

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

LATROY L. CURRIE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Stinson v. United States*, 508 U.S. 36 (1993), still correctly states the rule for the deference that courts must give the commentary to the Sentencing Guidelines.

2. Whether, under the version of USSG § 2B1.1(b)(1) in effect before November 1, 2024, the term “loss” includes intended loss, or instead means only actual loss.

LIST OF PARTIES

Petitioner, the Defendant-Appellant below, is Latroy L. Currie.

Respondent, Plaintiff-Appellee below, is the United States of America.

RELATED CASES

United States v. Thaddeus Jerome Lee, et al., United States District Court for the Southern District of Iowa, No. 4:24-cr-00108-RGE-HCA. Mr. Currie was Defendant 4 in the indictment. Original judgment entered August 14, 2025, amended judgment entered September 4, 2025.

United States v. Latroy L. Currie, United States Court of Appeals for the Eighth Circuit, No. 25-2666, 185 F.4th 864 (8th Cir. 2026). Judgment entered August 5, 2026.

United States v. Malik K. Marshall, United States Court of Appeals for the Eighth Circuit, No. 25-3141, 185 F.4th 864 (8th Cir. 2026). Judgment entered August 5, 2026. The appeal arose from the same district-court prosecution and was resolved in the same opinion, although the appeals were not consolidated.

United States v. Tiarra Lenae Jones, United States Court of Appeals for the Eighth Circuit, No. 25-1498, 2026 WL 2268267. Judgment entered August 6, 2026.

United States v. Stephan Rashad Haley, United States Court of Appeals for the Eighth Circuit, No. 25-1379, No. 25-1381, 2026 WL 22003. Judgment entered January 5, 2026.

United States v. Kila R. Wright, United States Court of Appeals for the Eighth Circuit, No. 25-2216. Judgment entered and appeal dismissed August 29, 2025.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI**

The Petitioner, Latroy L. Currie, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *United States v. Currie*, Case No. 25-2666.

OPINION BELOW

The opinion of the Court of Appeals appears at Appendix Pages A-1 through A-4, the 8th Circuit case number is 25-2666 and reported as *United States v. Currie*, 185 F.4th 864 (8th Cir. 2026).

JURISDICTION

The Eighth Circuit entered judgment on August 5, 2026. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction of the prosecution under 18 U.S.C. § 3231. The petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND SENTENCING GUIDELINE PROVISIONS INVOLVED

U.S. Const. art. I, § 9, cl. 3

No Bill of Attainder or ex post facto Law shall be passed.

USSG § 2B1.1(b)(1) (2023)

§2B1.1. LARCENY, EMBEZZLEMENT, AND OTHER FORMS OF THEFT; ...

...

(b) Specific Offense Characteristics

(1) If the loss exceeded \$6,500, increase the offense level as follows:

Loss (apply the greatest)
Increase in Level

...

(I) More than \$1,500,000	add 16
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...

(K) More than \$9,500,000	add 20
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...

Application Notes:

...

3. 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).

...

STATEMENT OF THE CASE

A. Petitioner's Offense And Sentence. Petitioner pleaded guilty to conspiracy to commit bank fraud in violation of 18 U.S.C. §§ 1344 and 1349. The conspiracy members obtained stolen business checks, created fictitious businesses with names resembling the checks' intended payees, opened bank accounts in the fictitious business names, deposited the checks, and withdrew or transferred the proceeds. Pet. App. A-2.

Petitioner participated from December 2021 through at least August 2024. The loss figures are not disputed. The intended loss of the stolen checks was over \$15,400,000 and the conspiracy successfully obtained approximately \$2,900,000.00. Pet. App. A-2. The parties also stipulated that Petitioner personally received approximately \$559,555.49 in proceeds. Pet. App. B-11.

The difference between actual and intended loss changed the advisory guideline range substantially. An actual loss of approximately \$2.9 million produced a 16-level enhancement. An intended loss of approximately \$15.4 million produced a 20-level enhancement. With intended loss, the district court found a total offense level of 32, a criminal-history category of II, and an advisory range of 135 to 168 months. Pet. App. B-10. Using actual loss, the total offense level would

have been 28 and the advisory range would have been 87 to 108 months. USSG, ch. 5, pt. A, Sentencing Table.

