No. 24-__

IN THE
SUPREME COURT OF THE UNITED STATES

XIAOQING ZHENG,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that *Seminole Rock* deference, now generally known as *Auer* deference, required the United States Sentencing Commission's commentary on the Sentencing Guidelines to be treated like "an agency's interpretation of its own legislative rules," *and* afforded "'controlling weight unless it is plainly erroneous or inconsistent with'" the Guidelines themselves. *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court circumscribed the deference courts must give to agencies' interpretations of their own legislative rules, and made clear that courts may extend *Auer* or *Seminole Rock* deference only where the law remains "genuinely ambiguous" after the court has "exhausted all the traditional tools of construction." *Id.* at 2415 (quotation marks omitted).

The Question Presented is:

Whether the limits on agency deference articulated in *Kisor* limit the deference owed to the United States Sentencing Commission's commentary on intended loss under 2B1.1 Application Note 3 of the Sentencing Guidelines.

## PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is Xiaoqing Zheng.

Respondent is the United States of America.

There are no publicly held corporations involved in this proceeding.

## RELATED PROCEEDINGS

*United States of America v. Xiaoqing Zheng*, No. 23-6070, U.S. Court of Appeals for the Second Circuit. Judgment entered June 27, 2023.

*United States of America v. Xiaoqing Zheng*, No. 19-cr-156, U.S. District Court for Northern District of New York. Judgment entered June 24, 2022.

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## INTRODUCTION

Circuit courts around the country are deeply divided over whether the limitations imposed by *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), constrain the deference that courts give the commentary interpreting the U.S. Sentencing Guidelines. This case presents an opportunity for this Court to resolve that deep and entrenched circuit split. The question is whether *Kisor* limits the deference owed to Application Note 3 of 2B1.1 defining intended loss, or whether the more extreme form of deference set forth in *Stinson v. United States*, 508 U.S. 36 (1993), continues to apply.

In *Stinson*, this Court held 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.'" *Id.* 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."

*Id.* (quotation marks omitted).

The answer to the Question Presented has profound implications for the fairness and uniformity of federal sentencing because Guidelines and their commentary govern the presumptively appropriate sentencing range for criminal defendants in nearly every federal case. *See Booker v. United States*, 543 U.S. 220, 264 (2005); *Gall v. United States*, 552 U.S. 38, 49 (2007). Yet, depending on the circuit, some courts—as in this case—are required to defer to commentary that expands or contradicts the plain text of the Guidelines, even if the commentary is unreasonable or unsupported by the Commission's rulemaking authority, while other courts are free to interpret the Guidelines based on their best reading of the text, without deferring to commentary that does not reflect a genuine ambiguity or a reasonable interpretation. *See, e.g.*, *Castillo v. United States*, 69 F.4th 648, 655–66 (9th Cir. 2023) (applying *Kisor* and declining to defer to commentary that includes inchoate offenses as predicate controlled substance offenses, contrary to the plain meaning and structure of the Guidelines).

There is no sound reason to treat the Commission differently from other agencies, or to exempt its commentary from the safeguards that *Kisor* established to prevent agencies from circumventing the rule of law and infringing on individual rights. *See Kisor*, 139 S. Ct. at 2415–23. Indeed, given the Commission's unique structure and authority, and the impact of its commentary on criminal sentencing, there is even more reason to apply *Kisor*'s rigorous standard of review. *See, e.g.*, *Campbell v. United*

*States*, 22 F.4th 438, 446 (4th Cir. 2022) ("[W]here individual liberty is at stake, the concerns that *Kisor* identified regarding reflexive deference are even more acute.").

This case is an ideal vehicle for resolving this important and recurring issue. The question is squarely presented, was fully briefed and decided below, and was outcome determinative of Petitioner's sentence. The Second Circuit relied exclusively on *Stinson* and refused to apply *Kisor*. Pet.App. 39a–41a. And the Second Circuit's decision conflicts with the decisions of six other circuits that apply *Kisor* to Guidelines commentary generally and to the Third Circuit on the specific guideline at issue. Even the Courts of Appeals that have taken the issue *en banc* are split. *See United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (*en banc*) (applying *Kisor*); *United States v. Nasir,* 17 F.4th 459 (3d Cir. 2021) (*en banc*) (same); *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (*en banc*) (applying *Stinson*).

This Court should grant certiorari and overturn *Stinson*, or at least confirm that *Kisor* limits its application once and for all. Indeed, given the Commission's unique structure and authority, and the impact of its commentary on criminal sentencing, there is even more reason to apply *Kisor*'s rigorous standard of review. *See, e.g.*, *Campbell v. United States*, 22 F.4th 438, 446 (4th Cir. 2022) ("[W]here individual liberty is at stake, the concerns that *Kisor* identified regarding reflexive deference are even more acute."). The Court should also hold that the commentary on intended loss in USSG § 2B1.1, which the District Court applied to Petitioner's sentence, is

not entitled to any deference, because it is inconsistent with the plain text of the Guideline and reflects an unreasonable interpretation of the Commission's rulemaking authority.

## OPINIONS BELOW

The relevant portions of the sentencing transcript are reproduced at Pet.App. 43a–56a. The Second Circuit's unpublished decision affirming the District Court's judgment is unreported and reproduced at Pet.App. 1a–42a.

## JURISDICTION

The Second Circuit entered judgment on August 28, 2024. This petition was timely filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## GUIDELINES PROVISIONS INVOLVED

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

## STATEMENT

**1.** In response to the "[f]undamental and widespread dissatisfaction with the uncertainties and the disparities" in federal sentencing, Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1987. *Mistretta v. United States*, 488 U.S. 361, 366 (1989). The Act established the United States Sentencing Commission "as an independent commission in the judicial branch of the United States." 28 U.S.C. § 991(a). Congress charged the Commission with issuing "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case." *Id.* § 994(a)(1), (2).

To enact a Sentencing Guideline, the Commission must abide by the notice-and-comment requirements of the Administrative Procedure Act. *Id.* § 994(x). To comply, the Commission must submit the proposed Guideline to Congress for a six-month review period before the new Guideline takes effect. *Id.* § 994(p). Additionally, the Commission also produces commentary that accompanies the Guidelines, including Application Notes that "interpret [a] [G]uideline or explain how it is to be applied." USSG

§ 1B1.7. However, unlike the Guideline itself, commentary is not subject to mandatory notice-and-comment and congressional review procedures. *See* U.S. Sent'g Comm'n, Rules of Practice & Procedure 4.1, 4.3 (2016).

The Sentencing Guidelines are critically important and play a "central role in sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016). Although the Guidelines are no longer strictly mandatory, *see United States v. Booker*, 543 U.S. 220 (2005), district courts "shall consider—…the kinds of sentence and the sentencing range established" by and remain obligated to "begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." 18 U.S.C. § 3553(a); *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). As a result, the Guidelines—and the commentary that expand them—exert significant influence on sentences. *See Peugh v. United States*, 569 U.S. 530, 543–44 (2013); U.S. Sent'g Comm'n, 2023 Annual Report and Sourcebook of Federal Sentencing Statistics (reporting that during the year Petitioner was sentenced, 66.9% of offenders received sentences that were either within the Guidelines range or justified by a Guidelines ground for departure). Indeed, "[f]ailure to follow . . . commentary could constitute an incorrect application of the [G]uidelines, subjecting the sentence to possible reversal on appeal." USSG § 1B1.7. That is because "[a] district court that improperly calculates a defendant's Guidelines range . . . has committed a significant procedural error." *Molina-Martinez*, 578 U.S. at 199 (quotation marks and brackets omitted).

The Sentencing Guidelines require enhanced sentences depending on the "loss amount." *See* United States Sentencing Commission, *Guidelines Manual*, § 2B1.1(b)(1) (2023). While the Guideline itself does not define loss, the commentary defines loss to include "actual loss or intended loss." 2B1.1, Application Note 3. Courts have used the commentary's "intended loss" definition to enhance the Guideline calculation for defendants in cases—including this case—where no actual loss occurred.

**2.** In *Stinson v. United States*, this Court held that the Sentencing Commission's commentary should "be treated as an agency's interpretation of its own legislative rule"—and thus is entitled to significant deference under *Seminole Rock*, 325 U.S. 410. 508 U.S. at 44. In other words, so long as the Commission's commentary "does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with'" the Guidelines. *Id.* at 45 (quoting *Seminole Rock*, 325 U.S. at 414). Importantly, the Court explained that such deference is warranted even when the relevant Guideline is silent or "unambiguous," and even when the commentary conflicts with a prior judicial ruling. *Id.* at 44, 46, 47. This unlimited deference to agencies' interpretations of their own regulatory pronouncements was later known as *Auer* deference. *See Auer v. Robbins,* 519 U.S. 452 (1997).

In 2019, this Court in *Kisor* acknowledged that the "classic formulation" of *Auer* deference—like the one from *Seminole Rock* applied in *Stinson*—could effectively bestow agencies with "expansive,

unreviewable" authority, explaining that *Auer* deference and *Seminole Rock* deference are synonymous. *Id.* at 2408; *Id.* at 2414–15; *see also id.* at 2411 n.3 (noting that *Stinson* was one of the Court's *Seminole Rock* cases that predated *Auer*). But relying on principles of *stare decisis*, a majority of the Court narrowly declined to eliminate *Auer* deference entirely. *Id.* at 2422–23. But every member of the Court agreed that the Court needed to at least "reinforc[e]"—and "somewhat expand on"—"the limits inherent in the *Auer* doctrine." *Id.* at 2414, 2415; *see also id.* at 2425–48 (Gorsuch, J., concurring in the judgment); *id.* at 2448–49 (Kavanaugh, J., concurring in the judgment). This led to the Court finding that the courts should only defer to an agency's interpretation of its own regulations if (1) the regulation is "genuinely ambiguous" even after using all the traditional tools of statutory interpretation; (2) the agency's interpretation is reasonable; and (3) the "character and context" of the agency's interpretation entitle it to "controlling weight." This ruling removed the strong deference to agency commentary when the regulation is silent or "unambiguous," requiring instead a finding of genuine ambiguity before resorting to agency interpretation.

3. In March 2022, Petitioner was found guilty of conspiracy to commit economic espionage, and not guilty of two substantive economic espionage counts and two substantive theft of trade secrets counts (Counts 7–10). The jury hung as to the remaining seven counts (Counts 2–6 and 13–14). Pet.App. 39a–41a. The Presentence Report calculated that "loss" resulting from Zheng's offense "exceeded $1,500,000,

but was less than $3,500,000" because "[t]he combined value of [the] [t]rade [s]ecrets [Zheng misappropriated] was millions of dollars, including expenses for research and design and other costs of reproducing the trade secrets that Zheng…avoided," resulting in a 14-level enhancement pursuant to § 2B1.1(b)(1)(I). *Id.* Petitioner objected to Probation's use of "intended loss" in calculating the loss amount. *See id.* He argued that the Guidelines commentary is no longer entitled to judicial deference after *Kisor v. Wilkie*, 588 U.S. 558 (2019), and that "loss" in § 2B1.1 unambiguously refers to "actual loss." *Id.* Petitioner's Guideline range would have suggested a sentence far below the ultimate 24-month sentence in this case had the Court applied *Kisor*.

The District Court nevertheless applied the enhancement, finding that under *Stinson v. United States*, 508 U.S. 36 (1993), courts are required "to follow [Guidelines] commentary that interprets or explains a [G]uideline unless it violates the Constitution or a federal statute or is inconsistent with or a plainly erroneous reading of that [G]uideline," stating "*Stinson* continues to be the law in this Circuit." *Id.* The District Court then sentenced Petitioner to 24 months of imprisonment followed by 1 year of supervised release.

The Second Circuit affirmed, simply by concluding that it was bound by *Stinson* to defer to Application Note 3. *Id.* at 39a–41a. In so doing, the court cited *United States v. Rainford*, No. 20-359, 2024 WL 3628082 (2d Cir. Aug. 2, 2024), which acknowledged that the Courts of Appeals are divided over whether *Kisor* changed the level of deference owed to

Guidelines commentary under *Stinson*. *Id.* But the court determined it was nonetheless "obliged to adhere to Stinson." *Id.* Thus, the court concluded—again consistent with circuit precedent—that Application Note 3 is entitled to deference. *Id.*

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. The Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This petition followed.

## REASONS FOR GRANTING THE WRIT

After this Court's decision in *Kisor*, circuit courts have split as to whether the application note defining "loss" to include the intended loss should continue to receive deference. *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.'"). Every Circuit that hears criminal cases has decided this issue in some form, with no consistency, leaving a split that is deep, acknowledged, and entrenched. This issue is important because it directly affects the time of incarceration for individuals around the country. This case is an ideal vehicle to resolve this deeply divisive issue. Certiorari should be granted.

