No. 25-1373

IN THE

Supreme Court of the United States

TRINSEO EUROPE GMBH,

Petitioner,

v.

KELLOGG BROWN & ROOT, L.L.C.;
STEPHEN HARPER, *also known as* STEVE HARPER;
STEVE HARPER CONSULTING, INCORPORATED;
POLYCARBONATE CONSULTING SERVICES, INCORPORATED,

Respondents.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In the face of rudimentary principles of jury deference, the decisions below zeroed out a $77 million damages award that the jury deemed warranted by respondents' theft of multiple Trinseo trade secrets. Respondents' brief in opposition clings to their $77 million windfall, principally by racing away from the question presented. As if respondents had not just spent years litigating for "per-trade-secret" damages apportionment, respondents now act as if it has precious little to do with this case.

Papering over lower-court divisions, respondents trumpet consensus over the high-level principle that evidence should link damages to the misappropriated technology, attributing different outcomes to different applications of that principle. But the real issue is one level down: whether that evidence requires, *as a matter of law*, individually valuating each jury-found secret (or jury-found group) or providing a methodology to do so. That was the ruling respondents sought and won. And that was the measure by which Trinseo's proffered evidentiary basis was deemed no basis at all.

In so ruling, the Fifth Circuit set a legal baseline that sharpens divisions over a commonly-recurring scenario—where a jury finds *some* but not all the alleged secrets, yet the damages evidence at trial went to *all* the alleged secrets. Those divisions have whipsawed litigants, alternately saving or felling jury awards. And they are reflected in a common cadre of cases routinely trotted out by courts whenever apportionment rears its head—with the Federal and now Fifth Circuits on one side, and Sixth and Ninth Circuits on the other. Respondents brush off the disarray as fact-specific, but the irreconcilable outcomes stem from the different legal lenses through which award underpinnings are viewed.

The Fifth Circuit's ruling was also wrong. Seeking to defend the indefensible—that Trinseo should get zero damages for proven thefts of its technology—respondents essentially claim that Trinseo asked for this. But the notion that Trinseo strategically opted to risk recovering nothing is absurd; in fact, market realities about integrated PC packages precluded per-trade-secret apportionment. There is no defending the extraordinary conclusion that there was *no basis* in evidence—*none*—to uphold the jury's more-than-reasonable approximations. The Fifth Circuit so concluded only by redefining the ordinarily-modest evidentiary threshold into a highly specific, inflexible bar, defying the customary respect to which the jury's judgment is owed.

ARGUMENT

I. The Decision Below Conflicts With Decisions of this Court and Other Circuits.

Respondents' brief makes no effort to square the jury-award-nullification below with this Court's longstanding precedents establishing that uncertainties that go "to the extent of the damage," not "the fact of damage," do not preclude an award. *Story Parchment v. Paterson Parchment Paper*, 282 U.S. 555, 562-63 (1931); *cf.* Pet.20, 29 (citing *Eastman Kodak v. Southern Photo Materials*, 273 U.S. 359 (1927); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); and *Sea-Land Servs. v. Gaudet*, 414 U.S. 573 (1974)).

The *fact* of damage here was undisputable; the liability evidence "establishing Trinseo's right to …

damages" was "substantial." Pet.App.89. Yet with only the *extent* of Trinseo's damages at issue, respondents fail to acknowledge those precedents, let alone reconcile the Fifth Circuit's decision with the jury's "fair latitude to make reasonable approximations," without "exactness," on "probable and inferential" bases. *Sea-Land Servs.*, 414 U.S. at 590; *Eastman Kodak*, 273 U.S. at 379; *Bigelow*, 327 U.S. at 264.

Respondents fare little better trying to reconcile the decisions of the Fifth and other Circuits. The Fifth Circuit's decision was not "strict," they say, because the Fifth Circuit did not call it that. Opp.Br.19. But respondents cannot deny that "strict apportionment" is lifted from the district court opinion the Fifth Circuit affirmed. Pet.App.52-53. And while respondents tie themselves into knots to avoid the term "per-trade-secret apportionment," that is what they sought—at every stage of the proceedings[1]—and what the courts delivered. The district court, in granting JMOL, demanded "(1) evidence that apportions value per trade secret, or (2) evidence that provides some methodology … for how the jury may do so itself." Pet.App.64. Following suit, the Fifth Circuit cited, as the means of apportionment that "come to mind," (1) "individually valu[ating] each alleged trade

[1] *E.g.,* ROA.13392 (instruction failed to require jury to "apportion[] damages … trade secret by trade secret"); D.C.Dkt.327 at 12, 25 (Trinseo was required to "analyze on a trade secret-by-trade secret basis"); D.C.Dkt.334 at 12 ("plaintiffs [must] try their cases … on a trade secret by trade secret basis"); D.C.Dkt.385 at 12 (criticizing Trinseo's "position that it was not required to apportion … on a trade secret-by-trade secret basis"); C.A.Dkt.134 at 43 (Trinseo failed to "apportion[] damages by trade secret or otherwise provid[e] a methodology").

secret" or the (jury-found) "*group* of trade secrets" or (2) "provid[ing] a methodology for the jury to calculate the value of a particular trade secret or group[.]" Pet.App.18 n.10.

