No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MALIK MARSHALL

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

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 in the Sentencing Guidelines.
2. Whether under the version of USSG §2B1.1(b)(1) effective at the time of the offense conduct in this matter and before November 1, 2024, the term "loss" means only actual loss or includes intended loss.

LIST OF PARTIES

Petitioner, the Defendant-Appellant below, is Malik Marshall.

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

RELATED CASES

- *United States v. Marshall*, No. 4:24-cr-00108-003, U.S. District Court for the Southern District of Iowa. Judgment entered October 15, 2025.
- *United States v. Marshall*, No. 25-3141, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 5, 2026.
- *United States v. Thaddeus Jerome Lee, et al*, United States District Court for the Southern District of Iowa, No. 4:24-cr-00108-004. Judgment entered August 14, 2025 and Amended Judgment entered September 4, 2025.
- *United States v. Latroy L. Currie*, United States Court of Appeals for the Eighth Circuit, No. 25-2666. Judgment entered August 5, 2026. This appeal is from the same district court proceeding and was resolved in the same opinion. The appeals were not consolidated.
- *United States v. Tiarra Lenae Jones*, United States Court of Appeals for the Eighth Circuit, No. 25-1379. Judgment entered August 6, 2026.
- *United States v. Stephan Rashad Haley*, United States Court of Appeals for the Eighth Circuit, No. 25-1379. 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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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Malik Marshall. respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the Petition and is reported as *United States v. Currie*, 185 F.4th 864 (8th Cir. 2026).

The judgment of the United States District Court for the Southern District of Iowa appears at Appendix C to the Petition.

JURISDICTION

The Eighth Circuit entered judgment on August 5, 2026. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1254 – Court of Appeals; Certiorari; Certified Questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

U.S. Const. art. I, § 9, cl. 3 (Ex Post Facto Clause)

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

18 U.S.C. § 3553(a)(4)(A)

> The court, in determining the particular sentence to be imposed, shall consider . . . "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced."

U.S.S.G. § 1B1.11(b)(1)

> "The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced unless doing so would violate the ex post facto clause of the United States Constitution."

U.S.S.G. § 2B1.1(b)(1) (2023)

> "If the loss exceeded $6,500, increase the offense level as follows:"
>
> **Loss — Increase in Level**
>
> More than $1,500,000 — add 16
> More than $3,500,000 — add 18
> More than $9,500,000 — add 20
> More than $25,000,000 — add 22

U.S.S.G. § 2B1.1, cmt. n.3(A) (2023)

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

U.S.S.G. § 2B1.1(b)(1) (2024)

"If the loss exceeded $6,500, increase the offense level as follows:"

Loss	Increase in Level
More than $1,500,000	add 16
More than $3,500,000	add 18
More than $9,500,000	add 20
More than $25,000,000	add 22

"Notes to Table:
(A) Loss.—Loss is the greater of actual loss or intended loss."

STATEMENT OF THE CASE

Petitioner pleaded guilty to Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. §§1344 and 1349. Petitioner and others conspired to defraud financial institutions by a scheme which involved creating fraudulent business entities which matched the names of payees from stolen checks. The checks were then deposited into banks accounts which were opened by co-conspirators in the name of the fraudulent business entities and the proceeds were then withdrawn from the accounts.

Petitioner participated in the conspiracy from approximately January 2023 until approximately May 2024. (Appendix G1-21). The loss figures are not disputed. During the period of Marshall's involvement, the intended loss attributed to the conspiracy was $10,924,671.11 of which 1,619,302.43 was successfully withdrawn. (Appendix B11). Petitioner asserted the $1,619,302.43 was the appropriate loss figure which should be used to calculate loss. (Appendix E1-11).