Petitioner argued at sentencing that the 2023 guideline applied because a 2024 amendment inserting the definitions of actual and intended loss from the commentary to the actual guideline could not be used as it would increase his sentencing range, thus triggering ex post facto concerns. Pet. App. B-12-13. He further argued that the court was required to interpret the word “loss” before consulting the guideline commentary, and that the Third Circuit previously had correctly held that “loss” in the pre-amendment guideline meant actual loss and not intended loss. *Id.* The district court understood both layers of the objection and stated as follows:

The Court overrules the objection. I am bound by Eighth Circuit law. And, notably, Eighth Circuit law prior to the amendment is clear that the intended loss is the correct calculation. The *Nock* opinion reaffirms the fact that this is still – their view of the commentary remains.

Pet. App. B-14.¹

The court then added: “The matter is preserved for purposes of the record. Should a circuit split get to the Supreme Court on this issue, Mr. Currie’s rights are retained.” *Id.*

The district court sentenced Petitioner to 135 months, the exact bottom of the intended-loss range. In announcing sentence, the court stated that the sentence was

¹The Court’s reference is to the Eighth Circuit decision of *United States v. Nock*, 148 F.4th 607 (8th Cir. 2025) *cert. denied*, ___ U.S. ___, 146 S. Ct. 1814 (2026).

“at the bottom of the advisory guideline range.” Pet. App. B-23. The court recognized authority to vary downward further, but it did not state that it would impose 135 months if the correct range were 87 to 108 months. Pet. App. B-23–B-24. The sentence imposed is 27 months above the top of the range if actual-loss was the appropriate measure.

B. The Applicable Guideline, Its Commentary and Disagreement Among Courts. USSG § 2B1.1 governs theft, fraud, and related economic offenses. The version applicable to Petitioner did not say that a sentencing court should use the greater of actual loss or intended loss. It said only that the offense level increased “[i]f the loss exceeded \$6,500,” and it assigned progressively greater increases as the amount of “loss” rose. USSG § 2B1.1(b)(1) (2023). A loss greater than \$1.5 million produced a 16-level increase. A loss greater than \$9.5 million produced a 20-level increase.

The commentary supplied a separate rule. Application Note 3(A) stated that “loss is the greater of actual loss or intended loss.” It defined actual loss as reasonably foreseeable pecuniary harm that resulted from the offense. It defined intended loss as pecuniary harm the defendant purposely sought to inflict, including harm that would have been impossible or unlikely to occur. USSG § 2B1.1, Application Note 3(A)(ii) (2023).

In *Stinson v. United States*, this Court held that commentary interpreting or explaining a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, the

guideline. *Stinson v. United States*, 508 U.S. 36, 38 (1993). The Court analogized guideline commentary to an agency’s interpretation of its own legislative rule. *Id.* at 44-45.

In *Kisor v. Wilkie*, the Court explained that deference to an agency’s interpretation of its own rule is not automatic or reflexive. *Kisor v. Wilkie*, 588 U.S. 558, 573-79 (2019). A court must first exhaust the traditional tools of interpretation and determine that the text is genuinely ambiguous. Only then may the court ask whether the agency’s interpretation is reasonable and whether its character and context warrant controlling weight. *Id.* If the text is unambiguous, the court must enforce the text without deferring to a different agency interpretation.

The courts of appeals divided over how *Kisor* affects *Stinson*, and that disagreement repeatedly determined federal prison ranges. This Court granted certiorari in *Beaird v. United States*, S. Ct. No. 25-5343 (U.S. Apr. 20, 2026), limited to the following question: “Whether *Stinson v. United States*, 508 U.S. 36 (1993), still correctly states the rule for the deference that courts must give the commentary to the Sentencing Guidelines.” The case is currently pending with this Court and was argued on October 13, 2026.