### I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The Courts of Appeals are in deep disagreement

about whether *Kisor*'s deference principles extend to the Sentencing Commission's commentary on its Guidelines as a general matter. There is an even six to six circuit split where half the circuits apply *Kisor* to Guidelines commentary while the other six apply *Stinson* to Guidelines commentary.

More specifically, the courts are divided over whether "loss" under Section 2B1.1 refers only to the actual loss suffered by a victim and not intended loss questioning whether they should rely on the Guideline itself, or defer to the commentary's expansive definition. Only this Court can provide a definitive answer on this important issue and restore uniformity.

### A. Six Circuits Apply *Kisor* When Considering The Guidelines.

Six circuits apply *Kisor*'s ordinary administrative law principles—rather than *Stinson*'s extreme form of deference—to Guidelines commentary. The Third, Fourth, Sixth, Ninth, Eleventh and D.C. Circuits all agree that the Supreme Court in *Kisor* replaced *Stinson*'s highly deferential standard—to guideline commentary—with a less deferential one.

**1.** In *United States v. Nasir*, the *en banc* Third Circuit applied *Kisor*'s limiting principles to the Sentencing Commission's commentary. 17 F.4th at 470–71. The court recognized that "Congress has delegated substantial responsibility to the Sentencing Commission." *Id.* at 472. "If the Sentencing Commission's commentary sweeps more broadly than the plain language of the

> guideline it interprets, we must not reflexively defer. The judge's lodestar must remain the law's text, not what the [Sentencing] Commission says about that text." *Id.* So the court proceeded to apply *Kisor*'s more limited form of deference to Guidelines commentary. *See id.*

Following *Nasir*, the Third Circuit applied this principle to preclude any reliance on "intended loss"—which is a term included only in the Commentary—because the guideline only refers to "loss," a term that the court found unambiguously means only actual loss. *Banks,* 55 F.4th at 258. The court found that "[b]ecause the commentary expands the definition of 'loss' by explaining that generally 'loss is the greater of actual loss or intended loss,' [it] accord[s] the commentary no weight." *Id.*

**2.** The Fourth Circuit held in *United States v. Campbell* that *Kisor*'s modifications to *Auer* deference "apply equally to judicial interpretations of the Sentencing Commission's commentary." 22 F.4th 438, 444–47 & n.3 (4th Cir. 2022). Twelve days later, however, the Fourth Circuit published *United States v. Moses*, which held the exact opposite: that "*Stinson* continues to apply unaltered by *Kisor*." 23 F.4th 347, 349 (4th Cir. 2022). The Fourth Circuit is thus internally divided on the Question Presented; however, as *Campbell* is the earlier ruling, it should control. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004); *Moses*, 23 F.4th at 359 (King, J., dissenting in part and concurring in the judgment).

**3.** The Sixth Circuit also applies *Kisor* to Guidelines commentary. *See United States v. Riccardi*, 989 F.3d 476, 484–85 (6th Cir. 2019);

*United States v. Phillips*, 54 F.4th 374, 379 (6th Cir. 2022). In *Riccardi*, the court held that "*Kisor* must awake us 'from our slumber of reflexive deference' to the commentary," but determined it "need not decide whether one clear meaning of the word 'loss' emerges from the potential options [under 2B1.1(3)(A)(iii)] after applying the 'traditional tools' of construction" because the commentary's $500 minimum loss amount for gift cards does not fall "within the zone of [any] ambiguity" in this guideline. *Id.* at 486.

In *You*, 74 F.4th at 397 the Sixth Circuit applied *Kisor* and found contrary to the Third Circuit that "[a]lthough *Riccardi* declined to declare 'loss' ambiguous, its reasoning makes it easy for us to conclude that the definition of loss has no single right answer." *Kisor*, 139 S. Ct. at 2415. 23 F.4th 347, 349 (4th Cir. 2022), creating a further split on the issue of whether *Kisor* applies and, if so, whether "loss" includes intended loss as defined by the commentary.

**4.** In *United States v. Castillo*, the Ninth Circuit squarely held that "[t]he more demanding deference standard articulated in *Kisor* applies to the Guidelines' commentary." 69 F.4th 648, 655 (9th Cir. 2023). The court found that its precedent was "irreconcilable with *Kisor*'s instructions regarding review of agency regulations and deference to an agency's, including the Sentencing Commission's, interpretive commentary." *Id.* In so holding, the court noted that "the Sentencing Commission's lack of accountability in its creation and amendment of the commentary raises constitutional concerns when we defer to commentary . . . that expands unambiguous Guidelines, particularly because of the extraordinary

power the Commission has over individuals' liberty interests." *Id.* at 663–64.

In *United States v. Kirilyuk*, the Ninth Circuit considered the term "loss" in 2B1.1 Application Note 3(F)(1), but avoided making a determination under *Kisor.* 29 F.4th 1128, 1138 (9th Cir. 2022). Yet the court's dicta is instructive in finding that § 2B1.1 is driven by "the amount of loss *caused by the crime*," and "cannot mean a pre-determined, contrived amount with no connection to the crime committed, even if it is based on the Commission's research and data." *Id.*; *See* USSG amend. 596 (Nov. 2000). The Court found that "Application Note (3)(F)(i) [] doesn't illuminate the meaning of 'loss,' but modifies it," while "*Stinson* requires that commentary interpret the guidelines, not contradict or add to them." *Id.* The court noted that the case "illustrates the egregious problem with the Application Note's expansion of the meaning of 'loss,'" citing the significant impact loss has on possible jail sentences. *Id.*

**5.** The *en banc* Eleventh Circuit reached the same result in *United States v. Dupree*, 57 F.4th at 1275–76. *Stinson*, the court reasoned, "adopted word for word the test the *Kisor* majority regarded as a 'caricature,' so the continued mechanical application of that test would conflict directly with *Kisor*." *Id.* at 1275. In order to "follow *Stinson*'s instruction to treat the commentary like an agency's interpretation of its own rule," it concluded, "we must apply *Kisor*'s clarification of *Auer* deference to *Stinson*." *Id.* at 1276.

6. The D.C. Circuit also appears to apply *Kisor* in the Guidelines context. *See United States v. Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022) (citing *Kisor*, as

well as *Stinson*, in construing Guidelines commentary). Even pre-*Kisor*, the D.C. Circuit had declined to defer to Guidelines commentary where the Guidelines themselves were not ambiguous. *See United States v. Winstead*, 890 F.3d 1082, 1092 & n.14 (D.C. Cir. 2018) ("[S]urely *Seminole Rock* deference does not extend so far as to allow [the Commission] to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the [G]uidelines themselves[.]").

### B. Six Circuits Apply *Stinson* When Considering The Guidelines.

The Second Circuit is one of six circuits that continues to apply *Stinson* deference—without *Kisor*'s limitations—to the Sentencing Commission's commentary.

1. The Second Circuit, as in this case, has uniformly applied *Stinson* to Guidelines commentary. *See, e.g.*, *United States v. Rainford*, No. 20-359, 2024 WL 3628082 (2d Cir. Aug. 2, 2024); *United States v. Richardson*, 958 F.3d 151, 154 (2d Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020). In this case, the Court explained, "this Court is obliged to adhere to *Stinson*, and thus to treat the Guidelines commentary as authoritative," because "only the Supreme Court may overrule its own decisions, and it has not overruled *Stinson*." *Rainford* at *7 n.5.

2. The First, Fifth, Seventh, Eighth and Tenth Circuits have also continued to apply *Stinson* deference notwithstanding *Kisor*.

In continuing to follow *Stinson*, the Tenth Circuit has noted that the Courts of Appeals are "fractured" on "what weight" to give to "commentary from the U.S. Sentencing Commission." *Maloid*, 71 F.4th at 798, 804 n.12; *see also* Pet.App. 5a ("The [C]ourts of [A]ppeals are divided on whether *Kisor* changed how courts should apply *Stinson*."), and stated that it will continue to apply *Stinson* until it receives "clear direction" from this Court. *Maloid*, 71 F.4th at 798, 808.

The *en banc* Fifth Circuit also concluded that "*Stinson* continues to bind" the lower courts—which must "adhere strictly to Supreme Court precedent, whether or not [they] think a precedent's best days are behind it." *Vargas*, 74 F.4th at 679, 683. Judge Oldham, joined by Judge Jones, wrote separately. *Id.* at 699 (Oldham, J., concurring).

The Eighth Circuit concluded that it was bound by prior precedent applying *Stinson* to Guidelines commentary. *United States v. Rivera*, 76 F.4th 1085, 1089–91 (8th Cir. 2023) (citing *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693–94 (8th Cir. 1995) (en banc)).

In *United States v. White*, the Seventh Circuit delved into whether *Stinson* remained controlling, reasoning that it did and holding that "[t]he disagreement among the circuits—now quite entrenched—is another reason not to change positions." 97 F.4th 532, 539 (7th Cir. 2024), *cert. denied sub nom. Keith v. United States*, No. 24-5031, 2024 WL 4427289 (U.S. Oct. 7, 2024). Following the reasoning of *White*, the court in *United States v.*

*Ponle* found that "consistent with Advisory Note 3 to § 2B1.1(b), the district court correctly utilized 'the greater of the actual loss or intended loss'" to calculate Ponle's offense level as *Stinson* requires. 110 F.4th 958, 963 (7th Cir. 2024).

Finally, in *United States v. Lewis*, the First Circuit refused to overrule prior precedent relying on *Stinson*. 963 F.3d 16, 24–25 (1st Cir. 2020).

### C. The Split Is Well Developed And Entrenched.

The circuit split over the amount of deference owed to the Sentencing Commission's commentary is well-known. *E.g.*, *White*, 97 F.4th at 539; *Maloid*, 71 F.4th at 804 n.11; *Vargas*, 74 F.4th at 680 & n.11; *Lewis*, 963 F.3d at 25. Nearly every circuit has weighed in, and many of those circuits have called upon this Court to harmonize the split.

Until this Court intervenes, courts around the country will continue to flounder in uncertainty. Unlike most Guidelines questions, the Sentencing Commission cannot answer the Question Presented itself. Although the Court often leaves disagreements over the interpretation of particular Guidelines to the Commission, *see, e.g.*, *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari), the Commission "cannot, on its own, resolve the dispute about what deference courts should give to the commentary." *Dupree*, 57 F.4th at 1289 n.6 (Grant, J., concurring in the judgment). Only this Court can determine the Question Presented.

Even the circuits sitting *en banc* have been unable to reach a workable harmonization of the issue. The disagreement among the Courts of Appeals reflects tensions in this Court's own caselaw. *See* Order, *Moses*, No. 21-4067, at 3 (Niemeyer, J., supporting denial of rehearing *en banc*) ("[U]nder *Stinson*, Guidelines commentary would be authoritative and binding regardless of whether the Guideline to which it is attached is ambiguous, whereas under *Kisor*, Guidelines commentary would receive such deference only if the Guideline were 'genuinely ambiguous.'"); *Dupree*, 57 F.4th at 1283 n.1 (Grant, J., concurring in the judgment) ("One source of confusion in this area may be a tension within *Kisor* between stare decisis and the articulation of new limits on *Seminole Rock*."). And the split has only continued to deepen and solidify over time as more issues arise with the Commentary's effect on sentencings. Many courts have made plain that they would welcome the Supreme Court's advice on the issue.

## II. THE QUESTION PRESENTED MERITS THE COURT'S ATTENTION.

The Question Presented is exceptionally important and arises frequently. The Guidelines are uniquely important to federal sentencing. In many instances, the unwarranted deference to the Commentary is outcome determinative of the proper Guidelines range—and thus of the ultimate sentence imposed.

No agency or commission should have such sway over a federal court's interpretation of federal law. Deference should have "no role to play when liberty

is at stake." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., respecting denial of certiorari). In these circumstances more than any other, a defendant is entitled to nothing less than a court's "best independent judgment of the law's meaning." *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment).

**1.** Federal district courts must interpret and apply the Sentencing Guidelines every time they sentence a criminal defendant. *See Booker*, 543 U.S. at 264; *Rita*, 551 U.S. at 351; *Gall*, 552 U.S. at 49. And virtually every Guideline is accompanied by commentary. *See generally* United States Sentencing Commission, *Guidelines Manual* (Nov. 2022). As a result, the question of whether and to what extent courts must defer to the Commission's commentary arises again and again.