The resulting guideline distinction between actual and intended loss was significant. The loss amount of approximately 1,600,000 created a 16-level increase while an intended loss amount of approximately 10,0000 created a 20 level increase. With intended loss, the district court applied a 20 level increase, found a total offense level of 33, a criminal history category of IV, and an advisory guideline range of 188 to 235. Without intended loss, application of a 16 level increase resulted in a total offense level of 29, which

as with category IV criminal history resulted in a guideline range of 121-151 months. U.S.S.G., ch. 5, pt. A, Sentencing Table.

At sentencing Petitioner objected to the loss calculations and contended the amount of loss attributed should be actual loss, not intended loss based upon *Kisor v. Wilke* and *United States v. Banks*. (Appendix E1-11). Petitioner specifically cited *United States v. Nock*, and conceded *Nock* was binding on the district court based upon Petitioner's objections. The district court then overruled the objection concluding "The objection which is made for the defendant's benefit to preserve that issue is overruled. The probation office has correctly scored the amount of loss under the Eighth Circuit precedent that's applicable here." (Appendix D1-40). The court then sentenced Petitioner to 188 months, the bottom of the disputed guideline range, noting the sentence was at the bottom of the advisory guideline range. (Appendix D30).

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 guidelines. *Stinson v. United States*, 508 U.S. 36, 38 (1993). 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. Then, and 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 not ambiguous, the court must enforce the text without deferring to a different agency interpretation.

In *Kisor*, the Court concluded that deference to an agency's interpretation is not automatic. 588 U.S. 558, 573079 (2019. The courts of appeal have split over how to interpret *Stinson* after *Kisor*. The circuits being split on how *Kisor* impacts *Stinson*, how circuits interpret and apply *Kisor* results in a disparity in federal sentences in the various circuits. This Court granted certiorari in *Beaird v. United States*, S.Ct.No. 25-5343 (U.S. Apr.20, 2026) limited to the question of "whether *Stinson v. United States*, 508 U.S. 36 (1993), still correctly states the rule for the deference the courts must give the commentary in the Sentencing Guidelines." *Beaird* was argued October 13, 2026 and is still pending with the Court. The United States supports Vacatur in *Beaird*, arguing *Stinson* must be understood through *Kisor*, the 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).

Effective November 1, 2024, the Sentencing Commission amended §2B1.1(b)(1) and moved the language relating to intended loss from the

commentary to directly after the loss table and labeled it "notes to table." Amendment 827. This was in response to conflicting decisions about guideline commentary and the Third Circuits decision in *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022) concluding that loss was being calculated differently in the Third Circuit and elsewhere.

Under § 1B1.11, a sentencing court ordinarily applies the Guidelines Manual in effect at sentencing. If applying that Manual would violate the Ex Post Facto Clause, however, the court must apply the Manual in effect when the offense was committed. U.S.S.G. § 1B1.11(a), (b)(1); U.S. Const. art. I, § 9, cl. 3. Petitioner's offense conduct predates Amendment 827. A retrospective increase in the advisory Guidelines range creates a constitutionally sufficient risk of a higher sentence. *Peugh v. United States*, 569 U.S. 530, 544 (2013).

The Eighth Circuit expressly recognized that Amendment 827 complicated the applicable-manual analysis but declined to resolve that question. *United States v. Currie*, 185 F.4th 864 (8th Cir. 2026). In a footnote, the court observed:

> Anticipating this issue, the Sentencing Commission amended § 2B1.1 in November 2024, moving the intended loss language from the commentary to the text of the Guideline. See USSG § 2B1.1, note (A) (2024). Currie and Marshall were sentenced in August and October 2025. Ordinarily, the 2024 Sentencing Guidelines would apply, but the Ex Post Facto Clause complicates the analysis because it applies to a "retrospective increase in the Guidelines range [that] creates a sufficient risk of a higher sentence." *United States v. Roberts*, 747 F.3d 990, 991 (8th Cir. 2014) (quoting *Peugh v. United States*, 569 U.S. 530, 544 (2013)); see U.S.S.G. § 1B1.11(b)(1).

