gene D. Vorobyov*

Supreme Court Bar No.292878
Counsel of Record for Petitioner
RUSLAN KIRILYUK

Certificate of Service

I, Gene David Vorobyov, hereby certify that on September 3, 2026, a copy of the petitioner's Reply Brief in support of the Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit were served by U.S. mail and e-mail, addressed as follows:

Heiko P. Coppola, Assistant U.S. Attorney
501 I Street
Suite 10-100
Sacramento, CA 95814
heiko.coppola@usdoj.gov

Office of U.S. Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

DATE: September 3, 2026

Respectfully submitted,

By: *s/ Gene D. Vorobyov*

Supreme Court Bar No.292878
Counsel of Record for Petitioner
RUSLAN KIRILYUK