In many of these cases, the degree of deference owed to the commentary is determinative of the applicable Guidelines range. This case is a perfect example. Application Note 3 has divided the Courts of Appeals about whether "loss" includes "intended loss." A strict *Stinson* regime requires courts to defer to the Commission's commentary—even if they think the text is unambiguous or the commentary unreasonable. In contrast, application of *Kisor* would allow courts to determine the appropriate Guideline range and corresponding sentence based on the Guidelines' plain text.

District court cases within the internally divided Fourth Circuit grappling with the meaning of "loss"

under § 2B1.1 also demonstrate the real-world impact of deference to Guidelines commentary. *See, e.g.*, *Griffin v. United States*, No. 3:14-cr-82, 2023 WL 2090287, at *9 (W.D.N.C. Feb. 17, 2023) (applying *Stinson*, adopting commentary definition, and holding that USSG § 2B1.1 measures "loss" as "the greater of actual loss or intended loss"); *United States v. Wheeler*, No. 5:22-cr-38, 2023 WL 4408939, at *2–3 (E.D.N.C. July 6, 2023) (applying *Kisor*, rejecting commentary definition, and holding that USSG § 2B1.1 measures "loss" as "actual loss").

The degree of deference to Guidelines commentary matters even though the Guidelines themselves are advisory. As this Court has repeatedly recognized, the Guidelines have a significant anchoring effect on the sentencing process. *See Molina-Martinez*, 578 U.S. at 200 ("[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar."); *id.* at 199 (describing "the real and pervasive effect the Guidelines have on sentencing"); *Peugh*, 569 U.S. at 541 ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."); *id.* at 544 ("[W]hen a Guidelines range moves up or down, offenders' sentences [tend to] move with it."). They also dictate the standard for appellate review. *See Molina-Martinez*, 578 U.S. at 204 ("[A] defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court

would have imposed a different sentence under the correct range."); *id.* at 201 ("[R]eviewing courts may presume that a sentence imposed within a properly calculated Guidelines range is reasonable" (citing *Rita*, 551 U.S. at 341)).

**2.** The degree of deference applicable to Guidelines commentary also implicates broader principles about individual liberty and uniformity in sentencing.

**a.** "Courts play a vital role in safeguarding liberty and checking punishment." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). The Guidelines prescribe the presumptively appropriate sentencing range for criminal defendants. *See United States v. Mistretta*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (The Guidelines "govern[ ] application of government power against private individuals—indeed, application of the ultimate governmental power, short of capital punishment."). There is "no compelling reason to defer to a Guidelines comment that is harsher than the text." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in the judgment); cf. *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., respecting the denial of certiorari) (deference in criminal cases turns normal interpretive principles "upside-down, replacing the doctrine of lenity with a doctrine of severity" (quotation marks omitted)). And disputes about the proper interpretation of those Guidelines can spell the difference between freedom and imprisonment over extended periods of time.

**b.** "Congress enacted the sentencing

statutes in major part to achieve greater uniformity in sentencing." *Booker*, 543 U.S. at 255. The circuits' inconsistent approaches to federal sentencing undermine one of the primary goals of the Sentencing Reform Act, which "was to achieve uniformity in sentencing * * * imposed by different federal courts for similar criminal conduct." *Molina-Martinez*, 578 U.S. at 192 (quotation marks omitted). However, the Courts of Appeals take dramatically different approaches to Guidelines commentary. *See supra* Part I.A–B. That decision on whether to give deference to the commentary or to allow the sentencing court to have the primary say over what even an unambiguous Guideline means—the precise problem this Court intended to quell in *Kisor*—all but guarantees disparity in sentencing. Resolving the Question Presented will restore uniformity to how courts approach sentencing, place the decision-making power appropriately back in the hands of those courts, and ultimately promote uniform sentencing outcomes.

## III THIS CASE IS AN IDEAL VEHICLE.

This case is an ideal vehicle for this Court to decide whether *Kisor* modifies the deference previously due to the Guidelines under *Stinson*. Although this Court has denied petitions presenting this question, this case is readily distinguishable from those. And now that this Court has revised the *Chevron* standard in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024), there is more reason for this Court to resolve the split about *Kisor*'s applicability to the Guidelines now.

1. The question whether *Kisor* or *Stinson* governs Guidelines commentary is squarely presented here. That question was fully briefed below. The Second Circuit definitively answered it, relying on the reasoning of its earlier decision in *Rainford*, which expressly acknowledged contrary rulings from other circuits. *Id.* at 39a.

Here, the Second Circuit relied on *Stinson* in upholding Petitioner's sentence without further analysis. *Id.* at 39a–41a. Under *Stinson*, the court had no choice but to defer to Application Note 3. It went no further in determining whether it would have construed intended loss to apply to Petitioner's case absent *Stinson*. This is directly contrary, however, to this Court's observation "that interpretive issues arising in connection with a regulatory scheme often 'may fall more naturally into a judge's bailiwick' than an agency's." *Kisor*, 588 U.S. at 578.

2. Although this Court has denied petitions purporting to present similar questions, those petitions suffered from vehicle problems not present here and predated a full six-to-six split in the Courts of Appeals.

For example, the Court denied certiorari in *United States v. Moses*, No. 22-163 (cert. denied Jan. 9, 2023). But the deference question appeared unlikely to be outcome determinative in that case. *See Moses* BIO at 15–16 ("This . . . is not a case in which direct application of *Stinson*, rather than *Kisor*, makes a difference to the outcome.").

The Court also denied certiorari in *Lomax v.*

*United States*, No. 22-644 (cert. denied Feb. 21, 2023). But there, the deference question arose in the context of a distinct split over whether an inchoate offense can be a predicate offense for identifying career offenders. *See* Pet., *Lomax v. United States*, No. 22-644, at i. That is an issue this Court has repeatedly declined to review. *See, e.g.*, *Crum v. United States*, No. 19-7811 (cert. denied Mar. 30, 2020).

Finally, the Court denied certiorari in *Ratzloff v. United States*, No. 23-310 (cert. denied Jan. 8, 2024). Like in *Moses*, *Ratzloff* was not a case in which direct application of *Stinson*, rather than *Kisor*, makes a difference to the outcome. *See Ratzloff* BIO at 14. Additionally, unlike in *Ratzloff*, this case involves a circuit split related to deference generally, but also related to the specific Guideline Application Note in issue. *Compare, e.g.*, *Banks*, 55 F.4th at 258, *with You*, 74 F.4th at 397.

Finally, this Court's ruling in *Loper Bright Enterprises* underscores the need for immediate intervention. *See* 144 S. Ct. 2244 (2024). As an initial matter, "[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress." *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part); *see also Stinson*, 508 U.S. at 44 (discussing *Chevron* and "find[ing] inapposite an analogy to an agency's construction of a federal statute that it administers"). The Court's *Loper Bright* opinion advances the trend away from administrative agency deference, as this Court

eliminated deference to administrative agencies' interpretation of ambiguous statutes. It "remains the responsibility of the court to decide whether the law means what the agency says." *Id.* at 2261 (citation omitted). At the very least, *Loper Bright* instructs that no "judicial invention" should "require[] judges to disregard their statutory duties," which is what continued deference under *Stinson*'s continuing application commands. The Court should grant certiorari and resolve the Question Presented now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

November 26, 2024 Respectfully submitted,

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# APPENDIX

## TABLE OF APPENDICES

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 28, 2024**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2023
No. 23-6070

UNITED STATES OF AMERICA,

*Appellee,*

v.

XIAOQING ZHENG,

*Defendant-Appellant.*[*]

On Appeal from the United States District Court
for the Northern District of New York

ARGUED May 23, 2024
DECIDED August 28, 2024

Before: WESLEY, NARDINI, and ROBINSON, *Circuit Judges*.

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* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

*Appendix A*

WILLIAM J. NARDINI, *Circuit Judge*:

Defendant-Appellant Xiaoqing Zheng worked as an engineer in General Electric's ("GE") Power division, where he developed seals for GE's steam turbines. From approximately 2016 to 2018, Zheng launched two business ventures in the People's Republic of China ("PRC") that also developed seals for aero engines and ground-based turbines. At the same time that Zheng was focused on growing his turbine-related businesses in China, he misappropriated GE trade secrets related to turbine technology, including turbine seals, by sending the trade secrets through surreptitious means to himself and a co-conspirator in China. Zheng was indicted on various federal charges, and a jury convicted him of one count of conspiracy to commit economic espionage, in violation of 18 U.S.C. § 1831(a)(5). The United States District Court for the Northern District of New York (Mae A. D'Agostino, *District Judge*) sentenced Zheng to 24 months in prison.

On appeal, Zheng argues that there was insufficient evidence supporting his conviction, that the district court improperly instructed the jury on the elements of the crime, and that the district court erred in calculating his advisory sentencing range under the U.S. Sentencing Guidelines. None of Zheng's claims have merit, and accordingly we AFFIRM the judgment of the district court.

*Appendix A*

## I. Background

### A. Zheng's Background

In 1993, Zheng immigrated to the United States from China, eventually becoming a United States citizen in 2004. He holds a bachelor's degree in aeroengine design, a master's degree in aeronautical propulsion and thermophysics, and a doctorate in computational fluid dynamics, all from Northwestern Polytechnical University in China. In 2008, GE hired Zheng as a "sealing and clearance senior engineer" in its Power division, and in 2015, he was promoted to "principal engineer/technologist." App'x at 347, 351. Zheng worked at GE Power's headquarters in Schenectady, New York, where he helped to develop and test "seals technology," such as brush seals and carbon seals, for GE's steam turbines. *Id.* at 788.

### B. The Investigation into Zheng

In November 2017, the FBI field office in Cincinnati, Ohio, during the course of an unrelated investigation, uncovered information showing that Zheng gave a presentation in June 2017 or July 2017 at the Nanjing University of Aeronautics and Astronautics in China titled "encapsulation and efficiency in turbomachinery." *Id.* at 375. The FBI believed that Zheng's presentation might have contained proprietary GE information. After determining that Zheng worked for GE Power in Schenectady, the Cincinnati field office provided the information that they had obtained to the FBI field office

in Albany, New York, which then conveyed the information to GE Power.

GE opened an investigation into Zheng. As part of its investigation, GE's director of cyber security, Lucas Hilton, discovered that Zheng had over 400 files on his GE computer that were "encrypted, password protected[,] and renamed" using a software called AxCrypt that Zheng had downloaded from the internet. *Id.* at 417. According to Hilton, he had never before seen a GE employee encrypt files on his GE computer. In June 2018, as part of its internal corporate investigation, and without Zheng's knowledge, GE installed monitoring software on his computer, which would activate in response to certain "triggers," such as the use of AxCrypt, and record and save Zheng's screen when activated. *Id.* at 419.

About three weeks later, on July 5, 2018, the software was triggered and captured Zheng using AxCrypt to encrypt 40 files relating to the design and testing of carbon seals for GE's ground-based turbines. Zheng then used a technique called steganography to embed those encrypted files into an image of a sunrise, so that when viewed normally, the files appeared to be no more than a picture of a sunrise.[1] Zheng emailed the sunrise image

1. According to Hilton, whom the district court received "as an expert in the field of cyber security investigations," App'x at 415, "[s]teganography is a known technique within the cyber security field" and can "[e]ssentially" be described as "hiding something in plain sight," *id.* at 413. *See Steganography*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/steganography [https://perma.cc/9T6H-FN6D] (Definition: "the art or practice

containing the 40 GE files from his GE email account to his personal email account, with the subject line "nice view." App'x at 464. GE sent the July 5, 2018, video capture from Zheng's computer to the FBI.

### C. Arrest and Indictment

On July 6, 2018, one day after sending the 40 GE files to his personal email address, Zheng traveled to China, and he returned to the United States on July 31. The next day, on August 1, the FBI executed a search warrant on Zheng's home in Niskayuna, New York. Among other items, the FBI seized Zheng's desktop computer and cellphone. In addition, Zheng, who was not yet in custody, voluntarily gave an over five-hour interview in his home with two FBI agents. Zheng was arrested later that day.

On August 10, 2021, a grand jury returned a fourteen-count superseding indictment charging Zheng and a co-conspirator, Zhaoxi Zhang,[2] with conspiracy to commit economic espionage, in violation of 18 U.S.C. § 1831(a)(5) (Count 1), and conspiracy to commit theft of trade secrets, in violation of 18 U.S.C. § 1832(a)(5) (Count 2). It further charged Zheng with four counts of economic espionage, in violation of 18 U.S.C. § 1831(a) (Counts 3, 4, 7, and 8), five

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of concealing a message, image, or file within another message, image, or file"; Etymology: "New Latin *steganographia*, from Greek *steganos* covered, reticent (from *stegein* to cover) + Latin *-graphia* -graphy").