There is no meaningful daylight between those formulations. While the Fifth Circuit hinted that those means might not be "exhaustive," it squarely deemed their absence the deficiency below. *See* Pet.App.8-9 ("Pastore did not individually valuate each of the alleged trade secrets or any specific combination of trade secrets, nor did he provide a method for the jury to do so."). And it deemed any mismatch between the trade secrets valuated (at trial) and those found by the jury (after trial) to "lend[] itself to … speculation" and leave the award with "no basis." Pet.App.18, 23. That gloss on the minimum baseline to sustain an award is "strict" in every sense.

Nor do respondents succeed in smoothing over inter-Circuit differences. Respondents fixate on the high-level agreement—enshrined in the agreed-upon jury instructions—that some evidence should support attributing damages to proven wrongs. The issue, however, is not whether a damages award needs evidence (it does), nor even whether the Fifth Circuit ignored Trinseo's evidence (it did), but rather, what that evidence need or need not encompass. The Fifth Circuit held that a legally sufficient evidentiary basis must encompass damages valuations for each jury-found secret (or group) or a methodology for the same. On this point of law, there is emphatically no agreement.

To be sure, evidence will vary by case. But what is striking about the cases the petition details—which are predictably invoked in every case where apportionment arises—is their near-equivalence on key facts: In each case, there was liability on *some*-but-not-all alleged secrets. Pet.App.9 (4-of-10); *Texas Advanced Optoelectronic Sols.. v. Renesas Elec. Am.*, 895 F.3d 1304, (Fed. Cir. 2018) (1-of-3); *O2 Micro Int'l v. Monolithic Power Sys.*, 399 F.Supp.2d 1064 (N.D. Cal. 2005), *aff'd*, 221 F. App'x 996 (Fed. Cir. 2007) (5-of-11); *Caudill Seed & Warehouse v. Jarrow Formulas*, 53 F.4th 368 (6th Cir. 2022) (4-of-6); *EchoSpan v. Medallia*, 2025 WL 3046753 (9th Cir. Oct. 31, 2025) (1-of-9). In each case, there was an unapportioned valuation of *all* the alleged secrets. Pet.App.18; *TAOS*, 895 F.3d at 1317; *O2 Micro*, 399 F.Supp.2d at 1076; *Caudill*, 53 F.4th at 388; *EchoSpan*, 2025 WL 3046753, at *1. In none of the cases did the trade-secret owner valuate each jury-found secret (or group), nor prescribe "a methodology" to do so. Under the Fifth Circuit's reasoning, those considerations alone would render all the awards "speculation." Pet.App.18.

Respondents then try to cast the cases that nonetheless *upheld* awards as fact-specific, but their distinctions are not distinctions at all.[2] The Sixth Circuit in *Caudill*, they note, was unbothered by how the "damages model assumed misappropriation of all six" secrets because there was also testimony that broccoli-seed research drove Caudill's R&D expenses.

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[2] Respondents note another distinction without a difference—that some cases involve Uniform Trade Secrets Act-based state statutes. Opp.Br.17. "Given that the DTSA was enacted in light of the UTSA and … uses virtually identical language, it is appropriate to consider cases interpreting the UTSA . . . in interpreting the DTSA." *Insulet v. EOFlow*, 176 F.4th 1347, 1354–55 (Fed. Cir. 2026); *accord Caudill*, 53 F.4th at 380-81 & n.2 (invoking DTSA cases because "Kentucky's trade secret protection statute is nearly identical").

53 F.4th at 389. That testimony about one secret's outsized importance sufficed to eliminate any "mismatch" between the expert's testimony and the award because it gave the jury "options" within the unapportioned sum, even after the jury found no liability on two alleged secrets. *Id.* at 389, 393. So too with *EchoSpan*, where the Ninth Circuit held that testimony about one secret's importance gave the jury a "reasonable basis" to approximate value within the unapportioned sum, with no obligation to "completely discount or completely credit" that testimony. 2025 WL 3046753, at *2. Here too, testimony that two jury-found secrets particularly drove value yielded leeway for the jury to maneuver within the unapportioned sum.

