

No. \_\_\_\_\_

---

IN THE  
**Supreme Court of the United States**

---

SYLVAIN GNAHORE  
*Petitioner,*

vs.

UNITED STATES,  
*Respondent.*

---

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

---

**PETITION FOR WRIT OF CERTIORARI**

---

MICHELLE ANDERSON BARTH  
*CJA appointed counsel for Petitioner*  
Law Office of Michelle Anderson Barth  
P.O Box 4240  
Burlington, VT 05406  
(619) 884-3883

---

i.

**QUESTIONS PRESENTED**

Whether the Second Circuit Court of Appeals erred, in light of this Court's decision in *Kisor v. Wilkie*, 588 U.S. 558 (2019), when it affirmed the district court's loss calculation at sentencing which included intended losses under §2B1.1 Application Note 3 of the Sentencing Guidelines.

**PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT**

Petitioner is Sylvain Gnahore, a defendant-appellant in the proceeding below. Respondent is the United States of America, the plaintiff-appellee below. Falikou Kone was also a defendant-appellant below but is not a party to this petition. Because the petition presents a question concerning only petitioner's own individualized sentence, petitioner submits, pursuant to Rule 12.6, that Mr. Kone has no interest in the outcome of this petition.

Pursuant to Rule 29.6, petitioner states that he is a natural person and not a corporation. No corporate disclosure statement is therefore required.

| <u>TABLE OF CONTENTS</u>                                                                                                                 | <u>Page</u> |
|------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| QUESTION PRESENTED.....                                                                                                                  | ii          |
| PARTIES TO THE PROCEEDINGS<br>AND RULE 29.6 STATEMENT.....                                                                               | iii         |
| TABLE OF AUTHORITIES.....                                                                                                                | v           |
| PETITION FOR CERTIORARI .....                                                                                                            | 1           |
| OPINIONS BELOW .....                                                                                                                     | 1           |
| JURISDICTION .....                                                                                                                       | 1           |
| I. STATEMENT OF THE CASE.....                                                                                                            | 2           |
| II. ARGUMENT .....                                                                                                                       | 4           |
| A. This Court should grant <i>certiorari</i> because the lower courts are<br>divided and this is an important and reoccurring issue..... | 4           |
| III CONCLUSION .....                                                                                                                     | 8           |
| INDEX TO APPENDICES                                                                                                                      |             |
| Opinion, <i>United States v. Sylvain Gnahore</i> .....                                                                                   | APPENDIX A  |

## TABLE OF AUTHORITIES

Page

### CASES

|                                                                                                   |         |
|---------------------------------------------------------------------------------------------------|---------|
| <i>Auer v. Robbins</i> ,<br>519 U.S. 452 (1997) .....                                             | 5       |
| <i>Bowles v. Seminole Rock &amp; Sand Co.</i> ,<br>325 U.S. 410 (1945) 519 U.S. 452 (1997) .....  | 5       |
| <i>Cook v. United States</i> ,<br>No. 24-7265, 145 S. Ct. 2830 (cert denied June 23, 2025) .....  | 7       |
| <i>Elwell v. United States</i> ,<br>No. 25-5110 (cert denied Oct. 6, 2025) .....                  | 7       |
| <i>Kisor v. Wilkie</i> ,<br>588 U.S. 558 (2019) .....                                             | 3,4,5,6 |
| <i>Loper Bright Enters. v. Raimondo</i> ,<br>603 U.S. 369 (2024) .....                            | 5,6     |
| <i>Munoz v. United States</i> ,<br>No. 25-5114, 146 S. Ct. 231 (cert denied Oct. 6, 2025) .....   | 7       |
| <i>Rahmankulov v. United States</i> ,<br>224 L. Ed. 2d 382 (cert denied Apr. 6, 2026) .....       | 7       |
| <i>Ratzloff v. United States</i> ,<br>No. 23-310, 144 S. Ct. 554 (cert denied Jan. 8, 2024) ..... | 7       |
| <i>Stinson v. United States</i> ,<br>508 U.S. 36 (1993) .....                                     | 3,5     |
| <i>United States v. Banks</i> ,<br>55 F.4th 246 (3d Cir. 2022) .....                              | 4,5     |
| <i>United States v. Conde</i> ,<br>No. 23-6327, 2026 WL 1045500 (2d Cir. Apr. 17, 2026) .....     | 1,2     |
| <i>United States v. Kirsh</i> ,<br>54 F.3d 1062, 1071 (2d Cir. 1995).....                         | 3       |

|                                                                              |     |
|------------------------------------------------------------------------------|-----|
| <i>United States v. Rainford</i> ,<br>110 F.4th 455 (2d Cir. 2024) .....     | 3,6 |
| <i>United States v. You</i> ,<br>74 F.4th 378 (6th Cir. 2023).....           | 4   |
| <i>Zheng v. United States</i> ,<br>145 S. Ct. 1899 (2025) (No. 24-604) ..... | 7   |