2. We discuss Zhang's role in the alleged conspiracy *infra* Section I.D. Zhang, who is Zheng's nephew and lives in China, was never arrested and remains a fugitive.

counts of theft of trade secrets, in violation of 18 U.S.C. § 1832(a) (Counts 5, 6, 9, 10, and 13), and one count of making false statements, in violation of 18 U.S.C. § 1001(a)(2) (Count 14).[3]

### D. The Evidence Presented at Trial

A jury was empaneled on March 3, 2022. On March 21, 2022, the parties rested their cases. The following evidence was presented at trial.

#### 1. An Overview of the PRC and Its Economic Priorities

The government called as a witness Cheng Chen, a political science professor at The State University of New York at Albany. The district court, with no objection from the defense, received Chen as an expert in political science, "specifically of Chinese government structure" and "policies." App'x at 1187.

Chen testified that the Chinese Communist Party ("CCP") governs "the Chinese party state," with "no clear boundary between the [CCP] and the state in China." *Id.* at 1188. The CCP "oversee[s] [various] administrative units as well as . . . state-owned enterprises." *Id.* at 1191. Regarding universities, Chen testified that "[t]he overwhelming majorit[y] of universities in China are public universities," to which the PRC provides funding, and each university has a "party committee[] to make

3. Counts 11 and 12 charged Zhang with economic espionage and theft of trade secrets, respectively.

sure that the[] universit[y] toe[s] the party line." *Id.* at 1201. According to Chen, "[u]niversities basically are owned by the Chinese government." *Id.* In general, the line between public and private entities in the PRC "is a very blurred one." *Id.* at 1242. "[I]f you are a relatively large enterprise, especially in the area of science and technology, it's very likely that the government will want to pay very close attention to you and . . . try to monitor you all the time." *Id.*

Every five years, the PRC promulgates a "five-year plan," which is an "economic blueprint[]" that identifies the PRC's "economic priorities" for the next five years. *Id.* at 1192. The plans are "widely promoted by the government . . . [and] within the Chinese public." *Id.* at 1193. Provincial and municipal governments are expected to help implement the five-year plans, and accordingly, "their economic policies mirror the interests of the national five-year plan." *Id.* at 1200.

As relevant here, from 2016 to 2018, the 13th Five-Year Plan was in effect, which had "a broad goal of moving China up the industrial chain by upgrading its entire manufacturing sector." *Id.* at 1193. Thus, during the 13th Five-Year Plan, economic actors were to be focused "on the innovation and high tech sectors, such as aero engines and industrial gas turbines, cyber security, computing, and technologies for deep sea exploration and space exploration." *Id.*

In addition to the 13th Five-Year Plan, in 2015, the PRC introduced the "Made in China 2025" initiative, the purpose of which was to "mov[e] China away from low-end

manufacturing . . . and make China . . . the world leader in science and technology," "such as aerospace, biotech, artificial intelligence, . . . [and] 5-G technology." *Id.* at 1195-96. Within the aerospace industry, the Made in China 2025 initiative focused on "turbine power generation" and "airline engines." *Id.* at 1196. According to Chen, the 13th Five-Year Plan and the Made in China 2025 initiative were "[c]omplementary" policies. *Id.*

### 2. Zheng's Business Interests in the PRC

#### i. The Thousand Talents Program

In 2012, Zheng was selected for the PRC's "Thousand Talents [P]rogram." App'x at 376. The Thousand Talents Program, established in 2008, is "overseen by the Chinese Communist Party" and "incentivizes individuals engaged in research and development in the [United States] to transmit that knowledge and research gained in the [United States] to China in exchange for salaries, research funds, lab space, or other incentives." *Id.* at 377. From 2016 to 2018, the focus of the Thousand Talents Program aligned with the priorities outlined in the 13th Five-Year Plan.

#### ii. LTAT and NTAT

In April 2016, Zheng and Zhang formed a company in China called Liaoning Tianyi Aviation Technology Company Limited ("LTAT"). According to an LTAT brochure, the company "deals with the research and development, design, manufacture and verification of the

mechanical seal technology of the aero engine and the ground engine and the large compressor." Gov't App'x at 2; *see also id.* at 5 (explaining that the "founders of LTAT" are "developing sealing technologies in LTAT for [the] next generation of aviation engines"). LTAT advertised that it would fill a "gap" in China's technology. *Id.* at 2.

In addition, Zheng served as the general manager of Nanjing Tianyi Aviation Technology Company Limited ("NTAT"), which was founded in December 2015 in China. According to an NTAT business proposal, "[a]t the early stage," the company would "focus on R&D of sealing technology for use in steam turbines and gas turbines, replacing existing technology for steam turbines, and developing gas turbine sealing technology." *Id.* at 151. At a "later stage," the company would "primarily engage in R&D of sealing technology for aero-engines to replace imported engines." *Id.* NTAT also advertised that it would "[f]ill[] [a] gap in the country's technology." *Id.* at 87.

On January 25, 2016, Zheng submitted a conflict of interest form to GE. In it, he stated: "[M]y brothers in China and I have registered a small company in China last month to be in the business of parts supplier for civil aviation engines. Although I am not working for G.E. Aviation and the company would never be in direct competition with G.E. Aviation, . . . there is a potential in the future it may become a supplier of G.E. Aviation." App'x at 233. On November 9, 2016, GE responded, saying that there did "not appear immediately to be a conflict of interest for G.E." but that, among other things, Zheng "must be extremely careful to avoid using G.E. intellectual

property, proprietary information, or proprietary processes" in his "outside activities." *Id.* at 237.

### iii. LTAT's and NTAT's Partnerships with Chinese Local Governments

The government presented evidence that Zheng sought financial assistance from local governments in China to help launch LTAT and NTAT. For example, agents recovered two documents from Zheng's home that were published by provincial governmental entities and detailed the financial incentives available to Chinese companies that developed technologies promoted by the PRC. The first document, published by the Liaoyang Municipal Science and Technology Bureau in September 2017 and titled "Ten Benefits for Being a High and New Tech Enterprise And Accreditation Criteria and Procedures for Becoming a High and New Tech Enterprise," described the financial incentives offered by the bureau to "high and new tech enterprises." Gov't App'x at 17-18. Those included: (1) eligibility "for a preferential tax rate of 15%"; (2) direct "cash rewards (up to a million)"; and (3) greater ease "obtain[ing] VC investments and loans from major banks." *Id.* at 18. The second document, published by the "Liaoning Provincial S&T Department" in June 2017 and titled "Enterprise S&T Innovation Policy Book," also described "incentive policies for innovation," such as a lower tax rate for qualifying companies. *Id.* at 36-37.

And, indeed, agents recovered from Zheng's desktop computer a 2017 "Project Initiation Application" that LTAT submitted, or at least had prepared for submission, to the

Liaoning Province Committee of Industry & Information Technology for an "Aircraft Engine Mechanical Seal Research and Manufacturing Project." *Id.* at 109. As "[b]ackground" to the project proposal, the application explained that "[g]rowing China's aviation industry is likely an important avenue for promoting 'Made in China'" and "[a]ircraft engines and ground gas turbines have become the top priority in China's Thirteenth Five Year Plan." *Id.* at 112. LTAT advertised that the aircraft seals it would develop would "fill[] a gap in China and [would] have a historical significance in extending the use life and performance of domestically manufactured aircraft engines." *Id.* at 113. The application indicated that the project would require "130 Mu[4] of land" and "approximately 620 million Yuan." Gov't App'x at 128.

Relatedly, agents also recovered text and audio messages between Zheng and Zhang that were sent over the application WeChat and indicated that they were meeting with, and seeking funding from, local government leaders for NTAT and LTAT. *See, e.g.*, *id.* at 95 (August 26, 2016, message from Zhang to Zheng stating that the "Provincial Standing Committee" had "approved" the "50 million direct investment fund . . . we applied for"); *id.* at 89 (March 17, 2016, message from Zhang to Zheng stating that "[o]ur Governor is visiting our company on the 27th of this month"); *id.* at 91 (March 30, 2016, message from Zhang to Zheng stating that "[t]he Secretary of the Municipal Communist Party Committee is visiting

4. A mu, sometimes transliterated as "mou," is approximately 0.165 acres, or 666.5 square meters. *See Mou*, Britannica.com, https://www.britannica.com/science/mou [https://perma.cc/T6TK-6AWY].

this afternoon"). In one message dated January 22, 2017, Zheng sent Zhang an apparent draft status report on LTAT addressed to multiple local government leaders. In it, Zheng thanked the leaders for their "consideration and support" and updated the officials on LTAT's progress. *Id.* at 97. He reiterated that "[t]he 13th Five-Year Plan places aerospace development as a priority among its strategic key technology projects" and that he was "[t]herefore . . . [t]here to ask the leadership to give the development of this national key technology project the special attention it deserves." *Id.*

#### iv. LTAT's and NTAT's Partnerships with Chinese Universities

The government also introduced evidence that Zheng, through LTAT and NTAT, sought to partner and collaborate with Chinese universities on various research projects. First, in June 2018, NTAT executed a "Technical Services Contract" with the Beijing University of Aeronautics and Astronautics ("BUAA"). Gov't App'x at 164. The contract was for a project titled "Research and Development of High Speed Pneumatic Bearing and Sealing Technology." *Id.* Under the agreement, BUAA would pay NTAT one million yuan to provide BUAA with technical services relating to the development of turbine bearing and sealing technology. Zheng signed the contract as NTAT's legal representative (although BUAA's signature line is blank). Chen testified that BUAA is a "major" university that "specializes [i]n aeronautics" and "astronautics." App'x at 1213. BUAA is "administered by the [PRC's] ministry of industry and information

technology." *Id.* As with other public universities in China, "the direction of [BUAA's] research [is] guided by policies like the 13th five-year plan." *Id.* at 1214.

Second, in July 2018, it appears that LTAT considered entering into a "Strategic Cooperation Agreement" with Shenyang Aerospace University ("SAU") for a project titled "Development of Brush Seal Technology for Aircraft Engines." Gov't App'x at 98. According to what appears to be a draft of that agreement, LTAT agreed to, among other things, provide "brush seal test samples" to SAU. *Id.* Chen explained that SAU "is a large public university" that "mostly trains engineers for China's . . . civilian and military education industries." App'x at 1210. SAU's "research would be in line with the 13th five-year plan," and it "ultimately report[s] back" to the CCP. *Id.* at 1210-11.

Lastly, in July 2018, Zheng emailed Zhang a draft "Strategic Cooperation Agreement For the Establishment of a Joint Research and Development Test Center of Sealing Components for Aero Engines and Gas Turbines" between LTAT and the AECC Shenyang Engine Research Institute ("AECC"). Gov't App'x at 173. Under the agreement, the parties would "[c]o-design, trial produce, test[,] and verify aero engine and gas turbine sealing products." *Id.* at 175. Chen testified that AECC is "one of the leading research institute[s] in China that specializes in R&D of large and medium turbo jet engines as well as natural gas turbines," and that "it belongs to Aero Engine Operations of China, which is a[] large[] state-owned enterprise." App'x at 1211.

### 3. Zheng's Emails to Himself and Zhang

During the time that Zheng was trying to grow LTAT and NTAT by partnering with Chinese local governments and universities, he was also misappropriating GE trade secrets that related to LTAT's and NTAT's areas of focus. On June 6, 2017, Zheng sent an email from his GE email address to his personal email address with an image of bamboo shoots attached. The image was titled "newyear.jpg." App'x at 643. Through steganography, Zheng had embedded in the image three GE files, which had been encrypted using AxCrypt, containing manufacturing drawings for turbine blades used in GE's gas turbines.

Then, on August 22, 2017, Zheng sent an email with an attachment from his personal email address to Zhang, who was located in China. Within the attachment were three GE files, including a manufacturing drawing for a brush seal used in various GE steam turbines. Zheng again emailed Zhang on September 1, 2017, this time with an attachment containing seven GE files relating to seal testing rigs that GE engineers used to test turbine seals or to aspirating face seals. The information in the files had applications for aviation turbines and engines. That same day, Zheng sent a message to Zhang on WeChat: "After you finish downloading, don't forget to delete everything. Don't leave it in the mailbox." *Id.* at 1345.