Nor is it significant that, in dicta, *EchoSpan* left open the possibility that apportionment could be required in a hypothetical case where a jury had no opportunity "to understand how the system and each component operated." *Id.* This jury, like *EchoSpan*'s, received detailed testimony about how the PC package and each component operated and interrelated.

Moreover, both the Sixth and Ninth Circuits couched their rationales in *legal* terms. The Sixth Circuit differentiated *O2 Micro* and *TAOS*—Federal Circuit cases the Fifth Circuit drew from—by emphasizing its more "flexib[le]" and less "rigid" view of the "evidence that can support a trade-secrets damages award" in the "malleable context of trade secrets." *Caudill*, 53 F.4th at 389-90. The Ninth Circuit underscored that the district court's JMOL ruling that EchoSpan had failed to "apportion … relief on a trade-secret-by-trade-secret basis" erred by presuming the jury's lack of apportionment, rather than "draw[ing] all reasonable inferences in favor of preserving the jury's verdict." 2025 WL 3046753, at *1-2. And both courts, unlike the courts below, emphasized that damages figures need *not* correspond with any specific testimony or obvious justification. *See id.* at *2 (affirming award of "50%," not "100%," for the value-driving secret despite lack of "coherent justification" because "drawing … legitimate inferences" is a "jury function[]").

All these fissures—among the circuits and from this Court's precedents—warrant review, given the costly stakes of jury-award-nullification and importance of uniformity in trade-secrets litigation.

II. The Decision Below Is Wrong.

On the merits, respondents offer no tenable defense of the Fifth Circuit's harsh and arbitrary ruling.

1. Respondents advance the outlandish theory that Trinseo "gamble[d]" on eschewing per-trade-secret valuations "to maximize its damages." Opp.Br.25-27. But no rational actor would elect to risk recovering *nothing* in the event of anything less than a clean-sweep verdict. Market realities simply dictated Trinseo's path. As even the district court acknowledged, evidence *including respondents' own expert testimony* showed that "in the industry, the entire PC package … was the product" and "Trinseo would never have sold its PC package piecemeal." Pet.App.53–54, 86-87; ROA.13723.

Respondents nonetheless assert that Pastore "could have come up with an apportionment of damages for a subset of Trinseo's alleged trade secrets, but he simply did not do so." Opp.Br.25. Yet this wrests one sentence—"I could do that work, if I was ordered to do it"—badly out of context. ROA.11924. Pastore was asked why his report did not offer opinions valuating any number of hypothetical split verdicts ("if [jurors] don't find that each and every trade secret … [was] misappropriated"). *Id.* Pastore was merely explaining that he would not opine on that universe of hypotheticals unless ordered to; as his next sentence clarified, "there isn't" "a verdict yet." *Id.* This was a comment on procedure, not substance. Nowhere did Pastore indicate that he *could apportion* Trinseo's PC package into 10 individual values, or that any subset would be valued at something other than the package. To the contrary, Pastore testified repeatedly that the royalty paid by a licensee *would not vary with the number of secrets. See* ROA.11922-923 ("I've not done a separation of value. Trinseo doesn't sell a la carte its trade secrets."); ROA.11899 (agreeing that "if Trinseo were to actually license its PC technology … it would provide a full … package"); ROA.11902 (agreeing "Trinseo would only license an entire technology package" because "[t]hey don't do a la carte"); ROA.11928 (whether for 10 or 11 alleged secrets, package would still be "$40 million per train").

Weaker still is respondents' claim that Trinseo "gamble[d]" by taking the legal position that per-trade-secret apportionment was not required. Opp.Br.25-27. Trinseo cannot be penalized for hewing to a position well-supported by other Circuits and uncontradicted by binding precedent. *Cf. Syntel Sterling Best Shores Mauritius v. TriZetto Grp.*, 2024 WL 1116090, at *8 (S.D.N.Y. Mar. 13, 2024).

Respondents' other complaints—that Trinseo should have but failed to pursue "compilation," "built-in apportionment" or "entire market value" theories—are more of the same. Opp.Br.26. With Trinseo's rejection of strict-apportionment, it would make no sense (and would have been a *bona fide* gamble) for

Trinseo to send the jury one compilation secret in lieu of 10 secrets based on impracticality concerns about *implementing* strict-apportionment. So too with "built-in apportionment" and "entire market value"; both theories could only have flowed from the premise that strict-apportionment was required.

2. Respondents fare no better in painting this as the rare case where *no basis* existed to support the award. The petition proffered multiple alternative bases, including those unrelated to Pastore, on which the jury may have reached its damages figure. Pet.31 & n.3. Respondents, like the Fifth Circuit, simply ignore them.