Currie, 185 F.4th 864, 872 n.2 (8th Cir. 2026). Instead, it rejected Petitioner's preserved challenge to the use of intended loss based on *United States v. Nock*, explaining:

> In *United States v. Nock*, we rejected this argument, as both defendants acknowledge: "[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." 148 F.4th 607, 619 (8th Cir. 2025) (quotation and citations omitted), cert. denied, 146 S. Ct. 1814 (2026).

Currie, 185 F.4th 864. The court concluded that the district court correctly followed controlling Eighth Circuit precedent and affirmed, explaining that the intended-loss argument was the sole issue raised on appeal.

Thus, the Eighth Circuit rejected Petitioner's preserved *Stinson/Kisor* challenge without independently applying the interpretive framework required by *Kisor*, while expressly leaving unresolved whether the amended Guideline could constitutionally govern Petitioner's pre-amendment conduct. That unresolved question further supports holding this petition pending *Beaird* and permitting the court of appeals to address the applicable Guideline on remand if necessary.

The Eighth Circuit denied co-defendant Currie's petition for rehearing en banc, which raised the same commentary issue. Petitioner therefore did not separately seek rehearing en banc. *United States v. Currie*, No. 25-2666 (8th Cir. Dec. 19, 2025).

Petitioner preserved the *Stinson*/*Kisor* issue at every available stage. Petitioner objected to the loss calculations in the presentence investigation report, argued intended versus actual loss under *Kisor* and *Banks* in a written sentencing memorandum, obtained a ruling identifying 8th Circuit precedent as the basis for denial of the objections at sentencing, and raised the issue on direct appeal wherein the 8th Circuit stated the 'sole issue' in the appeal was whether the district court erred in using intended loss. *Currie*, 185 F.4th at 866. The 8th Circuit acknowledged the distinction between intended and actual loss and acknowledged that this Court granted certiorari in *Beaird*. But rather than perform the analysis required by *Kisor*, determine whether "loss" is genuinely ambiguous, and determine whether the resulting 188-month sentence was within the applicable Guidelines range under the proper interpretation of "loss," the court relied on *Nock* and held that Petitioner's argument was foreclosed. *Currie*, 185 F.4th at 866, 871–72.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari in this case because there is genuine conflict in the interpretation of *Stinson* post *Kisor*. The Court has already granted review of the first question in *Beaird*. The decision in this matter rests upon the same reflexive-deference rule now before the court. This case is an ideal companion to *Beaird* because the Eighth Circuit expressly held that *Nock* forecloses the petitioner's argument that *Kisor* altered *Stinson*.

Unlike *Beaird*, which concerns commentary defining a term absent from the Guideline, this case concerns commentary that materially increases the Guidelines range by the interpretation of the single word "loss." The interpretation of that common word determines a significant variance in length of sentences. In this matter, the Eighth Circuit acknowledged the applicability of §1B1.11 and Amendment 827 and expressly recognized that ex post facto principles complicate application of the 2024 amendment to this matter but affirmed solely because *Nock* treated *Stinson* as controlling after *Kisor* without the threshold inquiry required by *Kisor*. *Currie*, 185 F.4th 864 at (8th Cir. 2026)(fn 2). 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 Fourth and Sixth Circuits, 'loss' has been determined 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 Third Circuit, use of the word 'loss' means actual loss. *Banks*, 55 F.4th at 255-258.

This case presents a clean Eighth Circuit application of the precise *Stinson/Kisor* question now before the Court in *Beaird*. Petitioner expressly preserved the issue in the district court and on appeal. The amount of loss is not disputed and the dispute is purely legal—whether commentary may supply the intended loss rule where the Guideline itself does not. The district court imposed a sentence based on the resulting Guidelines calculation and

overruled Petitioner's objection solely because binding Eighth Circuit precedent required consideration of intended loss. On appeal, the Eighth Circuit identified this as the "sole issue" presented and affirmed, relying on *Stinson* and *Nock* to reject Petitioner's *Kisor* argument. The court separately acknowledged the 2024 amendment and the resulting Ex Post Facto question but did not decide it. Thus, the judgment rests squarely on the *Stinson/Kisor* question presented in *Beaird*. Petitioner's case is a clean vehicle for resolving that question.