#### **OTHER AUTHORITIES**

|                        |           |
|------------------------|-----------|
| U.S.S.G. § 2B1.1 ..... | 1,2,3,4,8 |
|------------------------|-----------|

## **PETITION FOR CERTIORARI**

Petitioner Sylvain Gnahore respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

## **OPINIONS BELOW**

The judgment of the United States Court of Appeals for the Second Circuit was filed in a summary order on April 17, 2026. A three-judge panel of the Second Circuit issued an order affirming the judgment of the district court. *See United States v. Conde*, No. 23-6327, 2026 WL 1045500, at \*1 (2d Cir. Apr. 17, 2026). The opinion is attached as Appendix A.

## **JURISDICTION**

On April 17, 2026, a three-judge panel for the Second Circuit denied Petitioner's appeal and affirmed his sentence in the aforementioned order.<sup>11</sup> This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

## **GUIDELINES PROVISIONS INVOLVED**

Section 2B1.1(b)(1)(A)-(P) of the United States Sentencing Guidelines Manual (2021) provides, in relevant part, that an enhancement to the offense

---

<sup>1</sup> A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2. If the due date falls on a Saturday, Sunday, federal holiday, or day the Court is closed, it is due the next day the Court is open. Sup. Ct. R. 30.1. The appeal in this case was denied on April 17, 2026, making the petition for writ of *certiorari* due on July 16, 2026.

level applies “If the loss exceeded \$6,500, increase the offense level,” according to the loss table.

Application Note 3 to § 2B1.1 of the Guidelines provides, in relevant part:

Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—“Intended loss” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

## I.

### **STATEMENT OF THE CASE**

Before the Second Circuit, Petitioner Sylvain Gnahore appealed from a judgment of conviction following his plea of guilty to bank fraud, in violation of 18 U.S.C. §§ 1344 and 2. *United States v. Conde*, No. 23-6327, 2026 WL 1045500, at \*1 (2d Cir. Apr. 17, 2026). On appeal, Gnahore contended that his counsel was constitutionally ineffective by stipulating in his plea agreement to a Sentencing Guidelines calculation, using the November 1, 2021, Guidelines Manual, based on intended (rather than actual) loss. *See* U.S.S.G. § 2B1.1. The plea agreement stipulated to a Guidelines calculation predicated on “intended loss.” The district court later imposed a custodial sentence based on intended



loss, which was much higher than actual loss, resulting in increased sentencing exposure under the advisory Sentencing Guidelines.

Gnahore argued that this Court's decision in *Kisor* limits the deference owed to Application Note 3 of 2B1.1 defining intended loss, and that the Second Circuit could no longer continue to broadly defer to guidelines commentary as it had in reliance on *Stinson v. United States*, 508 U.S. 36 (1993). During the pendency of the appeal, however, the Second Circuit decided *United States v. Rainford*, 110 F.4th 455 (2d Cir. 2024). There, the Second Circuit held that "the application note defining loss [to include intended loss] is neither inconsistent with nor a plainly erroneous reading of the [G]uideline," and thus remains "authoritative." *Id.* at 475 (quoting *Stinson*, 508 U.S. at 38. Because the "failure to make a meritless argument does not rise to the level of ineffective assistance," *United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995), the Second Circuit concluded that Gnahore's counsel was not constitutionally deficient. Had the Second Circuit recognized *Kisor*'s limitations on a court's reliance on commentary to interpret guidelines provisions, Mr. Gnahore's sentencing exposure under the guidelines would have been much lower. At \$345,542.50, the intended loss amount, his guidelines were increased by twelve levels per U.S.S.G. § 2B1.1(b)(1)(G). At \$38,180.86, the actual loss amount, his guidelines would have been increased by four levels only per § 2B1.1(b)(1)(C).

Mr. Gnahore's petition should be granted because nationwide, courts

continue to grapple with *Kisor*, and how it limits the deference that courts give to guidelines’ commentary that both interprets and/or expands provisions in the U.S. Sentencing Guidelines. Compare, e.g., *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022) (“[T]he 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.”), with *United States v. You*, 74 F.4th 378, 397 (6th Cir. 2023), (“Applying *Kisor*’s framework, we defer to the Sentencing Commission’s interpretation of ‘loss.’”).

This is an important, reoccurring issue. This Court should grant certiorari to resolve this dispute and bring the courts in line with this Court’s jurisprudence.

## II.

### ARGUMENT

#### **A. This Court should grant *certiorari* because the Courts are divided and this is an important and reoccurring issue.**

There is a clear split with respect to the specific guideline at issue. Gnahre argued that the relevant guideline, §2B1.1, plainly uses the term “loss” without qualification. The ordinary definition of “loss” is actual loss. Since the term “loss” as used in the Guideline is unambiguous, the district court should have applied the ordinary definition and should not have turned to the definition of “loss” in Application Note 3(A), which defined “loss” as “the greater of actual loss or intended loss.” U.S.S.G. §2B1.1, comment. (n.3(A)).

