No. 19-1404

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Christopher Rad,

Petitioner,

v.

Attorney General, United States of America,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals

BRIEF OF GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC AS COURT-APPOINTED AMICUS CURIAE

Ana M. Builes
Student Counsel
Tyler D. Purinton
Student Counsel
Adam Walker
Student Counsel

Bradley Girard
D.C. Bar No. 1033743
Brian Wolfman
GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

Counsel for Amicus

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ROLE OF AMICUS

The Appellate Courts Immersion Clinic is a clinic at Georgetown University Law Center in which students under faculty supervision litigate a wide range of appeals in circuit courts nationwide and in the Supreme Court. This Court appointed the Clinic as Amicus to answer three sets of questions presented by this appeal. *See* Doc. 50 (Jan. 10, 2020).

ISSUES PRESENTED

The questions that this Court directed Amicus to answer are as follows:[1]

1. Whether a conviction under 18 U.S.C. § 1037(a)(3) and (4) of the CAN-SPAM Act is governed by the categorical approach or by the modified categorical approach, and whether the Board of Immigration Appeals should address that issue in the first instance.

2. Whether petitioner Christopher Rad's convictions under Paragraphs 1037(a)(3) and (4) "involve[d] fraud or deceit" for purposes of 8 U.S.C. § 1101(a)(43)(M)(i).

3. Whether the Government carried its burden of proving by clear-and-convincing evidence that Rad's offenses resulted in an actual loss of more than $10,000 to his victims, and whether the Board of Immigration Appeals erred in relying on Rad's gain as the measure of the victims' loss.

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[1] We have removed the citations from this Court's questions and slightly revised their wording. The substance of the questions is unchanged. We have changed the order of the questions to conform to the order in which they are addressed in this brief.

STATEMENT OF THE CASE

Petitioner Christopher Rad is a lawful permanent resident who was convicted of conspiracy to violate 18 U.S.C. § 1037(a)(3) and (4) of the CAN-SPAM Act, for participating in the delivery of unsolicited, bulk commercial email. If the Government proved in the immigration proceedings that Rad's convictions were for "aggravated felonies" under the Immigration and Nationality Act (INA), then Rad may be removed from the United States. *See* 8 U.S.C. § 1227(a)(2)(A)(iii).[2] To constitute "aggravated felonies," Rad's offenses must have (1) necessarily involved fraud or deceit and (2) imposed more than $10,000 in losses on the victim or victims. 8 U.S.C. § 1101(a)(43)(M)(i). The Government bears the burden of proving that Rad is removable. 8 U.S.C. § 1229a(c)(3)(A).

I. Factual Background

Rad is a citizen of Canada who has been a lawful permanent resident of the United States for almost forty-five years. AR 264. Rad moved to the United States with his family when he was eight and has never returned to Canada. *Id.* He owns several small businesses and properties in Texas. AR 265-66.

A. In 2013, Rad was convicted under the CAN-SPAM Act of six offenses relating to the sending of bulk commercial email. AR 2. He was convicted of one count under 18 U.S.C. § 371 for conspiracy to commit false-header spamming and false-registration spamming, in violation of 18 U.S.C. § 1037(a)(3) and (4) (Count One); one count under 18 U.S.C. § 371 for conspiracy to commit unauthorized-access spamming, in

[2] The term "removal" under the INA is synonymous with "deportation." *See* 8 U.S.C. § 1229a(e)(2)(B).

violation of 18 U.S.C. § 1037(a)(1); and four counts under 18 U.S.C. § 1037(a)(1) for aiding and abetting unauthorized-access spamming. AR 2.

In addition to the spamming charges, the Government indicted Rad under Count One for conspiracy to commit securities fraud, alleging Rad's spamming was "in furtherance" of a "pump and dump" scheme in violation of the Securities Exchange Act. AR 75, 80. The jury did not convict Rad of conspiracy to commit securities fraud, finding him guilty of only conspiracy to commit the spam-email offenses. AR 104; Gvt. Br. 12 n.11. The jury's decision not to convict Rad of the securities-fraud charge is reflected on the jury sheet below, on which the jury checked neither "guilty" nor "not guilty":

COUNT ONE (Conspiracy to Commit Securities Fraud, False Header Spamming, and/or False Registration Spamming - 18 U.S.C. § 371)