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 Presented is The Exact Question Presented and Granted in Beaird.*

The first question is the identical question on which the Court granted Certiorari in *Beaird*. Petitioner raised the same issue before the Eighth Circuit. The Eighth Circuit expressly acknowledged the pending case. *Currie*, 185 F.4th at 866.

This court can hold petitions presenting the same issue as a pending merits case 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). Doing so will preserve Petitioners' ability to receive any

benefit of changes in the forthcoming analysis in *Beaird* and conserve the resources of the Court.

The Eighth Circuit's failure to determine genuine ambiguity and failure to exhaust traditional tools of interpretation is contrary to *Kisor*. If *Beaird* confirms that *Stinson* must be applied through *Kisor*, the Eighth Circuit's reasoning is not supported. The Eighth Circuit treated the commentary as controlling unless plainly erroneous concluding that *Nock* held the rule survives even after *Kisor*. *Currie*, 185 F.4th at 866.

B. ***The Decision Below Presents the Exact Reflexive-Deference Error at Issue in Beaird.*** The United States' current position in *Beaird* is that *Stinson* adopted the deference framework later clarified in *Kisor*, not a separate rule under which commentary controls unambiguous Guideline text. The Government describes the contrary approach as reflexive and supports Vacatur so that the lower courts may apply the correct framework in the first instance. This case presents that precise error.

Petitioner argued that *Kisor* requires a court to exhaust the traditional tools of interpretation and determine whether the Guideline itself is genuinely ambiguous before giving controlling weight to commentary. The Government did not undertake that inquiry. Instead, its reply brief argued that *Nock* had considered and rejected the same *Kisor* and *Banks* argument, that *Nock* was binding, and that Petitioner's remedy lay with the en banc court. The Government also noted that the Eighth Circuit had denied co-

defendant Currie's petition for rehearing en banc raising the same issue. The Eighth Circuit likewise relied on *Nock* and concluded that it foreclosed Petitioner's challenge, without independently determining whether "loss" is genuinely ambiguous under *Kisor*. *United States v. Currie*, 185 F.4th 866, 871–72 (8th Cir. 2026).

Thus, the precise question presented in *Beaird* controlled the disposition below: whether *Stinson* permits courts to treat commentary as controlling based on prior precedent, or instead requires the *Kisor* framework and a threshold determination of genuine ambiguity from the Guideline itself. If *Beaird* requires the latter, this case should be held and, following *Beaird*, vacated and remanded for application of that framework.

C. ***Remand Could Change Petitioners' Sentence.*** The district court sentenced petitioner to a 'bottom of the advisory guideline range'. In doing so the court considered both aggravating and mitigating factors and concluded that the bottom of the guideline range was the appropriate sentence. The guideline range as determined by the court included the intended loss amount which significantly increased the guideline range, from 121-151 months to 188-235 months. The sentence imposed was 37 months higher than the top of the guideline range using loss and not intended loss.

In *Molina-Martinez v. United States*, this Court determined that an incorrect advisory range affects substantial rights because the Guidelines are the starting point and framework for federal sentencing. 578 U.S. 189, 198-

201 (2016). This record establishes exactly that. The court sentenced Petitioner to a 'bottom of the advisory guideline range' sentence, the lowest sentence permitted by the loss range without a variance in consideration of all the sentencing factors. Calculating the appropriate advisory guideline correctly under the *Kisor* analysis would result in a lower guideline range and may result in a significantly lower sentence. Even a sentence at the top of the advisory guideline range using loss as opposed to intended loss would result in a sentence 37 months shorter.