On October 23, 2017, Zheng again sent an email from his GE email address to his personal email address with two images of "something mechanical" attached. *Id.* at 676-77. Embedded in those images through steganography

were encrypted GE files containing designs for various gas turbine combustion chamber parts. Multiple GE employees testified that the GE files that Zheng sent to himself and Zhang contained valuable information that GE took measures to protect, that the information contained in the files would have been valuable to GE's competitors, and that the files contained proprietary information and constituted GE's trade secrets.

### E. The Jury Instructions

After the close of evidence, the district court instructed the jury on the elements of each charged offense. For substantive economic espionage, in violation of 18 U.S.C. § 1831(a), the district court instructed the jury that the government must prove the following elements beyond a reasonable doubt:

> [F]irst, that defendant knowingly stole or without authorization appropriated, took, carried away, or concealed or by fraud, artifice, or deception obtained information from General Electric Power . . . or knowingly received, bought, or possessed such information, knowing it to have been stolen, appropriated, obtained, or converted without authorization as alleged in the superseding indictment; second, that the stolen information was a trade secret . . . ; third, that the defendant knew the information was proprietary; [and] fourth, that the defendant acted with the intent to benefit a foreign government or a foreign instrumentality or

> a foreign agent or knew that it would benefit a foreign government or instrumentality or agent.

App'x at 1627-28. Regarding the fourth element, the district court explained that "[t]he benefit to the foreign government or instrumentality need not be economic in nature" and that "[o]ther benefits would also satisfy this element[,] such as furthering the national security interests of a foreign government." *Id.* at 1630. At the charge conference, defense counsel requested that the district court instruct the jury that to find Zheng guilty of economic espionage, they must find "some evidence of foreign government involvement, such as foreign government sponsored or coordinated intelligence activity." *Id.* at 79. The district court rejected that request and instructed the jury as described above.

For conspiracy to commit economic espionage, in violation of 18 U.S.C. § 1831(a)(5), the district court instructed the jury that the government must prove the following elements beyond a reasonable doubt: "[F]irst, that such a conspiracy existed; second, that at some point, the defendant knowingly and willfully joined and participated in the conspiracy; and third, at least one overt act in furtherance of the conspiracy was knowingly and willfully committed by at least one member of the conspiracy." *Id.* at 1635-36. The district court advised the jury that the conspiracy charge and the substantive charge differed in one material respect:

> It is important to note that unlike the substantive charge of economic espionage, to establish

> conspiracy to commit economic espionage, the government is not required to prove that the information the alleged conspirators intended to misappropriate was in fact a trade secret. What is required is proof beyond a reasonable doubt that the defendant and at least one other member of the conspiracy knowingly agreed to misappropriate information that they *reasonably believed* was a trade secret and did so for the benefit of a foreign government or foreign instrumentality. This is because defendant's guilt or innocence on this charge depends on what he believed the circumstances to be, not what they actually were.

*Id.* at 1648 (emphasis added). At the charge conference, defense counsel requested an instruction that the jury must find beyond a reasonable doubt that Zheng "firmly believed," rather than "reasonably believed," that what he was misappropriating were, in fact, GE trade secrets. *Id.* at 1591. The district court rejected this request and instructed the jury as described above.

### F. Jury Verdict

The jury began deliberating on March 22, 2022, and returned a verdict on March 31. It found Zheng guilty of Count 1, conspiracy to commit economic espionage, and not guilty of two of the substantive economic espionage counts and two of the substantive theft of trade secrets counts (Counts 7-10). The jury hung as to the remaining seven counts (Counts 2-6 and 13-14).

### G. Zheng's Motions for a Judgment of Acquittal

At the close of the government's evidence, Zheng moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). The district court denied the motion, reasoning "that a reasonable jury might fairly conclude beyond a reasonable doubt that the defendant is guilty of the crimes charged" because the evidence that the government had presented, "including the testimony of agents involved in the investigation, expert witnesses, employees of GE, the recordings to the defendant's interview, and the physical evidence recovered during the investigation," "would permit a reasonable jury to conclude that the defendant stole trade secrets from GE and that this was done for the benefit of a foreign government or instrumentality." App'x at 1531. At the close of evidence, Zheng renewed his motion for a judgment of acquittal, which the district court denied for the same reasons.

Following the jury's verdict, on June 29, 2022, Zheng moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) or, alternatively, for a new trial pursuant to Federal Rule of Criminal Procedure 33. Zheng argued that there was insufficient evidence to convict him of conspiracy to commit economic espionage because the government had not presented evidence that he intended to benefit the Chinese government. Rather, Zheng argued, the evidence showed that he intended, at most, to benefit himself as a private citizen by pursuing business interests in the PRC that aligned with the PRC's stated economic policies during that time. The government opposed Zheng's motion.

On December 28, 2022, the district court denied Zheng's motion. The district court reasoned that Zheng's interpretation of "benefit" in 18 U.S.C. § 1831(a)(5) was too "narrow." Gov't App'x at 255. According to the district court, "[t]he language of Section 1831 does not preclude a conviction where the defendant derives some benefit from his conduct; rather, all that is required is for the defendant to engage in the conduct knowing or intending his conduct to also benefit a foreign government, instrumentality, or agent." *Id.* at 256. And here, "[t]he evidence admitted at trial was unambiguous in establishing that [Zheng] knew, and intended, that the turbine technology trade secrets taken from GE would benefit himself personally, as well as the Chinese government and various foreign instrumentalities by advancing their ability to research, develop, design, test, manufacture, and service turbines and turbine technologies." *Id.* at 259.

### H. Sentencing

In its Pre-Sentence Investigation Report ("PSR"), the U.S. Probation Office ("Probation") calculated Zheng's advisory imprisonment range under the Sentencing Guidelines as follows. Pursuant to U.S.S.G. § 2B1.1(a)(2), Zheng's base offense level was 6. Probation then determined that several specific offense characteristics applied. First, it determined that the "loss" resulting from Zheng's offense "exceeded $1,500,000, but was less than $3,500,000" because "[t]he combined value of [the] [t]rade [s]ecrets [Zheng misappropriated] was millions of dollars, including expenses for research and design and other costs of reproducing the trade secrets that Zheng and Zhang avoided." PSR ¶ 12. This loss amount resulted in a

16-level enhancement pursuant to § 2B1.1(b)(1)(I). Second, Probation applied a two-level enhancement pursuant to § 2B1.1(b)(10)(B) and (C) because "a substantial part of [the] fraudulent scheme was committed from outside the United States, and [defendants used] sophisticated means." *Id.* ¶ 13. "Specifically, a substantial part of the scheme was committed from the People's Republic of China and the offense involved encryption and decryption of trade secrets, steganography, sending trade secrets to China, and coconspirators using encrypted text messages and audio files to communicate." *Id.* Third, Probation applied a four-level enhancement pursuant to § 2B1.1(b)(14)(B) because "[t]he offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent." *Id.* ¶ 14. Thus, Probation calculated Zheng's total adjusted offense level as 28. Combined with a criminal history category of I, the Guidelines yielded an advisory imprisonment range of 78 to 97 months.

As relevant here, Zheng objected to Probation's use of "intended loss" in calculating the loss amount. Gov't App'x at 232. The commentary to § 2B1.1 provides that "loss is the greater of actual loss or intended loss." U.S.S.G. § 2B1.1 cmt. n.3(A). Zheng argued, however, that the Guidelines commentary is no longer entitled to judicial deference after *Kisor v. Wilkie*, 588 U.S. 558, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019), and that "loss" in § 2B1.1 unambiguously refers to "actual loss," which Zheng argued was zero dollars in his case. The district court rejected Zheng's objection, explaining that under *Stinson*

*v. United States*, 508 U.S. 36, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993), courts are required "to follow [Guidelines] commentary that interprets or explains a [G]uideline unless it violates the Constitution or a federal statute or is inconsistent with or a plainly erroneous reading of that [G]uideline," App'x at 1871, and that "*Stinson* continues to be the law in this Circuit," *id.* at 1874. The district court accordingly concluded that, based on the Guidelines commentary, it should use intended loss when calculating Zheng's Guidelines imprisonment range.

However, in contrast to Probation, the district court determined that the intended loss amount should be based on GE's "potentially lost profits" had Zheng's conspiracy succeeded, which the district court determined to be $1,058,800. *Id.* at 1881. This loss amount resulted in a 14-level enhancement, rather than the 16-level enhancement recommended by Probation, pursuant to § 2B1.1(b)(1). The district court otherwise adopted the PSR's factual findings and Guidelines calculations. Accordingly, a total offense level of 26 and a criminal history category of I yielded an advisory Guidelines imprisonment range of 63 to 78 months. After considering the factors set forth in 18 U.S.C. § 3553(a), the district court departed downward from the advisory range, sentencing Zheng to 24 months of imprisonment, to be followed by one year of supervised release.

The district court *sua sponte* granted Zheng bail pending the disposition of any appeal. Zheng timely appealed.

## II. Discussion

On appeal, Zheng argues (1) that there was insufficient evidence to convict him of conspiracy to commit economic espionage, in violation of 18 U.S.C. § 1831(a)(5), because the government did not prove that Zheng's conduct resulted from "foreign government sponsored or coordinated intelligence activity"; (2) that the district court improperly instructed the jury regarding the elements of § 1831(a)(5), specifically that the district court should have instructed the jury that the government must prove that (a) Zheng's economic espionage resulted from "foreign government sponsored or coordinated intelligence activity," and (b) Zheng "firmly believed" that what he had misappropriated from GE were, in fact, trade secrets; and (3) that the district court erred by imposing a 14-level enhancement under U.S.S.G. § 2B1.1 based on "intended loss."

Because Zheng preserved his arguments regarding the sufficiency of the evidence and the jury instructions, we review those issues *de novo*. *United States v. Jimenez*, 96 F.4th 317, 322, 324 (2d Cir. 2024). Zheng also preserved his argument about "intended loss," and we therefore review the district court's interpretation of the Guidelines *de novo*, "just as we would review the interpretation of any law." *United States v. Hasan*, 586 F.3d 161, 168 (2d Cir. 2009). For the reasons explained below, we are unpersuaded by all of Zheng's arguments and accordingly affirm the judgment of the district court.

## A. Sufficiency of the Evidence

Zheng argues that there was insufficient evidence to convict him of conspiracy to commit economic espionage "because the government did not prove beyond a reasonable doubt that Zheng's conduct resulted from a government sponsored or coordinated intelligence activity." Appellant's Br. at 11. "Because of the strong deference to which jury verdicts are entitled in our justice system, we must 'draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury's verdict.'" *United States v. Osuba*, 67 F.4th 56, 61 (2d Cir. 2023) (quoting *United States v. Willis*, 14 F.4th 170, 181 (2d Cir. 2021)). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). If the answer is yes, the conviction must be upheld. *See id.* Thus, "[a] defendant bears a heavy burden in seeking to overturn a conviction on grounds that the evidence was insufficient." *United States v. Rosemond*, 841 F.3d 95, 113 (2d Cir. 2016) (citation and quotation marks omitted).

### 1. Whether Section 1831 Requires Proof of Foreign Government Sponsored or Coordinated Intelligence Activity

Zheng argues that 18 U.S.C. § 1831(a) requires proof of foreign government sponsored or coordinated intelligence activity, and that the government's evidence failed to prove

such activity. As "[w]hen answering [any] question[] of statutory interpretation, we begin with the language of the statute." *United States ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163, 171 (2d Cir. 2018).

Section 1831 was codified as part of the Economic Espionage Act of 1996 ("EEA"), Pub. L. No. 104-294, 110 Stat. 3488, and provides: "Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly" misappropriates a trade secret in one of the ways set forth in the statute, attempts to do so, or conspires to do so, is guilty of a federal offense, and may be imprisoned for up to 15 years. 18 U.S.C. § 1831(a). A "foreign instrumentality" is defined as "any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government." *Id.* § 1839(1).

Contrary to Zheng's claim, there is nothing in § 1831(a) that requires proof of a foreign government's involvement in the defendant's conduct. To the extent the statute makes any mention of foreign governments, it does so only in terms of the defendant's mental state: the defendant must intend or know that his misappropriation of a trade secret will benefit a foreign government or instrumentality. Far from requiring any action or involvement by another sovereign, under § 1831(a), "criminal liability . . . may be established on the basis of [the] [d]efendant's intent alone." *United States v. Chung*, 659 F.3d 815, 828 (9th Cir. 2011).