The Application Note expanded the meaning of “loss” beyond its ordinary meaning. The court (and Mr. Gnahore’s attorney) should not have deferred to it. In *Banks*, the Third Circuit reasoned similarly, “[T]he ordinary meaning of the word ‘loss’ is the loss the victim actually suffered. ... Because 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.” *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022).

While *Banks* is the minority view among the circuits that have examined this specific issue, it is the correct one because it is the only one that aligns with this Court’s reasoning in *Kisor* and *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

Before *Kisor* and *Loper Bright Enters.*, this Court held in *Stinson* that Guidelines commentary is subject to deference under *Seminole Rock*, now generally known as *Auer* deference. Under this form of deference, “provided an agency’s interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” *Stinson*, 508 U.S. at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); see also *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (same). *Kisor*, however, significantly limited the circumstances in which courts may accord *Auer* or *Seminole Rock* deference. After *Kisor*, a court may defer to an agency’s interpretation of its own regulation only where the regulation remains

“genuinely ambiguous” after the court has “exhaust[ed] all the traditional tools of construction.”

Later, this Court decided *Loper Bright Enters.* which underscores the trend that courts should move away from agency deference in interpreting statutes. *Loper Bright Enters.*, 603 U.S. at 403, (2024). The Court reasoned, “The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role.” *Id.* This Court thinks it is “reasonable to assume that Congress intends to leave policymaking to political actors.” *Id.* But this Court is clear that “... the resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an ‘agency to fall back on.’” *Id.* (citing *Kisor*, 588 U.S. at 575). Fundamental to the Framers who crafted the Constitution was the idea that “Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences.” Such an interpretation “ensure[s] that federal judges could exercise judgment free from the influence of the political branches.” *Id.* (citation omitted). “They were to construe the law with ‘[c]lear heads ... and honest hearts,’ not with an eye to policy preferences that had not made it into the statute. *Id.* at 403-04 (quotation marks and brackets in original) (citation omitted).

This Court’s reasoning in *Loper Bright* aligns with Gnahore’s

interpretation of the Guidelines and why decisions like *Rainford* are incorrectly decided. *Loper Bright* continues the trend of moving away from administrative agency deference, even when a statute is seemingly ambiguous. All of which underscores that it “remains the responsibility of the court to decide whether the law means what the agency says.” *Id.* at 392 (citation omitted)

In recent years, this Court has denied certiorari on this and similar Guidelines-deference issues. *See, e.g., Munoz v. United States*, No. 25-5114 (Oct. 6, 2025); *Elwell v. United States*, No. 25-5110 (Oct. 6, 2025); *Cook v. United States*, 145 S. Ct. 2830 (2025) (No. 24-7265); *Zheng v. United States*, 145 S. Ct. 1899 (2025) (No. 24-604); *Ratzloff v. United States*, 144 S. Ct. 554 (2024) (No. 23-310); and *Rahmankulov v. United States*, 224 L. Ed. 2d 382 (Apr. 6, 2026). The number of times that the issue is brought to the Court’s attention, however, should indicate to the Court the urgency and need for resolution.

Furthermore, in 2025, the Sentencing Commission went so far as to recognize this issue and amend the Guidelines to include the definition of intended loss within the Guideline itself. This change was not made retroactive. The Sentencing Commission’s course-correction, however, should not dissuade this Court from addressing this issue. On the contrary, the Sentencing Commission recognized a fundamental flaw that permeates other aspects of the Manual. But more importantly, this specific issue continues to

affect litigants like Mr. Gnahore, who were sentenced under previous versions of the Guidelines Manual.

Finally, this fundamental flaw made a difference in Mr. Gnahore's sentencing computation at the time of his sentencing. As mentioned above, the district court increased Mr. Gnahore's base offense level for amount of "loss" under USSG §2B1.1 based on the total amount of intended loss instead of actual loss. This error increased Mr. Gnahore's guideline range significantly. At \$345,542.50, the intended loss amount, his guidelines were increased by twelve levels per U.S.S.G. § 2B1.1(b)(1)(G). At \$38,180.86, the actual loss amount, his guidelines would have been increased by four levels only per § 2B1.1(b)(1)(C). Mr. Gnahore is among many similarly situated defendants. This Court should grant certiorari and provide much-needed clarity to the courts below.

### III.

### CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

*Michelle Barth*

MICHELLE ANDERSON BARTH  
*CJA appointed counsel for Petitioner*  
Law Office of Michelle Anderson Barth  
P.O. Box 4240  
Burlington, VT 05406  
(619) 884-3883