With respect to Count One, we, the jury, find the defendant

Securities Fraud:	______ NOT GUILTY	______ GUILTY
False Header:	______ NOT GUILTY	✓ GUILTY
False Registration:	______ NOT GUILTY	✓ GUILTY

B. Rad's spam convictions stem from his alleged role in a larger series of unlawful stock-promotion campaigns "orchestrat[ed]" by Doyle Scott Elliott, AR 32—a stock promoter and self-described consultant. AR 32, 43. Elliott would seek as clients penny-stock companies—companies whose stock, among other things, typically trades for less than $5 per share, 17 C.F.R. § 240.3a51-1(d)—promising he would help them raise equity through promotional campaigns. AR 32. Elliott was paid in shares of his clients' stock. AR 35.

Elliott hired Rad to coordinate distribution of emails touting the stock to prospective investors. AR 35. Rad, in turn, hired others to conduct the email campaigns, providing them with press releases about the stock to distribute. *Id.* Rad thus operated as a "middleman" between Elliott and the computer experts who actually sent the spam emails. AR 32. Elliott paid Rad in amounts ranging from $2,000 to $30,000, with $20,000 being the typical amount. AR 42. Rad would then pay his hired emailers 50% of the amount he received and another person, Glen McCausland, 25% as a "finder's fee." AR 42. (The record does not reflect what McCausland would "find.") Elliott usually paid Rad in cash. AR 42-43. But sometimes Elliott paid Rad in stock as a retainer or as advanced compensation. AR 36, 42-43.

C. The emailers Rad hired concealed their identities or locations by using false information—for example, by altering the "from," "to," or "subject" lines of the emails—to avoid spam-filtering techniques used by email recipients or internet service providers. AR 34. The emailers also used so-called botnets and proxy computers to aid with the email distribution. *Id.* Through their use of botnets, the spammers could transmit messages from third-party computers and email addresses to hide the true origin of the spam and help the spammers remain anonymous. AR 34, 47. The spammers used proxy computers to replace the sender's IP address in the email header with the IP address of the proxy computer, making it difficult to trace the emails back to their original source. AR 34.

Although, as already explained, the Government failed to secure a securities-fraud conviction against Rad, it alleged that the email campaigns were part of a broader "pump and dump" scheme in which Elliott, Rad, and others manipulated the price

and volume of particular stocks and then later sold their own holdings of those stocks for profit. AR 32. The Government contended that the promotional emails generated artificial demand for the shares that "pumped" their price. AR 35-36.

The Government also maintained that the conspirators "pumped" the share price of particular stocks in other ways, though the extent of Rad's involvement in these efforts remains unclear. For example, the Government alleged that the conspirators hacked into brokerage accounts of third parties, liquidated the existing holdings, and then used the money to trade in a particular stock to increase its trading volume and price. AR 75-76. But neither Rad's presentence report (PSR) nor indictment identified Rad as engaging in hacks. Rather, the PSR identified three other individuals as hackers. AR 32. Moreover, in preindictment interviews with the FBI, Rad maintained he was unaware of brokerage hacks and believed they were not possible. AR 43. He explained that he believed some of the promoted stocks could only be traded with a telephone call and not through an online brokerage account. *Id.*

The Government also alleged that the conspirators engaged in matched trades—prearranged purchases and sales at predetermined prices—to create the appearance of strong demand for the stock. AR 36. Neither the indictment nor the PSR, however, identified any specific matched trade made by Rad.

The Government alleged that once the conspirators were satisfied with the inflated share price, they "dumped" their holdings for profit. AR 76. Yet the indictment specifies only one series of these inflated-price sales, and it was made by Elliott, not Rad. AR 87-88; *see* AR 37. Moreover, the record is unclear as to whether Rad even

owned the promoted shares during most of the campaigns, because, as noted, he was usually paid in cash. *See* AR 42.

D. At sentencing, the PSR prepared by the U.S. Probation Office grouped Rad's six convicted counts together for sentencing purposes, as required by the 2012 Sentencing Guidelines, meaning that all six counts were sentenced as if they were a single count of conviction. AR 45; *see also* U.S.S.G. §§ 3D1.2(d), 3D1.3(b) (2012). The PSR recommended that Rad receive a 121- to 151-month sentence based on thirty-two offense levels, including an eighteen-level upward adjustment for victim pecuniary loss. AR 46, 49-50.