Zheng argues that a foreign government's involvement is at least arguably implicit in the term "benefit," and that ambiguity about that term is resolved in favor of his reading by looking at two aspects of the statute—its title and its legislative history. But there is no such ambiguity. Here, the only actor specified in the statute is the defendant—that is, "[w]hoever" takes any of the actions enumerated in subsections (1)-(5) of § 1831(a) with the requisite mental state. That *mens rea* involves "intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent." 18 U.S.C. § 1831(a). In the latter phrase, "will benefit a foreign government," the foreign government is described only as the object—that is, the recipient—of the intended benefit. *See Benefit*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/benefit [https://perma.cc/RC4B-5GFJ]. (defining the verb "benefit" as "to be useful or profitable to"). In short, there is nothing in § 1831(a) that requires the intended beneficiary to take some action to bring about the crime.

Because we disagree with Zheng's argument that § 1831(a) is ambiguous with respect to foreign government involvement, we need not consider his arguments that go beyond the statutory text. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 127, 138 S. Ct. 617, 199 L. Ed. 2d 501 (2018) ("Because the plain language of [the statute] is unambiguous, our inquiry begins with the statutory text, and ends there as well." (citation and quotation marks omitted)); *Wood*, 899 F.3d at 171 ("Only when the terms are ambiguous or unclear do we consider legislative history and other tools of statutory interpretation."); *Bhd. of R.R.*

*Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947) ("[T]he title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase." (citations omitted)). However, even assuming that § 1831(a) is ambiguous (which it is not), the title and legislative history do not support Zheng's argument.

Section 1831 is titled "Economic espionage," 18 U.S.C. § 1831, and Zheng argues that "espionage" typically connotes government-sponsored spying activity. However, the structure and legislative history of the EEA make clear that "espionage" is used broadly here, and should not be understood in the limited sense that Zheng proposes.

Beginning with the EEA's structure, in addition to § 1831, the EEA codified § 1832, "Theft of trade secrets." 18 U.S.C. § 1832. Section 1832(a) provides that "[w]hoever, with intent to convert a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly" misappropriates a trade secret in one of the ways set forth in the statute, attempts to do so, or conspires to do so, is guilty of a federal offense, and may be imprisoned for up to 10 years. *Id.* § 1832(a). Thus, in contrast to § 1831(a), § 1832(a) does not even mention foreign governments, instrumentalities, or agents, but it was still codified as part of the Economic *Espionage* Act of 1996. It is therefore clear that the EEA proscribes

more than classic spy craft involving foreign government interference.

Contemporary references to "espionage" in the legislative history are consistent with this broader understanding of the term. The House of Representatives explained that the EEA was needed because of the growing threat of "economic or industrial espionage." H.R. Rep. No. 104-788, at 5 (1996). Although "[e]spionage is typically an organized effort by one country's government to obtain the vital national security secrets of another country," they explained, "as the cold war has drawn to a close, this classic form of espionage has evolved." *Id.* From the traditional style of espionage, which was "[t]ypically . . . focused on military secrets," had evolved "industrial espionage," which

> includes a variety of behavior—from the foreign government that uses its classic espionage apparatus to spy on a company, to the two American companies that are attempting to uncover each other's bid proposals, or to the disgruntled former employee who walks out of his former company with a computer diskette full of engineering schematics.

*Id.* The legislators recognized that "[a]ll of these forms of industrial espionage are problems" and that "[e]ach will be punished under [the EEA]." *Id.* Accordingly, the title of § 1831 does not support Zheng's assertion that there must be proof of government sponsored or coordinated intelligence activity, because Congress understood

"economic espionage" to encompass much more conduct than Zheng's limited—and outdated—conception of "espionage" that only involves foreign government or coordinated intelligence activity.

Zheng notes certain instances in the EEA's legislative history where legislators referred to § 1831 as applying to defendants acting on behalf of foreign governments. He points to the Senate Managers' Statement, which explained "the difference between Sections 1831 and 1832":

> This legislation includes a provision penalizing the theft [of] trade secrets (Sec. 1832) and a second provision penalizing that theft when it is done to benefit a foreign government, instrumentality, or agent (Sec. 1831). The principle [sic] purpose of this second (foreign government) provision is not to punish conventional commercial theft and misappropriation of trade secrets (which is covered by the first provision). Thus, to make out an offense under the economic espionage section, the prosecution must show in each instance that the perpetrator intended to or knew that his or her actions would aid a foreign government, instrumentality, or agent. *Enforcement agencies should administer this section with its principle [sic] purpose in mind and therefore should not apply section 1831 to foreign corporations when there is no evidence of foreign government sponsored or coordinated intelligence activity.*

142 Cong. Rec. S12212 (daily ed. Oct. 2, 1996) (emphasis added). According to Zheng, this last quoted sentence establishes that § 1831 may be applied only when there is "evidence of foreign government sponsored or coordinated intelligence activity." Appellant's Br. at 11 (citation omitted).

Zheng's argument fails for two reasons. First, the context of the Managers' Statement clarifies that legislators were concerned about § 1831 being enforced against someone who misappropriates a trade secret intending to benefit a foreign corporation that has no nexus to a foreign government, that is, a foreign corporation that is not a foreign instrumentality. Indeed, the very next paragraph explains that the legislators' "particular concern" was addressed through "the definition of 'foreign instrumentality[,]' which indicates that a foreign organization must be 'substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government or subdivision thereof.'" *Id.* In other words, the Managers' Statement's reference to "foreign government sponsored or coordinated intelligence activity" was an explanation of the limit to which § 1831 may be utilized when a defendant intended to benefit "foreign corporations," that is, only when the foreign corporation is considered a foreign instrumentality, as defined in § 1839(1). If the foreign corporation does not have the requisite level of connection with the foreign government to make it a foreign instrumentality, then the Managers' Statement expressed the view that § 1832, not § 1831, is the appropriate vehicle to prosecute someone who misappropriates a trade secret with the intent to benefit that foreign corporation.

Second, even assuming that the "princip[al] purpose" of § 1831 is to prosecute economic espionage done on behalf of a foreign government, that does not mean it is the only circumstance in which § 1831 may be utilized. 142 Cong. Rec. S12212. The legislative history to which Zheng draws our attention does no more than exhort "[e]nforcement agencies [to] administer" § 1831 with that purpose in mind—in other words, the statement is nothing more than a suggestion regarding the proper exercise of prosecutorial discretion, and should not be read as purporting to delineate the scope of the statute. *Id.* Perhaps prosecutors will prioritize the use of § 1831 for cases that involve foreign government spying. Or perhaps they will place greater importance on different factors, depending on the circumstances. But such questions about the allocation of prosecutorial resources are reserved for the executive branch, not for the judiciary. All that matters for purposes of this appeal is that an individual may intend to benefit a foreign government by misappropriating trade secrets without the foreign government directing or coordinating his activity. Under § 1831, a volunteer spy is just as guilty as one recruited and handled by a foreign government.

**2. Whether There was Sufficient Evidence That Zheng Intended To Benefit a Foreign Government or Instrumentality**

Having concluded that § 1831(a) does not require proof of foreign government activity, we next determine whether there was sufficient evidence for a rational jury to find Zheng guilty of conspiring to misappropriate GE's

trade secrets intending or knowing that the offense would benefit a foreign government or foreign instrumentality. There was.

We begin by noting that § 1831(a) is "expressed broadly." *United States v. Aleynikov*, 676 F.3d 71, 79 (2d Cir. 2012); *see also* H.R. Rep. No. 104-788, at 11 (explaining that "'benefit' is intended to be interpreted broadly"). Accordingly, the "benefit" that Zheng intended to confer on the foreign government or instrumentality need not have been an economic benefit; a strategic, tactical, or reputational benefit would also suffice. *See, e.g.*, H.R. Rep. No. 104-788, at 11. Based on the evidence presented at trial, a rational jury could conclude that Zheng conspired to misappropriate GE's trade secrets intending or knowing that such misappropriation would benefit either (1) a foreign government, or (2) a foreign instrumentality.

First, there was sufficient evidence for a rational jury to conclude that Zheng conspired to misappropriate GE's trade secrets with the intent to benefit the PRC. The government presented evidence that from 2016 to 2018, the PRC sought to improve its competitive stature within high-tech manufacturing sectors, including its ability to domestically manufacture "aero engines and industrial gas turbines." App'x at 1193. In service of this goal, the PRC published and promoted the 13th Five-Year Plan and the Made in China 2025 policy, which local governments helped to execute by offering subsidies and other incentives to companies developing products within the PRC's fields of interest.

Against this backdrop, beginning around 2016, Zheng helped launch two businesses in the PRC, LTAT and NTAT, to develop and manufacture seals for aero and ground-based turbines. Zheng sought funding from Chinese local governments for these ventures and kept local government officials apprised of the companies' work. LTAT's and NTAT's own publications explained how their objectives aligned with the PRC's national economic policies regarding improved domestic turbine manufacturing. Further, Zheng's writings, as evidenced by his draft status report to local government leaders from January 2017 and his draft speech to government and university officials from July 2018, reiterated his desire to help the PRC meet its economic goals.

In short, Zheng launched businesses in the PRC to develop and manufacture technology—seals—that were critical to producing the turbines that the PRC wanted to manufacture domestically, and with the express objective of helping the PRC do so. Further, the trade secrets that Zheng misappropriated from GE all related to turbine designs, including the specific types of turbine seals that Zheng's companies wanted to develop. Zheng misappropriated these trade secrets using surreptitious means and twice sent the trade secrets directly to Zhang in China. The jury therefore could have found that Zheng misappropriated GE's trade secrets for the purpose of allowing his Chinese companies to achieve their objectives, and consequently, those of the PRC. And the jury could therefore have found that Zheng acted with the intent to confer a benefit on the PRC—whether economic, strategic, tactical, or reputational—or at least with the knowledge

that such a benefit would be conferred on the PRC if his conspiracy succeeded.[5]

5. In arguing that there was insufficient evidence of foreign government involvement, Zheng argues in passing that there was also no proof that he "willfully engaged in criminal conduct" because the government failed to prove that he acted "with knowledge that his conduct was unlawful." Appellant's Br. at 20. The district court instructed the jury that to find Zheng guilty of conspiracy to commit economic espionage, the jury must find, among other things, that Zheng "knowingly and willfully joined and participated in the conspiracy" and that "at least one overt act in furtherance of the conspiracy was knowingly and willfully committed by at least one member of the conspiracy." App'x at 1635-36. Although the district court did not expressly define "willfully," we have generally defined the term to mean what Zheng says it means. *See, e.g.*, *United States v. Kukushkin*, 61 F.4th 327, 332 (2d Cir. 2023) ("[I]n order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." (quoting *Bryan v. United States*, 524 U.S. 184, 191-92, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998))). It appears that the district court relied on *Modern Federal Jury Instructions* for its instruction, which matches that source nearly verbatim. *See* Leonard B. Sand et al., 1 Modern Federal Jury Instructions: Criminal, Instruction 19-3S (2024). That model instruction appears to concern conspiracy charges where the substantive offense specifically includes a willfulness requirement; § 1831(a) does not include a willfulness requirement, however, and there is no indication that Congress intended that all conspiracy offenses include a willfulness requirement even if the substantive offense does not. Nevertheless, Zheng did not ask the district court to further define "willfully," nor does the government challenge the district court's instruction. Accordingly, we need not decide whether the instruction as given properly included a willfulness requirement, and we simply assume for purposes of this appeal that the jury had to find that Zheng knew that the conspiracy's objective was unlawful.

Even indulging this assumption, Zheng's claim fails. There was abundant evidence that Zheng was conscious that he was engaged in

Second, there were several Chinese government "instrumentalities" that the jury could have found that Zheng intended to benefit. Bear in mind that § 1839(1) defines a "foreign instrumentality" to include "any . . . institution . . . or business organization . . . or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government." 18 U.S.C. § 1839(1). Here, the jury could have reasonably found that LTAT and NTAT themselves were foreign instrumentalities. Zheng sought government funding to start LTAT, and local government officials were involved in LTAT's formation and kept apprised of its status. Both LTAT's and NTAT's business objectives were tied to national economic policy. And both were operating in the PRC, where, as Chen testified, the distinction between private and public entities is "very blurred," such that the PRC would want to "pay very close attention . . . and . . . try to monitor" "relatively large enterprise[s], especially in the area of science and technology." App'x at 1242. The

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wrongdoing. Most obviously, the evidence showed that Zheng went to considerable lengths to hide his misappropriation of GE's trade secrets, including by using encryption and steganography when sending the trade secrets outside the GE system, instructing Zhang to delete some of the files that Zheng sent him, and communicating with Zhang through encrypted messages. A jury may infer a defendant's knowledge that conduct is wrongful from his efforts to conceal his conduct. *See, e.g.*, *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008) (explaining that evidence of importation methods that "included efforts to conceal the nature of [the] packages" helped demonstrate that the defendant knew that what he was importing contained a controlled substance and therefore that he knowingly participated in the conspiracy to import and distribute the controlled substance).

jury therefore could reasonably have determined that the government "sponsored" both companies as contemplated under 18 U.S.C. § 1839(1), and that Zheng misappropriated trade secrets to benefit them. *Accord United States v. You*, 74 F.4th 378, 396 (6th Cir. 2023) (holding that defendant's "joint venture" with a Chinese chemical company was a "foreign instrumentality" as defined in § 1839(1)).