The United States now supports vacatur in *Beaird*. It does not argue that commentary is never entitled to deference. It argues that *Stinson* must be understood through *Kisor*, that commentary cannot override unambiguous guideline text, and that a court may not defer reflexively without first performing

the required textual analysis. *Brief for the United States Supporting Vacatur* at 2-3, 28-33, *Beaird v. United States*, S. Ct. No. 25-5343 (filed June 30, 2026; corrected July 9, 2026).

The Sentencing Commission separately amended § 2B1.1 effective November 1, 2024. Amendment 827 moved the rule that loss is the greater of actual loss or intended loss from the commentary into the guideline called “Notes to Table,” which appears directly after the guideline’s loss table. The Commission explained that the amendment responded to conflicting decisions about guideline commentary and to the Third Circuit’s decision in *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022). The Commission stated that loss was being calculated differently in the Third Circuit and elsewhere, and estimated that before *Banks* approximately 50 individuals per year in the Third Circuit were sentenced using intended loss. USSG, App. C, Amend. 827 (2024).

That amendment did not govern Petitioner’s pre-amendment conduct if it increased his advisory range. The Guidelines instruct a court to use the manual in effect at sentencing unless doing so would violate the Ex Post Facto Clause, in which event the court uses the manual in effect when the offense was committed. USSG § 1B1.11; U.S. Const. art. I, § 9, cl. 3. A retrospective increase in the advisory range creates a constitutionally sufficient risk of a higher sentence. *Peugh v. United States*, 569 U.S. 530, 544 (2013). The Eighth Circuit acknowledged that, although the 2024 Manual would ordinarily apply, the Ex Post Facto Clause “complicates the

analysis,” and it analyzed the case under the 2023 commentary. *United States v. Currie*, 185 F.4th 864, 866, n. 2 (8th Cir. 2026); Pet. App. A-3 n.2.

C. Preservation And The Decision Below. Petitioner preserved the questions at every available stage. He objected to the presentence report, argued the issue in a written sentencing memorandum, and obtained an express ruling at sentencing and again raised the issue on direct appeal. The Court at both the District Court and Court of Appeals level ruled on the issues without discussing or finding any waiver. *Currie*, 185 F.4th at 866; Pet. App. B-13-B-14; A-3-A-4.

The Eighth Circuit affirmed on August 5, 2026. It stated that the “sole issue” in the appeal was whether the district court erred by using intended loss. *Currie*, 185 F.4th at 866; Pet. App. A-3. The court acknowledged the exact difference between intended loss and actual loss. It acknowledged that this Court had granted certiorari in *Beaird* to consider the circuit split over *Stinson* and *Kisor*. But it did not perform the interpretive analysis required by *Kisor*. It quoted *Nock* instead:

“[E]ven after *Kisor* we consider the Guidelines together with their commentary . . . [which] will be given controlling weight unless plainly erroneous. Our court, moreover, has applied the commentary directing courts to use the greater of actual and intended loss even after *Kisor*. Precedent therefore forecloses *Nock*’s contention.” *Nock*, 148 F.4th at 619.

Currie, 185 F.4th at 866 (quoting *Nock*, 148 F.4th at 619); Pet. App. A-4.

On that basis alone, the court held that the district court correctly used intended loss and affirmed. It did not decide whether the word “loss” is genuinely ambiguous after applying the traditional tools of interpretation. It did not decide

whether the commentary merely interprets the text or instead expands it. And it did not find that the 135-month sentence would have been imposed under the actual-loss range.

REASONS FOR GRANTING THE WRIT

This is not a petition asking the Court to search for a conflict. The Eighth Circuit identified the conflict. The Sentencing Commission identified the conflict. And this Court has already granted review of the first question in *Beaird*. The decision below rests on the same reflexive-deference rule now before the Court.