In discussing its loss calculation, the PSR noted that "individuals purchased stocks based on the spamming scheme, and then lost some of their investments as the conspirators sold ('dumped') their shares at fraudulently inflated ('pumped') prices. This conduct caused actual losses to countless victims." AR 46. Yet the Probation Office acknowledged that the Government did not provide a victim list or trading records, AR 69, stating "the government [did] not identif[y] victims who incurred actual losses," AR 48. Rather, according to the PSR, "due to the scope of the offense and the vast number of potential and actual victims in this case, the government indicate[d] that loss cannot reasonable [sic] be determined." AR 46.

The Government thus contended that a reasonable estimate of victim loss was indeterminable and proposed that the sentencing court instead rely on Rad's monetary *gains* to measure loss, as permitted under the Guidelines. AR 46. The PSR approximated that Rad received over $2.8 million, based not on the amount Rad actually possessed, but on the amount he wired to his finder and emailers. AR 41-42.

It calculated this figure by doubling the total of Rad's outgoing wire transfers, based on trial testimony from an FBI agent contending that Rad "wired 25% to 50% of the proceeds." *Id.*; AR 68.

The Probation Office recommended other upward sentence adjustments in addition to victim loss. It recommended an increase of two levels for offenses committed through mass-marketing; two levels for offenses involving obtaining email addresses through improper means; two levels for offenses committed from outside the United States or involving sophisticated means; and two levels for obstruction of justice. AR 49-50. It recommended against a three-level increase for defendants who have managed or supervised criminal activity. AR 47.

E. The sentencing court did not adopt the PSR's recommended sentence. Instead, it sentenced Rad to seventy-one months in prison for the combined six counts of conviction—corresponding to twenty-five offense levels under the Sentencing Guidelines, U.S.S.G. Sentencing Table, Ch. 5, Pt. A (2012). Although the sentencing court attributed thirty-five months of the seventy-one months to the spam offenses under Count One, it never specified the offense level or reasons for the sentence under any individual count. AR 109. The sentencing court was silent on whether—or how—it found any victim loss tied to Count One. *Id.*

II. Procedural Background

A. The Department of Homeland Security brought removal proceedings against Rad under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), which authorizes a noncitizen's removal if he has committed an "aggravated felony." DHS

alleged that each of Rad's CAN-SPAM Act violations was an aggravated felony, which is defined by 8 U.S.C. § 1101(a)(43)(M)(i) as "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." AR 356.[3]

Rad was convicted of violating or conspiring to violate three provisions of the CAN-SPAM Act: unauthorized proxy spamming, 18 U.S.C. § 1037(a)(1), false-header spamming, 18 U.S.C. § 1037(a)(3), and false-registration spamming, 18 U.S.C. § 1037(a)(4). AR 2. Paragraphs 1037(a)(3) and (4) expressly require material falsification of email-header information and registration information, respectively. Under the Act, "information is materially falsified if it is altered or concealed in a manner that would impair the ability of a recipient of the message … to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation." 18 U.S.C. § 1037(d)(2).

B. In December 2017, an Immigration Judge found that Rad's CAN-SPAM Act violations are aggravated felonies under Section 1101(a)(43)(M)(i). AR 633. The IJ held that violations of Paragraphs 1037(a)(1), (3), and (4) involve deceit because "knowingly using materially falsified information inherently involves deliberate deception." AR 631.[4]

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[3] Count One charged Rad under 18 U.S.C. § 371, with conspiracy to violate the CAN-SPAM Act. The INA includes within the definition of an "aggravated felony" any conspiracy to commit an aggravated felony. 18 U.S.C. § 1101(a)(43)(U).

[4] This holding failed to recognize that Paragraph 1037(a)(1), unlike Paragraphs 1037(a)(3) and (4), does not require material falsification. As indicated below, the BIA did not adopt the IJ's holding as to Paragraph 1037(a)(1), and the Government has never argued that Rad committed an aggravated felony by violating Paragraph 1037(a)(1).

The IJ relied on the Supreme Court's holding in *Kawashima v. Holder*, 565 U.S. 478, 482-85 (2012), that falsification of an income-tax return is always deceitful. AR 631. But the IJ did not acknowledge that the CAN-SPAM Act has a particular statutory definition of material falsification, which, as just explained, includes any "conceal[ing]" of email header and registration information "in a manner that would impair the ability of the a recipient … to identify, locate, or respond to a person who initiated" the email. AR 630-31; *see* 18 U.S.C. § 1037(d)(2).