II. THE SECOND QUESTION PRESENTS A CIRCUIT CONFLICT

A. *The interpretation of "loss" varies by circuit resulting in disparity in federal sentences.* In *United States v. Banks*, the Third Circuit held that loss means actual loss. *Banks*, 55 F.4th at 255-58. In so concluding, the court in *Banks* applied *Kisor* to the same guideline at issue here and determined that the Guideline's use of "loss" was unambiguous. Through exhaustion of traditional tools of interpretation, the court concluded that 'loss' is the loss actually suffered by the victim. *Id.* at 258. The court then concluded

> Because the commentary expands the definition of "loss" by explaining that generally "loss is the greater of actual loss or intended loss,"[57] we accord the commentary no weight. Banks is thus entitled to be resentenced without the 12-point intended-loss enhancement in § 2B1.1..

Banks, 55 F.4th at 258.

Other circuits have concluded intended loss is permitted in the pre-amendment guideline. The Sixth Circuit and Eleventh Circuits permit the

use of intended loss, but each court arrived at the conclusion by different analysis. The Sixth Circuit concluded that 'loss' is genuinely ambiguous and Application Note 3A is entitled to deference. *United States v. You*, 74 F.4th at 397-98. The Eleventh Circuit concluded the pre-amendment guideline unambiguously incorporates intended loss through the application of USSG 1B1.3(a)(3) and treated Amendment 827 as clarifying the rule. *United States v. Horn*, 129 F.4th at 1297-1301. In *Boler*, the Fourth Circuit concluded that the term 'loss' is genuinely ambiguous and that the commentary's inclusion of intended loss was reasonable in rejecting *Banks*. 115 F.4th at 325-29 (J. Quattlebaum dissent: "loss means actual loss, not harm that never occurred").

The Third, Sixth, Eleventh, and Fourth Circuits concluded "loss' was either ambiguous, or unambiguous by using the traditional tools of interpretation. In *Nock*, the Eighth Circuit did not conclude the term "loss" is ambiguous by use of traditional tools of interpretation. *Nock*, 148 F.4th at 619. Rather, the Eighth Circuit concluded that even after *Kisor*, guideline commentary receives controlling weight unless plainly erroneous, and prior decisions using intended loss foreclosed further inquiry. *Id.*

The competing interpretations are not consistent applications of the same rule; they produce directly disparate sentencing outcomes. Under the *Banks* analysis, Petitioner's Guidelines range would be 121–151 months, while under *Nock*, it is 188–235 months. That 67- to 84-month difference

results solely from the circuit in which Petitioner is sentenced—the very kind of unwarranted sentencing disparity the Guidelines were designed to reduce.

Further, the Sentencing Commission itself recognized the conflict and specifically addressed *Banks* in explaining Amendment 827. The Commission noted that courts had reached conflicting conclusions concerning the treatment of loss under §2B1.1 and that *Banks* had held "loss" to mean actual loss. The 2024 amendment responded by moving the intended-loss rule from the commentary into the text of §2B1.1 "to ensure consistent loss calculation across circuits." U.S.S.G. App. C, Amend. 827 (2024). The Commission's action confirms that the competing interpretations produced materially different results and that the conflict was sufficiently significant to warrant amendment of the Guideline itself.

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

A. ***In §2B1.1, loss means harm that actually occurred.*** Section 2B1.1(b)(1) bases the offense-level increase on the amount by which "the loss exceeded" specified dollar thresholds. Ordinary usage distinguishes an actual financial loss from a potential or unrealized loss. If an investor buys stock for $100,000 and later sells it for $90,000, the investor has incurred a $10,000 loss—not a $100,000 loss simply because $100,000 was the amount originally invested. The amount of the loss reflects the actual economic harm suffered. Likewise, if a defendant attempts to obtain $100,000 through fraud but the

transaction is stopped after only $10,000 is obtained, the defendant may have intended to cause a $100,000 loss, but the victim has suffered only a $10,000 corresponding loss.