The case also presents a second and independent conflict over a common word that determines years of imprisonment. In the Third Circuit, the pre-2024 guideline's use of the word "loss" means actual loss. *Banks*, 55 F.4th at 255-258. In the Fourth and Sixth Circuits, the word is ambiguous and commentary permits intended loss. *United States v. Boler*, 115 F.4th 316, 327 (4th Cir. 2024); *United States v. You*, 74 F.4th 378, 398 (6th Cir. 2023). In the Eleventh Circuit, the court has held that related relevant-conduct language places intended loss in the guideline itself. *United States v. Horn*, 129 F.4th 1275, 1298 (11th Cir. 2025). In the Eighth Circuit, commentary controls under *Nock* without the threshold inquiry demanded by *Kisor*. *Nock*, 148 F.4th at 619. The same guideline text therefore produces materially different prison ranges depending on geography.

Petitioner's case is an unusually clean vehicle. The issue was preserved. The figures are undisputed. The court of appeals identified the issue as the sole question

presented. The district court imposed the bottom of the disputed range and did not announce an alternative sentence.

**I. THE COURT SHOULD HOLD THIS PETITION
FOR *BEAIRD* AND THEN DISPOSE OF THE
PETITION AS APPROPRIATE, INCLUDING BY
GRANTING, VACATING, AND REMANDING IF
BEAIRD UNDERMINES THE DECISION BELOW**

A. The First Question Is The Exact Question Already Granted In Beaird. The first question is identical to the question on which the Court granted certiorari in *Beaird*. That is no coincidence. Petitioner raised the same doctrinal issue before the Eighth Circuit, notified the court when *Beaird* was granted, and received a decision that expressly acknowledged the pending case. *Currie*, 185 F.4th at 866; Pet. App. A-3-A-4.

The normal course is therefore to hold this petition pending *Beaird*. This Court can hold petitions presenting the same issue as a pending merits case so that the lower judgment can be reconsidered in light of the Court's decision. *See* 28 U.S.C. § 2106; *Lawrence v. Chater*, 516 U.S. 163, 166-68 (1996) (per curiam); *Stutson v. United States*, 516 U.S. 193, 195-97 (1996) (per curiam). A hold will conserve the Court's resources and preserve Petitioner's ability to receive any benefit of changes in the analysis to be announced in *Beaird*.

If *Beaird* confirms that *Stinson* must be applied through *Kisor*, the Eighth Circuit's reasoning cannot stand. It did not ask whether the text was genuinely ambiguous. It did not exhaust the traditional tools of interpretation. It simply

treated the commentary as controlling unless plainly erroneous because *Nock* said that rule survives “even after *Kisor*.” *Currie*, 185 F.4th at 866; Pet. App. A-4.²

B. The Decision Below Presents The Precise Reflexive-Deference Error At Issue In Beaird. The United States’ current merits position in *Beaird* makes the need for a hold and remand especially clear. The Solicitor General argues that *Stinson* adopted the deference framework later clarified in *Kisor*, not a separate rule under which commentary controls unambiguous text. The government describes the lower court’s contrary approach as reflexive and supports vacatur so the lower courts can apply the correct framework in the first instance.

That is precisely what happened here. The government’s appellate brief in Petitioner’s case did not defend the ordinary meaning of “loss.” It did not work through text, structure, history, and purpose. It relied on *Nock* and argued that one Eighth Circuit panel could not reconsider a prior panel. The court of appeals did the same. Its opinion consists of a description of the guideline, a quotation from *Stinson*, recognition of *Beaird*, and the conclusion that *Nock* forecloses the claim. *Currie*, 185 F.4th at 866; Pet. App. A-3-A-4.

The issue in *Beaird* is therefore not abstract in this case. The difference between a reflexive rule and the *Kisor* framework determines whether the court ever asks what “loss” means. Under the Eighth Circuit’s rule, the commentary ends the inquiry. Under *Kisor*, the guideline text begins it.

²The quote in the opinion is from *Nock*, 148 F.4th at 619.

C. A Remand Could Change Petitioner's Sentence. The district court tied the chosen sentence to the intended-loss range. It calculated 135 to 168 months and imposed 135 months. It expressly said that the sentence was at the bottom of the advisory range. The correct actual-loss range would be 87 to 108 months. A 135-month sentence is not merely above the bottom of that range; it is 27 months above the range's ceiling.