In determining that victim losses exceeded $10,000, the IJ recognized that the sentencing court never made an explicit finding of loss. AR 631-33. In place of an explicit finding, the IJ reasoned that the length of Rad's sentence was consistent with a finding that included victim loss. *Id.* Thus, the IJ inferred that the sentencing court must have considered Rad's gain as a proxy for loss. AR 632-33. He then "adopt[ed] the sentencing court's rationale"—that is, the rationale he had just imputed to the sentencing court—holding that the PSR's gain estimate was sufficient evidence of victim-loss amount to meet Section 1101(a)(43)(M)(i)'s more-than-$10,000 threshold. AR 631-33.

C. Rad appealed pro se to the Board of Immigration Appeals, AR 440, which upheld the IJ's order. AR 334-36. The BIA held that convictions for false-header spam and false-registration spam categorically are aggravated felonies, concluding, without further reasoning, that they fall within the INA's definitions of "fraud or deceit" because they invariably "contemplate[] deception." AR 329. Like the IJ, the BIA did not address the CAN-SPAM Act's definition of material falsification. And like the IJ,

the BIA imputed a loss finding to the sentencing court based solely on the length of Rad's sentence. AR 330.

D. Rad petitioned for review to this Court, which remanded for further consideration by the BIA. AR 317-20. The BIA again upheld the removal order, AR 2-6, this time simply reciting the elements necessary for conviction under Paragraphs 1037(a)(3) and (4): "knowingly and materially falsifying header information" and "knowingly and materially falsifying the identity of the actual registrant of five or more electronic mail accounts or online user accounts or two or more domain names," both "for the purpose of affecting an entity covered by the statute." AR 4. "Consequently," the BIA concluded—again, without addressing the statute's definition of material falsification—"the statute's minimum proscribed conduct requires fraud or deceit." *Id.*

As to whether victims incurred more than $10,000 in losses, the BIA again found loss implicit in the length of Rad's Count One sentence. The BIA held that because the sentencing judge imposed a thirty-five-month sentence for Count One, he must have found a twenty-level adjustment under the Sentencing Guidelines based on conduct "tethered to that offense." AR 5. Having worked back from the Count One sentence to arrive at a loss finding (erroneously, as we show below), the BIA concluded that "it would have been mathematically impossible for the sentencing court to have imposed the sentence it did without finding that the loss to victims exceeded $10,000." AR 5.

In extrapolating an offense level from the sentence for Count One alone, and then ascribing to the sentencing court a loss finding based on that offense level, the BIA

failed to acknowledge how offense levels are actually calculated under the Guidelines. Counts are grouped together and assigned a collective offense level, rather than considered individually. U.S.S.G. § 3D1.2(d). Thus, here, the sentencing court assigned the six counts under which Rad was convicted a single, collective offense level of twenty-five. AR 45. Yet, as noted, the BIA chalked up twenty offense levels to Count One alone. AR 5.

E. Rad again sought this Court's review of the BIA's removal order. After the parties filed briefs, this Court appointed the Appellate Courts Immersion Clinic to file this amicus brief.

SUMMARY OF ARGUMENT

I. The categorical approach, not the modified categorical approach, governs whether a conviction under 18 U.S.C. § 1037(a)(3) or (4) is an aggravated felony because the specific crimes for which Rad was convicted are clear from the judgment. Because the categorical approach turns on an interpretation of a criminal statute—an issue on which the BIA receives no deference—and because remand to the BIA would result in the same conclusion, this Court should decide the issue now.

II. Because Paragraphs 1037(a)(3) and (4) do not necessarily involve fraud or deceit, Rad's convictions are not aggravated felonies under the categorical approach. These two paragraphs prohibit "material falsification," which has a particular definition under the CAN-SPAM Act. An email sender materially falsifies an email header or registration information when he conceals his identity to impair the ability of a recipient to determine who sent the email. Because an email sender can conceal

his identity to impair the recipient without misleading him, material falsification does not require fraud or deceit. In fact, the Government has used these two paragraphs to prosecute conduct that is not fraudulent or deceitful. The BIA erred in concluding that a conviction under Paragraphs 1037(a)(3) and (4) is an aggravated felony. This Court should reverse on that basis alone.