The surrounding language of §2B1.1 supports the same conclusion. The Guideline establishes progressively greater enhancements according to the amount by which "the loss exceeded" specified dollar thresholds. U.S.S.G. §2B1.1(b)(1). The commentary's definition of "actual loss" is consistent with that understanding, describing it as "the reasonably foreseeable pecuniary harm that resulted from the offense." U.S.S.G. §2B1.1, cmt. n.3(A)(i) (2023). Pecuniary harm that "resulted from" an offense is pecuniary harm that has occurred; it is not an amount that remained unrealized because the fraud was detected or otherwise failed.

A lack of intent in calculation of loss certainly does not make intent irrelevant to sentencing. The court may consider a variety of factors under 18 U.S.C. 3553(a) which are relevant to an appropriate sentence: the purpose, the scope of the scheme, and the risks created by the offense, and other guideline provisions account for factors such as sophistication or number of victims. This question is much more precise. Does §2B1.1's loss enhancement alone permit a sentencing court to increase the offense level based on an amount that the defendant sought to obtain but that no victim actually lost? The pre-Amendment-827 Guideline contains no ambiguity

permitting "loss" to be expanded to include amounts that no victim actually lost.

B. ***The Notes and Commentary to §2B1.1 expand the meaning of "loss" beyond what the Guideline itself provides rather than interpreting the word "loss".*** Section 2B1.1(b)(1) establishes graduated enhancements based on specified amounts of loss. Before Amendment 827, the Guideline did not distinguish between "actual loss" and "intended loss"; that distinction appeared in Application Note 3(A), which instructed courts to use the greater of the two. *Stinson* permits commentary to interpret or explain a Guideline, but not when the commentary is inconsistent with the Guideline or represents a plainly erroneous reading of it. 508 U.S. at 38, 43. *Kisor* subsequently established that a court must first determine, using traditional tools of interpretation, whether the Guideline itself is genuinely ambiguous. Then, and only then, may a court consider whether the agency's interpretation is entitled to deference. 588 U.S. at 573–79.

The intended-loss rule illustrates why that inquiry matters. The actual pecuniary harm resulting from Petitioner's offense was approximately $1.6 million, yet the commentary directed the court to treat more than $10 million as "loss" for purposes of the Guidelines. The commentary therefore did more than explain an ambiguous term; it supplied a rule that materially increased Petitioner's offense level. Whether that rule can properly be derived from the

Guideline's text is precisely the question that *Kisor* requires a court to address before giving the commentary controlling weight.

The Eighth Circuit did not perform that analysis. Rather than determine whether "loss" is genuinely ambiguous under the traditional tools of interpretation, the court relied on *Nock* and held that existing circuit precedent foreclosed Petitioner's challenge to the commentary. The court therefore did not decide whether the intended-loss rule was a permissible interpretation of the Guideline's text under *Kisor*. That is the question presented here.

The magnitude of the difference demonstrates that this was not a minor dispute over terminology. Intended loss is a wholly separate calculation. Treating intended loss as loss increased the amount attributed to Petitioner from approximately $1.6 million in actual pecuniary harm to more than $10 million, producing a four-level increase in the offense level. If "intended loss" were simply an application of the meaning already contained in the word "loss," Amendment 827 would be superfluous. In adding Amendment 827, the Commission explained that it did so to promote consistency among the circuits in response to disagreement over the proper treatment of intended loss.

Amendment 827 does not resolve whether the same rule could be imposed through commentary before the Amendment itself. That is the question *Kisor* requires courts to answer before giving commentary

controlling weight. Nor can reliance on *Nock* substitute for that analysis. If *Nock* treated the commentary as controlling without first applying the interpretive framework required by *Kisor*, subsequent courts cannot avoid that framework simply by treating *Nock* as binding precedent. Such reasoning perpetuates the very error *Kisor* requires courts to examine. The judgment below therefore presents the precise question now before this Court in *Beaird*.