Zheng's companies also entered into, or at least contemplated, agreements with BUAA, SAU, and AECC. BUAA and SAU are public universities, which in the PRC are, according to Chen, "basically . . . owned by the Chinese government" and expected to "toe the party line," App'x at 1201, and AECC belongs to a state-run enterprise. The jury therefore could reasonably have found that these entities were "foreign instrumentalities" as defined by § 1839(1). Further, there was evidence that Zheng's companies agreed to provide BUAA and SAU technical specifications for turbine seals and turbine seal samples, respectively. Similarly, in its draft agreement with AECC, LTAT and AECC would work together to develop "aero engine and gas turbine sealing products." Gov't App'x at 175. These agreements all depended on Zheng's companies having technical expertise of turbine seals, and the trade secrets that Zheng misappropriated from GE related to the design of such seals.

Accordingly, there were multiple avenues for the jury to find that Zheng acted with the intent to confer a benefit on a foreign instrumentality. And contrary to Zheng's argument, it is of no moment that throughout all of the conduct described above, Zheng might have also

been attempting to benefit himself financially. Intent to benefit oneself is not mutually exclusive of intent to benefit another.

### B. Jury Instructions

Zheng next argues that the district court erred by failing to instruct the jury that in order to be found guilty of conspiracy to commit economic espionage, in violation of § 1831(a)(5), the government must prove that (1) a foreign government sponsored or coordinated the intelligence activity, and (2) Zheng "firmly believed"—rather than "reasonably believed"—that what he was misappropriating from GE were, in fact, trade secrets. "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law. The defendant bears the burden of showing that his requested instruction accurately represented the law in every respect and that, viewing as a whole the charge actually given, he was prejudiced." *Jimenez*, 96 F.4th at 322 (cleaned up).

Zheng's first argument need not detain us long, because as explained above, *see supra* Section II.A.1, § 1831(a) does not require proof of foreign government sponsored or coordinated intelligence activity. Accordingly, the district court did not err by failing to instruct the jury that such proof was required.

The district court also did not err by failing to instruct the jury that they must find that Zheng "firmly believed" that the material he misappropriated constituted GE trade

secrets. To begin with, the government was not required to prove, for purposes of the conspiracy count, that the stolen materials were actually trade secrets. It is well established that factual impossibility is not a defense to inchoate crimes, such as conspiracy to commit an offense. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 300, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); *United States v. Hassan*, 578 F.3d 108,123 (2d Cir. 2008). That is because conspiracy law targets the mere agreement to commit a crime; in this way, it differs from the substantive crime that is the object of the conspiracy. Accordingly, in the conspiracy context, a defendant's guilt depends on the facts as he believed them to be. *See, e.g.*, *United States v. Wen Chyu Liu*, 716 F.3d 159, 170 (5th Cir. 2013) ("[T]he relevant inquiry in a conspiracy case . . . is whether the defendant entered into an agreement to steal, copy, or receive information that he *believed* to be a trade secret.").

Zheng suggests that the jury had to find not just that he believed that he was misappropriating GE trade secrets, but that he "firmly believed" as much, relying on *United States v. Nosal*, 844 F.3d 1024 (9th Cir. 2016). In *Nosal*, a § 1832 case, the Ninth Circuit found no error in jury instructions where the district court advised the jury that for the conspiracy charge, "the government must prove that Defendant firmly believed that certain information constituted trade secrets." *Id.* at 1044 (internal quotation marks omitted). But on appeal, the defendant had argued only that the "firmly believed" standard constituted a constructive amendment of the indictment, "because the indictment allege[d] theft of actual trade secrets while the jury instruction did not require proof of actual trade

secrets." *Id.* The Ninth Circuit rejected the defendant's argument, explaining that because the grand jury indicted him for theft of trade secrets, in violation of 18 U.S.C. § 1832(a), which requires that he "knowingly" stole trade secrets, the grand jury would have necessarily indicted him on the lesser standard of "firmly believ[ing]" that he was stealing trade secrets. *See id.* at 1044-45. The *Nosal* court did not have occasion to assess, nor did it opine on, whether conspiracy to commit theft of trade secrets requires that the defendant "firmly believed" that he was misappropriating trade secrets.

Indeed, less than one year later, the Ninth Circuit, in a case where the defendant was convicted of both conspiracy to commit economic espionage and conspiracy to commit theft of trade secrets, did not find any error in the district court instructing the jury that the defendant must have "reasonably believed" that he was misappropriating trade secrets to be found guilty of the conspiracy charges. *See United States v. Liew*, 856 F.3d 585, 594, 600 (9th Cir. 2017). *Cf. United States v. Shi*, 991 F.3d 198, 209-10, 451 U.S. App. D.C. 215 (D.C. Cir. 2021) (turning away a challenge to jury instructions that included the "reasonably believed" standard in a § 1832 case because the defendant had not objected to the instructions either before the district court or on appeal).

The *Nosal* and *Liew* courts did not focus on whether the district court in each case properly instructed the jury on whether the defendant had to have a more specific type of belief—whether firm, reasonable, or otherwise—to be found guilty of conspiracy to commit economic espionage

or theft of trade secrets. Rather, those courts agreed that for a conspiracy offense, all that matters is the facts as the defendant believed them to be. *See Nosal*, 844 F.3d at 1044-45; *Liew*, 856 F.3d at 600. And nothing in § 1831(a)(5) suggests it requires a special *mens rea* in this respect—all the statute speaks about is conspiring "to commit any offense described in any of paragraphs (1) through (3)." 18 U.S.C. § 1831(a)(5). Thus, to find Zheng guilty of conspiracy to commit economic espionage, the jury needed to find that Zheng believed that the material he was misappropriating were GE trade secrets, regardless of whether his belief turned out to be accurate. Accordingly, the district court did not err in failing to instruct the jury that Zheng had to have a "firm" belief that he was dealing in trade secrets.[6]

### C. Zheng's Sentence

Lastly, Zheng argues that the district court erred in calculating his advisory Guidelines range because it relied on the Guidelines commentary to use "intended loss," as opposed to "actual loss," when determining the "loss" amount under U.S.S.G. § 2B1.1(b)(1), which resulted

6. Zheng only argues that the district court should have instructed the jury that his belief must have been "firm." It is not altogether clear to us why the district court instructed the jury that Zheng had to have "reasonably" believed that what he misappropriated were trade secrets. App'x at 1648. Perhaps the court simply concluded that it was a safe bet to use the instructions in *Liew* and *Shi*, which included the word "reasonably," since the convictions in those cases were affirmed on appeal. The parties here do not make any arguments about whether the defendant's belief had to be "reasonable," and so we express no view on that point.

in a 14-level enhancement to his Guidelines sentencing range. *See* U.S.S.G. § 2B1.1 cmt. n.3(A) ("[L]oss is the greater of actual loss or intended loss."). The premise of Zheng's argument is that after *Kisor v. Wilkie*, 588 U.S. 558, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019), the Guidelines commentary is no longer "authoritative," *Stinson v. United States*, 508 U.S. 36, 38, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993), and may be deferred to only if, after exhausting all tools of statutory interpretation, a Guideline remains "genuinely ambiguous," *Kisor*, 588 U.S. at 573. In the context of § 2B1.1, Zheng argues that "loss" is not genuinely ambiguous, and unambiguously means actual loss.

We recently rejected this proposition in *United States v. Rainford*, No. 20-359, 2024 U.S. App. LEXIS 19305, 2024 WL 3628082 (2d Cir. Aug. 2, 2024). As we explained there, this Court is obliged to adhere to *Stinson*, and thus to treat the Guidelines commentary as authoritative, for two reasons. 2024 U.S. App. LEXIS 19305, [WL] at *7 n.5. First, only the Supreme Court may overrule its own decisions, and it has not overruled *Stinson*. *Id.* Second, because the Sentencing Commission adopts the Guidelines and the commentary as "'a reticulated whole'" that should be read as such, the commentary qualifies as an authoritative source of interpretation under *Kisor*. *Id.* (quoting *United States v. Moses*, 23 F.4th 347, 355 (4th Cir. 2022)). Accordingly, it was proper for the district court to defer to the Guidelines commentary interpreting "loss" in § 2B1.1(b)(1).

Further, Zheng does not challenge the district court's actual calculation of the intended loss in this case, only

the district court's general use of it. Thus, because the district court, relying on the Guidelines commentary, properly used intended loss when calculating Zheng's Guidelines sentencing range, we find no error in the 14-level enhancement the district court added based on the loss that Zheng intended to cause.

## III. Conclusion

In sum, we hold as follows:

1. 18 U.S.C. § 1831(a) does not require proof beyond a reasonable doubt that the "benefit" to a foreign government, instrumentality, or agent resulted from foreign government sponsored or coordinated intelligence activity. Accordingly, there was sufficient evidence to convict Zheng of conspiracy to commit economic espionage, in violation of 18 U.S.C. § 1831(a)(5).

2. The district court properly instructed the jury on the elements of conspiracy to commit economic espionage, in violation of 18 U.S.C. § 1831(a)(5). That crime does not require proof of foreign government sponsored or coordinated intelligence activity, and Zheng's guilt depended on the facts as he believed them to be.

3. The district court properly deferred to the Guidelines commentary interpreting "loss" in U.S.S.G. § 2B1.1. Therefore, the district

court, when calculating Zheng's Guidelines sentencing range, did not err in adding a 14-level enhancement based on the loss that Zheng intended to cause.

Accordingly, we AFFIRM the judgment of the district court.

## APPENDIX B — TRANSCRIPT OF THE PROCEEDING, DATED JANUARY 3, 2023

[1]UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

19-cr-156

UNITED STATES OF AMERICA,

*Plaintiff,*

–v–

XIAOQING ZHENG,

*Defendant.*

***

[41]coming my way.

So I would just say more thank you than sorry just because I -- I think I -- I'm better man than four years ago.

THE COURT: Okay. Thank you, sir. As I said, we will take a brief recess before I impose sentence. Thank you.

(Pause in proceeding, 1:13 p.m.)

(Following recess, 1:41.)

THE COURT: I'm first going to address the issue of the loss amount in this case.

*Appendix B*

For decades, federal courts have looked in the case of *Stinson v United States,* 508 U.S. 36, 1993, when determining whether commentary to the sentencing guidelines is binding. *Stinson* instructs courts to follow commentary that interprets or explains a guideline unless it violates the Constitution or a federal statute or is inconsistent with or a plainly erroneous reading of that guideline; that's at page 38.

In *Kisor,* the Supreme Court held that an agency interpretation of an agency rule is only authoritative if the rule itself is genuinely ambiguous; 139 Supreme Court at 2414.

Now, some circuit courts have determined that *Kisor* impliedly overruled *Stinson* and therefore, they [42] apply *Kisor's* "genuinely ambiguous" standard to the commentary to the sentencing guidelines; that's from *United States v Lewis,* 963 F.3d 16, First Circuit 2020, *United States v Nasir,* 17 F.4th 459, Third Circuit 2021, that was en banc, *United States v Riccardi,* 989 F.3d 476, Sixth Circuit, *United States v Winstead,* 890 F.3d 1082, D.C. Circuit 2018.

Other circuits have continued to follow *Stinson* despite the *Kisor* decision; *United States v Moses,* 23 F.4th 347, Fourth Circuit, 2022.

In this case, the defendant relies on *United States v Banks,* 22 Westlaw 17333797. That's a Third Circuit case from just last year, 2022, to argue that the intended loss referenced in the guidelines commentary

associated with Section 2B1.1 should not be applied in this case since the guideline only mentions loss and does not include intended loss, which is only listed in the commentary.

Court acknowledges that some courts have found that *Kisor* impliedly overruled *Stinson;* however, the Court finds more persuasive those courts finding that *Stinson* remains good law as applied to the sentencing guidelines. *Stinson,* which was decided before *Kisor,* directly addressed the enforceability and the weight to be given to guideline commentary, such as the [43]application note at issue here, recognizing that commentary explains the guidelines and provides concrete evidence -- pardon me -- concrete guidance as to how even unambiguous guidelines are to be applied in sentencing criminal defendants.