Drawing all reasonable inferences in the verdict's favor, there is plainly evidentiary basis for the jury's reasonable approximations. The courts held otherwise only by redefining the usually-modest evidentiary threshold as one requiring damages evidence to correspond neatly to the number and permutation of jury-found secrets. *See* Pet.App.16, 18 ("Allowing damages to be awarded for the misappropriation of *four* trade secrets based on an estimation that presumed misappropriation of *ten* trade secrets" meant "the jury did not have a reasonable basis to award damages based on the misappropriation of only four"). The district court went so far as to *parse percentage deltas* in assessing that correspondence, Pet. 16—further underscoring the subversion of the customary respect for jury inferences. Nor can respondents feign surprise that this deference sounds in the Seventh Amendment. Opp.Br.29. Trinseo has consistently touted the "constitutionally-required … deference to a jury's verdict" in this litigation.

C.A.Dkt.233 at 18.[3] And respondents have no answer to the bottom line: that strict-apportionment renders trade-secret jury awards an aberration singled out for judicial dissections of their underlying bases.

Meanwhile, respondents say nothing about why the admittedly "imperfect" fit of patent law, Pet.App.86, is properly overlaid on trade secrets—where what is a trade secret (or not) is a jury question, not a formally-defined, known quantity. Those distinctions only compound the harshness of the all-or-nothing regime, as the difference between recovery and nothing turns on any mismatch between the damages evidence *at trial* and the trade secrets found *after trial*. This arbitrary approach makes no remedial sense, simply incentivizing litigants to conjure per-trade-secret proof that may not exist.

Nor do respondents explain how the inflexible prerequisites of per-trade-secret apportionment square with the "flexible and imaginative approach" that has guided trade-secret damages for 50 years. *Univ. Computing v. Lykes-Youngstown*, 504 F.2d 518, 538 (5th Cir. 1974). By endorsing the take that the Fifth Circuit was duty-bound to award Trinseo nothing—despite the impossibility of conducting per-trade-secret valuations here and the "substantial" evidence of Trinseo's "right to … damages," Pet.App.89—respondents muster only a wan reference to the prospective injunction. Opp.Br.16. That

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[3] *E.g.*, D.C.Dkt.355 at 8 (noting "'highly deferential'" review "afforded to jury verdicts" and "high hurdles that KBR faces to usurp the province of the jury"); D.C.Dkt.400 at 5 (noting "strong presumption in favor of affirming a jury award"); C.A.Dkt.160 at 15 ("A court is 'required to accept the verdict of a properly instructed jury unless … there is a complete absence of evidence to support it.'").

toothless "relief" does nothing to remedy the tens of millions of dollars of harm *already* inflicted on Trinseo by respondents' years of enriching themselves off of Trinseo's technology.

At minimum, even absent certiorari, summary reversal for a new damages trial is readily justified. As both courts conceded, the apportionment requirements were not the governing law at trial. *See* Pet.App.13 (the Fifth Circuit has "never explicitly adopted patent law's apportionment principles in the trade secret[s] context"); Pet.App.58 ("the Fifth Circuit does not appear to have encountered a case involving apportionment in trade secrets"). That the district court did not adopt strict-apportionment as its legal framework until its post-verdict JMOL ruling further counsels in favor of this step. Whatever the merits of the Fifth Circuit's newly-minted legal baseline, Trinseo should be afforded an opportunity to meet it.

III. This Case Is a Clean Vehicle.

Respondents' last-ditch attempts to conjure vehicle problems are meritless. Respondents submit that "KBR presented multiple independent grounds for affirmance that the Fifth Circuit did not reach." Opp.Br.28. Unaddressed alternative arguments—encompassing sufficiency-of-evidence challenges, no less—need give this Court no pause.

The district court's "contingent alternative finding" that the Fifth Circuit also did not reach, pertaining to just one component of the damages award (not reasonable royalty damages) and one defendant (not the Harper Respondents), is similarly irrelevant. The district court held that, in the event its apportionment rationale fell, it would downward-adjust the jury's unjust enrichment damages against KBR to $10.5

million. Nothing about that limited reduction in the alternative dims the stakes, and prospects of meaningful relief, for Trinseo. And even $10.5 million is substantially more than $0.

At bottom, far from "factbound," Opp.Br.3, this case arises from a Judgment-*as-a-Matter-Of-Law* ruling reversing the factfinder's conclusions after an evidentiary trial, in which both courts below conceded they were breaking new legal ground. There could hardly be a more ideal posture for teeing up a dispositive legal question.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should summarily reverse the judgment below.

Respectfully submitted,

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August 25, 2026