IV. THIS CASE IS A CLEAN VEHICLE AND RESOLUTION OF THIS ISSUE HAS LIBERT CONSEQUENCES

A. ***There Is A Clear Conflict In The Circuits.*** The courts of appeals have taken materially different approaches to the treatment of intended loss under §2B1.1. The Eleventh Circuit has treated intended loss as relevant conduct. The Fourth and Sixth Circuits have concluded that "loss" is ambiguous and that the commentary permits intended loss to be included. The Third Circuit, by contrast, has held that "loss" is unambiguous and refers to actual loss. *United States v. Banks*, 55 F.4th 246, 255–58 (3d Cir. 2022). The Eighth Circuit has adhered to its precedent requiring application of the commentary, declining to independently examine the issue under the framework established in *Kisor*.

These differing approaches can produce substantially different Guidelines ranges for defendants whose conduct is materially identical, based solely on the circuit in which they are sentenced. This Court's grant of

certiorari in *Beaird* presents the opportunity to resolve the threshold question governing the deference owed to Guidelines commentary. Further delay will perpetuate uncertainty and geographic disparities in federal sentencing.

B. ***The Difference In Guideline Range is Material And Not In Dispute.*** Intended loss increased Petitioner's offense level by four levels, resulting in an advisory range of 188–235 months rather than 121–151 months. The bottom of the range calculated using intended loss was therefore 37 months higher than the top of the range calculated using actual loss. The district court selected its sentence by reference to the calculated Guidelines range, emphasizing that both the actual and intended loss amounts were substantial. (Appendix D28-31). The sentence was thus anchored to a range that was materially increased by the intended-loss calculation.

This is not a case in which the alleged error had no meaningful effect on the sentencing determination. As this Court explained in *Molina-Martinez v. United States*, an incorrect Guidelines range ordinarily affects a defendant's substantial rights because the Guidelines serve as the starting point and framework for the sentencing decision. 578 U.S. 189, 198–201 (2016). Here, the difference between the two ranges was substantial, and the sentence imposed was 37 months above the highest sentence within the alternative range.

The Government may contend that Amendment 827 independently supports the intended-loss calculation because the 2024 Guidelines Manual placed the intended-loss rule in the Notes to the Loss Table. But Petitioner's offense conduct preceded Amendment 827's effective date. Section 1B1.11(b)(1) requires use of the earlier Manual when application of the later Manual would violate the Ex Post Facto Clause. This Court has held that retroactive application of a Guidelines amendment violates that Clause when it creates a significant risk of a higher sentence. *Peugh v. United States*, 569 U.S. 530, 544 (2013). The court of appeals recognized the potential Ex Post Facto issue but expressly declined to resolve it, affirming instead solely on *Nock*.

Although the Sentencing Guidelines are advisory, an accurately calculated Guidelines range remains the required starting point for sentencing. *United States v. Booker*, 543 U.S. 220 (2005). The range provides the framework for the district court's sentencing analysis and is the benchmark against which the sentence is selected and reviewed. *Molina-Martinez v. United States*, 578 U.S. 189, 198–201 (2016). When the calculation of that starting point depends on the circuit in which a defendant is sentenced, the Guidelines' central objective of promoting consistency in federal sentencing is undermined. Defendants convicted of comparable conduct should not face materially different advisory ranges based solely on geography.

The court can resolve the first question through *Beaird* and allow the Eighth Circuit to reconsider Petitioner's sentence under the appropriate deference framework of *Kisor*. The court can also grant this petition on the second question of loss directly and remand to the Eighth Circuit to determine any unresolved ex post facto issue.

CONCLUSION

The petition for writ of certiorari should be granted. The court should at a minimum 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. Alternatively, the Court should grant certiorari to resolve whether the pre-Amendment-827 version of §2B1.1 permitted intended loss to be included in calculating the loss enhancement and remand for further proceedings consistent with the Court's decisions and further for any such other relief as the Court deems just and proper.

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