*Stinson* further observed that the commentary provides "the most accurate indication of how the sentencing commission deems that the guidelines should be applied," at page 45, and it held accordingly that subject to some exceptions, the commentary is authoritative, binding and controlling.

*Kisor,* on the other hand, addressed whether the Court should overrule *Auer v Robbins,* 519 U.S. 452, from 1997, which had broadly authorized judicial deference to an agency's interpretation of its own rules. Conducting its analysis against a backdrop of concerns that executive agencies were using such rule interpretations to circumvent the notice and comment

procedures required by the Administrative Procedure Act, APA, the *Kisor* Court nonetheless declined to overrule *Auer*.

The Court did, however, state that with respect to the deference owed to an agency interpretation of its own rules, specifically, the Court held that a court should not afford *Auer* deference [44]unless the regulation is generally ambiguous and that even if a genuine ambiguity were found, the agency's interpretation still must come within the zone of ambiguity.

Initially, the Court notes that it agrees with those courts that have found that the *Stinson* analysis continues to apply to the commentary to the sentencing guidelines given the unique nature of the sentencing commission; that's from *United States v Moses,* 23 F.3d 347, Fourth Circuit 2022. Relatedly, the Second Circuit has not yet decided whether *Kisor* impacts the continued applicability of *Stinson* interpreting the sentencing guidelines.

And I have little doubt that the Second Circuit will be asked to take a look at this case in its totality following imposition of sentence.

As such, *Stinson* continues to be the law in this Circuit. In fact, although not specifically addressing the impact of *Kisor,* the Second Circuit has continued to defer to the sentencing guidelines commentary *post-Kisor* specifically relying on *Stinson;* that's from *United States v Tabb,* 949 F.3d 81, at pages 86 and 87 from the

Second Circuit 2020 and *United States v Richardson* 985 F.3d 151 and 154, Second Circuit 2020.

[45]Accordingly, the Court declines to find that the loss in Section 2B1.1 of the guidelines is limited to actual loss. The Court believes that there was actual loss but the Court simply cannot compute the actual loss for a number of reasons.

The government bears the burden to prove the amount of loss by the preponderance of the evidence, *United States v Riccardi,* 989 F.3d 476, 481, Sixth Circuit, 2021. The Court must then apply that loss to the guideline computation and increase the defendant's offense level accordingly; United States Sentencing Guideline 2B1.1(b)(1).

The guideline instructs that loss is the greater of actual loss or intended loss; United States Sentencing Guidelines 2B1.1 application note 3(A). Actual loss is defined as the reasonably foreseeably pecuniary harm that resulted from the offense.

On the other hand, intended loss means the pecuniary harm that the defendant purposefully sought to inflict, even if that pecuniary harm would have been impossible or unlikely to occur. Notably, while actual loss encompasses reasonably foreseeable damages, intended loss does not. Indeed, the United States Sentencing Commission amended the definition of intended loss in 2015 in an effort to clarify that intended loss [46]should focus on a defendant's subjective intent. United States

Sentencing Guidelines Appendix C at 111, November 1st, 2016. Also, *United States v Manatau,* 647 F.3d 1048, 1050, Tenth Circuit, 2011, holding that intended loss means a loss the defendant purposely sought to inflict and not a loss that the defendant merely knew would result from his scheme or a loss he might have possibly and potentially contemplated.

However, the guidelines and cases recognize that in some cases the loss amount may be difficult to determine with precision. That is the case here. Indeed, courts have specifically acknowledged the difficulty of determining a loss amount in the case involving intellectual property; that's from *United States v Howely,* 707 F.3d, pages 575 and 582, Sixth Circuit, 2013.

Thus, the guidelines instruct that so long as the Court offers a reasonable explanation of its computation, district courts need not reach an exact figure for the loss the victims suffered or the amount of harm caused or intended to cause; a reasonable estimate will due.

In other words, a court does not have to establish the value of the loss with precision. It simply needs to publish the resolution of contested [47]factual matters that form the basis of the calculations; that's from *United States v Patel,* 711 Fed. Appx. 283, 286, Sixth Circuit, 2017.

In that regard, the guidelines set forth a non-exhaustive list of factors that the Court may, but is not

required to, use in reaching a reasonable estimate of loss based on the information the Court has before it.

Of particular relevance here, the guidelines state that the Court may consider in the case of proprietary information, for example, trade secrets, the cost of developing that information or the reduction in the value of that information that resulted from the offense and more general factors, such as the scope and duration of the offense and revenues generated by similar operations; that's from Application Note 3(C).

Here, no computation would allow the Court to determine the exact amount of loss G.E. would have suffered if the defendant's offense had fully succeeded. Thus, a reasonable estimate is going to have to suffice.

In that regard, the Court's task is twofold. First, the Court must determine the precise economic harm defendant intended to inflict upon G.E.; and second, the Court must select and employ a method of computation that will reasonably estimate the monetary [48]cost of that harm.

As to defendant's intent, the government's evidence at trial and the jury's ultimate findings are particularly relevant to the Court's analysis. At trial, the defendant was convicted of one count of conspiracy to commit economic espionage, in violation of Title 18, United States Code, Section 1831(a)(5). This required the government to establish at trial that the defendant knowingly conspired to steal, take, copy, or otherwise

misappropriate G.E.'s trade secrets with the intent and the knowledge that the offense would benefit any foreign government, foreign instrumentality, or foreign agent. In this case, China.

In short, the government has already presented evidence at trial to prove beyond a reasonable doubt that upon which evidence this Court concludes for purposes of sentencing that defendant knowingly and intentionally committed the offense, that he did so with the knowledge and intent to benefit China economically and otherwise.

Additionally, the evidence at trial demonstrated that in addition to conspiring to provide a benefit to China, the defendant also intended to personally benefit from the conspiracy through his ownership and interest in two companies called LTAT – [49]that we refer to as LTAT, and NTAT, or NTAT.

For example, the superseding indictment specifically alleges and testimony at trial established that the defendant and Mr. Zhang, not to be mistaken for the defendant, Dr. Zheng, were in the process of approaching manufacturing facilities in China and offering to perform turbine repair services through their NTAT business; that's from Docket number 140 at paragraph 56.

But the Court must still determine the scope of the defendant's intended economic harm. The government, relying on the guidelines' suggested methodology for estimating loss in this case involving intellectual

property, argues that the intended loss calculation should be based in part on the cost G.E. incurred in researching and developing the technology that the defendant stole from it.

The issue with this methodology, however, is that while the cost of research and development may, in theory, be a reliable measure of how much China stood to gain from the theft, it does not speak to how much economic loss the defendant intended to inflict on G.E.

In other words, the government argues that the research and development cost incurred by G.E. for the trade secrets at issue, at a minimum, are in the tens of [50]millions of dollars, which was established through testimony at trial.

While the stolen trade secrets and other proprietary information the government contends – let me begin that again. With the stole trade secrets and other proprietary information, the government contends that defendant and his companies would have been able to develop the same turbine technology without having to expend such vast sums in R&D. Therefore, the savings in research and development would place China ahead, since they would not have spent such costs.

However, simply because China might have gained or saved tens of millions of dollars in research and development costs does not mean that G.E. would have lost the entirety of the money it put into research and development. This is because even if G.E.'s turbine

technology lies in the hands of a potential competitor, G.E. still possesses the technology as well. Indeed, the defendant conspired to simply steal the technology surreptitiously. Ideally, for defendant, G.E. would have been none the wiser about the theft and, therefore, defendant could not have logically expected, let alone intended, that the offense would deprive G.E. of a full value of its research and development. That's from the case of *United States v You,* number 2:19-cr-14, [51]22 Westlaw 1397771 at page 3, Eastern District of Tennessee, May 3rd 2022, holding that the defendant stole trade secrets from the victim company in an effort to enter the global market as a competitor, and so finding that defendant intended to cause the victim company a dollar-for-dollar loss equal to the amount of research and development funds extended in developing the victim companies' BPA-free coating would be improper here.

So, what economic harm did the defendant intend to inflict upon General Electric? Quite simply, defendant's intent was to steal profits out of G.E.'s pocket and place those profits in China's pocket instead, in this Court's view.

Therefore, the most reasonable method of calculating the intended loss amount in this case is to estimate G.E.'s potentially lost profits. Here, the intended loss can be determined with reference to, among other things, the profit model section of the NTAT business proposal in which the defendant indicated that he was looking to make a 15 percent net profit on the sale of

turbine parts with the principle of taking over market in large quantities.

A review of the business proposal, financial goals by phase and three-year plan, which revealed that [52] the defendant forecasted net profits for NTAT in 2017, 2018, and 2019 of 800,000, 2,500,000, and 4 million Yuan, respectfully. And this is from the trial. This is from trial testimony and from the exhibits at trial.

Using today's exchange rates, those figures convert to approximately $116,000, $362,600, and $580,200, respectively, for a total amount of $1,058,800. That's $1,058,800. The Court finds that these figures are an appropriate basis for determining defendant's intended loss to G.E.

The business proposal further notes that G.E. has a large share of the gas turbine market and that G.E.'s gas turbine production accounts for about 53 percent of the world's total production.

Beyond these figures, the Court finds that the remaining arguments the government raises in support of a higher intended loss calculation are not from estimations but speculation, which are inappropriate to consider to determine the intended loss amount; see *United States v Xu,* 2022 Westlaw 16715663, from the Southern District of Ohio, November 20, 2022.

The Court's estimate is based on real dollar figures admitted into evidence at trial, in evidence,

representing real projected profits supported by real evidence. While the Court's loss amount may be far from [53]perfect, it is, nevertheless, a reasonable estimate based on a fair methodology using facts and evidence and ultimately resolving any uncertainty in defendant's favor.

Finally, the Court notes that defendant maintains that the loss amount should be based solely on the sealing technology rather than other proprietary information defendant was alleged to have stolen. Although the defendant contends that his conviction for conspiracy to commit economic espionage is related solely to brush seal technology, the superseding indictment makes it clear that this count relates to only the proprietary -- not only to the proprietary seal technology but also to G.E.'s test rigs used by G.E. to analyze the performance of turbine seals, designs and manufacturing specifications for parts of the turbine blades, design for specific models of G.E. gas turbines, and design schematics for a proprietary G.E. gas turbine combustion system, including the fuel nozzles; that's from Docket 140 at paragraph 55, 74, 78 and 79.

While the jury may have acquitted or hung on all of the substantive trade secret counts relating to proprietary information other than seal technology, evidence was introduced at trial to support the conspiracy to commit economic espionage count that [54]related to technologies other than the proprietary seal information, which is appropriately included in the intended loss amount.

*Appendix B*

In the previous decision that the Court rendered on the motion to set aside the verdict, and the Court has reviewed that decision, I don't believe that I said anything that is inconsistent in that decision with the analysis that I am announcing here this afternoon.

In looking at the Court's decision on the motion to set aside the verdict, I was merely pointing out that the Court could not believe that the jury's verdict was inconsistent.

Based on the foregoing, the defendant's objection to the PSR's loss computation is overruled in part. The Court finds that the loss amount for purposes of sentencing is $1,058,800, resulting in a two-level reduction to the PSR's current computation of the defendant's offense level. So, in my view, it goes from a 16-point enhancement to a 14-point enhancement.

Therefore, adopting the remainder of the factual information and guideline applications contained in the presentence investigation report, the Court finds the loss amount for this offense was, as I stated, $1,058,800 as the loss was more than 550,000 but less than $1,500,000, the offense level is increased 14 levels, [55]pursuant to Section 2B1.1(b)(1)(H) of the guidelines.

Therefore, the Court finds the Total Offense Level is 26, the Criminal History Category is I, and the guideline imprisonment range is now 63 to 78 months.

The Court finds the sentence to be imposed today is sufficient but not greater than necessary to meet the goals

of sentencing outlined in 18 United States Code, Section 3553(a), including the need for the sentence to reflect the seriousness of the offense and to promote respect for the law.

And let me say that the Court believes that the offense -- the crime committed by Dr. Zheng is extremely serious. American companies have a right to rely on their research and development, and they have a right to rely on everything that goes into creating this complex technology and, simply put, not to have it stolen and certainly not to have it stolen for the benefit of one of the United States' most significant economic competitors in the world.

So when I look at 3553(a) factors, the need for the sentence to reflect the seriousness of the offense and to promote respect for the law, I consider, as I said a moment ago, the crime that Dr. Zheng committed to be extremely serious.

I also must look at the need to provide just

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