An incorrect advisory range ordinarily affects substantial rights because the Guidelines are the starting point and framework for federal sentencing. *Molina-Martinez v. United States*, 578 U.S. 189, 198-201 (2016). The record here confirms that ordinary rule. The district court did not say 135 months was appropriate regardless of the range. It selected the lowest sentence the intended-loss range permitted without a variance. A remand under the correct legal framework could make a real difference.

II. THE SECOND QUESTION PRESENTS A SQUARE AND ACKNOWLEDGED CIRCUIT CONFLICT

A. The Third Circuit Holds That The Pre-2024 Guideline Means Actual Loss. In *Banks*, the Third Circuit applied *Kisor* to the same guideline and the same commentary presented here. *Banks*, 55 F.4th at 255-58. It examined common dictionary definitions and the context of a sentence enhancement for economic offenses. It concluded that the ordinary meaning of “loss” is the loss the victim actually suffered. *Id.* at 258.

The Third Circuit then compared that text with USSG § 2B1.1, Application Note 3(A) (2022). The commentary did not simply explain how to measure a loss that occurred. It added a different category: harm the defendant intended but did not cause. Because commentary may interpret a guideline but may not expand it, the court gave the intended-loss rule no weight and remanded for resentencing without the enhancement. *Id.*

B. Other Circuits Include Intended Loss, But For Conflicting Reasons. The Fourth Circuit rejected *Banks* in *Boler*, 115 F.4th at 325-29. The majority concluded that the structure and history of the Guidelines made “loss” genuinely ambiguous and that the commentary’s inclusion of intended loss was reasonable. *Id.* at 325-28. Judge Quattlebaum dissented, stating the common-sense point directly: loss means actual loss, not harm that never occurred. *Id.* at 329.

The Sixth Circuit reached the same result through *Kisor*. In *United States v. You*, it held that “loss” is genuinely ambiguous in context and that Application Note 3(A) is entitled to deference. *You*, 74 F.4th at 397-98. The Sixth Circuit therefore permits intended loss under the pre-2024 text.

The Eleventh Circuit reached the intended-loss result by a different route. In *United States v. Horn*, it held that the pre-amendment guideline unambiguously incorporates intended loss through the relevant-conduct instruction in USSG § 1B1.3(a)(3), and it treated Amendment 827 as clarifying the longstanding rule. *Horn*, 129 F.4th at 1297-1301. Thus, the Third and Eleventh Circuits both call the

guideline unambiguous, but give it opposite meanings.

The Eighth Circuit takes still another approach. *Nock* did not decide whether “loss” is ambiguous after exhausting the traditional tools of construction. It held that even after *Kisor*, commentary receives controlling weight unless plainly erroneous, and that prior decisions using intended loss foreclosed further inquiry. *Nock*, 148 F.4th at 619. The decision below applied that rule verbatim. *Currie*, 185 F.4th at 866; Pet. App. A-3-A-4.

These are not different verbal formulations of the same rule. They dictate opposite sentencing outcomes. Under *Banks*, Petitioner’s enhancement is 16 levels and his range is 87 to 108 months. Under *Nock*, his enhancement is 20 levels and his range is 135 to 168 months. A federal guideline designed to promote national uniformity should not produce a range that starts four years higher solely because sentencing occurred in Iowa rather than Pennsylvania.

C. The Sentencing Commission Has Acknowledged The Conflict. The conflict is expressly acknowledged by the body that wrote the guideline. In explaining Amendment 827, the Sentencing Commission identified *Stinson*, *Kisor*, and conflicting court decisions over commentary. It discussed *Banks* by name. It stated that loss calculations in the Third Circuit differed from those elsewhere. And it moved the intended-loss rule into the text of § 2B1.1 to ensure consistent application across circuits. USSG App. C, Amend. 827 (2024).

That response confirms both the existence and importance of the

disagreement. It does not resolve what the earlier text meant. The Commission knew how to say “loss is the greater of actual loss or intended loss.” Before November 1, 2024, it said that only in commentary. After November 1, 2024, it placed the sentence in the guideline itself. Whether the earlier commentary interpreted or expanded the earlier text remains the question in every case governed by the old manual.

The amendment also does not eliminate the need for review. Defendants whose relevant conduct predates the amendment cannot be sentenced under new text when doing so creates a higher advisory range. *Peugh*, 569 U.S. at 544. The old text therefore continues to govern pending direct appeals and resentencings involving pre-November 2024 conduct, as well as those to be charged with theft or fraud offenses within the remaining statute of limitations.

III. THE DECISION BELOW IS WRONG UNDER THE GUIDELINE TEXT APPLICABLE TO PETITIONER

A. In the Economic-Offense Guideline, “Loss” Means Harm That Occurred.

The starting point is the word the Commission enacted. The Guidelines increase punishment “if the loss exceeded” stated amounts. USSG § 2B1.1(b)(1). In ordinary usage, a loss is a deprivation, reduction, or harm that occurred. A bank that paid a fraudulent check suffered a loss. A bank that stopped the check before payment avoided the loss. One can intend a loss, risk a loss, attempt to cause a loss, or threaten a loss. Those phrases make sense precisely because an intended, risked, attempted, or threatened loss is not yet a loss.

Context reinforces that reading. The loss table changes based on whether “the loss exceeded” concrete dollar thresholds. USSG § 2B1.1(b)(1). The commentary’s own definition of actual loss tracks that grammar: pecuniary harm that “resulted from the offense.” USSG § 2B1.1, application note 3(A)(i). The word “resulted” describes an event that happened, not an unrealized plan.

This does not make intent irrelevant to sentencing. A district judge may consider the scope of an attempted fraud, the defendant’s purpose, and the risk imposed on victims under 18 U.S.C. § 3553(a). The question is narrower: did the guideline itself assign four additional offense levels to money no victim lost? The pre-2024 text did not say so.

B. Application Note 3(A) Adds A Rule Rather Than Interpreting The Existing Word. *Stinson* itself recognizes a limit: commentary cannot control when it is inconsistent with the guideline or is a plainly erroneous reading of it. *Stinson*, 508 U.S. at 38, 43. *Kisor* adds the necessary sequence: interpret the text first, and consider deference only if genuine ambiguity remains. *Kisor*, 588 U.S. at 573-79. Application Note 3(A) crosses that line. It does not choose among methods for estimating a loss that occurred. It commands a court to disregard actual loss whenever a larger intended amount exists. It therefore changes both the category of harm and the number used in the table. In Petitioner’s case, the commentary converts \$2.9 million in realized loss into \$15.4 million in guideline loss. That is expansion, not explanation.

The four-level difference proves the point. If intended loss were merely an

interpretation already contained in “loss,” moving the intended-loss sentence into the guideline in 2024 would have changed nothing about the text. But the Commission amended the guideline precisely because courts disagreed over whether commentary could supply that rule. The amendment is a valid prospective policy choice. It is not a license to read new words backward into old text when doing so raises a prison range.

C. Neither Relevant-Conduct Language Nor Historical Practice Supplies The Missing Text. The contrary circuits rely heavily on history and on USSG § 1B1.3(a)(3), which directs courts to consider harm that resulted from relevant conduct and harm that was the object of such conduct. Those provisions help determine the conduct for which a defendant is accountable. They do not answer which measure § 2B1.1 selected when it used the single word “loss.”

A relevant-conduct rule cannot create a specific offense characteristic that the offense guideline does not contain. Section 1B1.3 tells a court whose acts and what consequences to consider when applying an existing adjustment. It does not rewrite “loss” as “loss or intended loss.” If it did, the commentary and the 2024 amendment would have been unnecessary.

Historical practice also cannot replace the text. The Commission long instructed courts through commentary to use intended loss, and many courts followed that instruction under *Stinson*. But repeated deference does not establish that the guideline itself always said what the commentary added. *Kisor* requires an independent judicial interpretation, not an assumption that longstanding

commentary must be right because it is longstanding.

At minimum, these competing analyses demonstrate why the analysis should not have ended by repeating the prior holding of *Nock*. The meaning of “loss” must be decided through the tools of interpretation. The Eighth Circuit never undertook that work.

IV. THIS CASE IS A CLEAN VEHICLE AND THE ERROR HAS CONCRETE LIBERTY CONSEQUENCES

A. The Questions Show a Clear Circuit Conflict. There is no need to await further percolation. The circuits have used all of the competing approaches: actual-loss text, ambiguous text plus deference, unambiguous text plus relevant conduct, and controlling commentary without a threshold ambiguity analysis. The Commission has responded to the split. This Court has granted certiorari in *Beaird*. Further waiting will not clarify the disagreement; it will only leave defendants serving sentences calculated under different national rules.

B. The Range Difference Is Undisputed And Material. This case shows the practical stakes without speculation. Intended loss adds four offense levels. It moves the range from 87-108 months to 135-168 months. The bottom of the intended-loss range is 48 months higher than the bottom of the actual-loss range. The top is 60 months higher. Petitioner received 135 months.

Federal courts are required to calculate and consider the advisory range accurately. Here the Court imposed the lowest sentence in the range it believed correct absent a variance. It did not impose a below-range sentence corresponding to

the actual-loss calculation, and it did not announce that 135 months would be imposed regardless of the correct range.

The government may point to the district court’s remark, during its § 3553(a) discussion, that intended loss is “the appropriate calculation in assessing the seriousness of the offense,” and to its denial of a variance. Pet. App. B-16, B-22–B-23. Neither changes the analysis. The remark explained the court’s application of the intended-loss rule that Eighth Circuit precedent required; it was not a finding that 135 months would be appropriate if the correct range were 87 to 108 months. The court then anchored the sentence to the range it calculated, selecting its floor “because of the mitigating factors present here.” Pet. App. B-23. Absent an explicit statement that the same sentence would be imposed regardless of the range, a sentence selected by reference to an incorrect range ordinarily reflects the error. *Molina-Martinez*, 578 U.S. at 200–01. The Eighth Circuit did not suggest otherwise; it affirmed solely on *Nock*.

C. Uniformity In Federal Sentencing Requires A National Answer. The Sentencing Guidelines remain advisory after *United States v. Booker*, 543 U.S. 220 (2005), but an accurately calculated range remains the required starting point. The range anchors the parties’ recommendations, the district court’s analysis, and appellate review. *Molina-Martinez*, 578 U.S. at 198-201. A conflict that changes the range by four levels therefore undermines the central promise of the federal sentencing system: similarly situated defendants should begin from the same national framework.

The Commission’s estimate that approximately 50 individuals per year in the Third Circuit alone were sentenced using intended loss before *Banks* shows that this is not an isolated disagreement. USSG App. C, Amend. 827 (2024). The numbers affected elsewhere are likely larger. And although Amendment 827 governs newer conduct, defendants with pre-amendment offenses will remain in the direct-review pipeline and may return for resentencing. Each serves real months under whichever circuit rule happens to govern.

Braxton v. United States, 500 U.S. 344, 347–49 (1991), does not counsel restraint. The Commission has acted, but only prospectively. Amendment 827 cannot govern pre-November 2024 conduct where it would raise the range, *Peugh*, 569 U.S. at 544, so the Commission cannot resolve this conflict for the cases it actually affects. Only this Court can.

This Court can resolve the first issue through *Beaird* and allow the Eighth Circuit to reconsider Petitioner’s sentence under the correct deference framework. It can also grant this petition on the second question to decide the meaning of “loss” directly. Either course is preferable to leaving a four-level geographic disparity in place.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should hold the petition pending its decision in *Beaird v. United States*, No. 25-5343, and then dispose of the petition as appropriate, including by granting,

vacating, and remanding if *Beaird* undermines the decision below.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John Keith Rigg", is written over a horizontal line.

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