III. The Government failed to meet its burden of proving by clear-and-convincing evidence that Rad's offense resulted in an actual loss exceeding $10,000, as 8 U.S.C. § 1101(a)(43)(M)(i) demands, for three related reasons.

First, Section 1101(a)(43)(M)(i)'s text does not permit using gain as a proxy for loss amount.

Second, a sentencing judge's loss finding is never alone clear-and-convincing evidence of victim loss for purposes of removal under Section 1101(a)(43)(M)(i). Thus, even if Rad's sentencing judge had found losses exceeding $10,000—which has not been shown—the Government still had to show in the removal proceeding that the evidence underlying the judge's finding clearly and convincingly established over $10,000 in losses tied to Count One. It did not.

Third, even if gain could in some circumstances serve as the measure of victim loss under Section 1101(a)(43)(M)(i), the Government must prove the offender's gain is a necessary and accurate measure of loss amount. The Government failed to make that showing here.

ARGUMENT

Lawful permanent residents, like Petitioner Christopher Rad, are considered "at home in the United States." *Demore v. Kim*, 538 U.S. 510, 547 (2003) (Souter, J., concurring in part). They have a presumed "right to stay and live and work in this land of freedom." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (quotation marks omitted). The Immigration and Nationality Act (INA) creates an exception to this presumption: When a legal permanent resident is found to have committed an "aggravated felony," he is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). The INA describes the various aggravated felonies that render a noncitizen deportable. 8 U.S.C. § 1101(a)(43). The provision at issue here—8 U.S.C. § 1101(a)(43)(M)(i)—provides that one "aggravated felony" is (1) "an offense that involves fraud or deceit" (2) "in which the loss to the victim or victims exceeds $10,000."

Rad's spamming convictions under 18 U.S.C. § 1037(a)(3) and (4) of the CAN-SPAM Act are aggravated felonies, then, only if (1) under the categorical approach the convictions require fraud or deceit *and* (2) the Government proved by clear-and-convincing evidence that Rad's crimes of conviction cost victims more than $10,000 in losses. Rad's convictions satisfy neither requirement.

I. This Court should apply the categorical approach to Rad's crimes of conviction: false-header spam and false-registration spam.

The categorical approach is used to determine whether a crime is an aggravated felony under the INA. *Kawashima v. Holder*, 565 U.S. 478, 483 (2012). This approach requires comparing the statutory elements of the crime of conviction to the INA's aggravated-felony definition. *Id.* at 483. Parts A and B below provide more detail on

the categorical and modified categorical approaches and explain why the categorical approach, and not the modified categorical approach, should be used here. Because this Court does not defer to the BIA on applications of the categorical approach, it should not remand the issue, as explained in Part C.

A. The categorical and modified categorical approaches

The categorical approach is applied by comparing two sets of elements: (1) the statutory elements of the defendant's crime of conviction, and (2) the elements of a federal category of crimes. *Taylor v. United States*, 495 U.S. 575, 588-89, 602 (1990). Because the categorical approach answers the abstract question whether the crime of conviction belongs to a federal category of crimes, the two sets of elements are compared without referring to the facts of a particular defendant's case. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). Under this approach, a crime of conviction belongs in a category only when the "least of the acts" it criminalizes also satisfy the elements of the crimes within the category. *Id.* at 191 (brackets omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). So, as applied here, if Rad's crimes of conviction "sweep[] more broadly" than the federal category, they cannot be aggravated felonies. *See Descamps v. United States*, 570 U.S. 254, 261 (2013).

Sometimes, a statute includes multiple sets of elements that prohibit distinct crimes. *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016). For these statutes, a "modified" categorical approach is used to identify the crime of conviction so the categorical approach can be applied accurately. *Id.* at 2249. For example, a single statute that criminalizes possession of a controlled substance for personal use *or* with

intent to distribute contains two distinct crimes: (1) possession for personal use and (2) possession with intent to distribute. If a defendant is convicted under that statute, it might not be clear which crime he committed by looking only at the judgment against him. And distinguishing between the two might be important if, for instance, federal law views only possession with intent to distribute as sufficiently serious to warrant a sentencing enhancement. When faced with such a statute, courts must modify the categorical approach by looking beyond the statute's text, to a narrow set of case-specific documents, to determine which crime the defendant was actually convicted of. *Mathis*, 136 S. Ct. at 2249.

As just explained, the modified categorical approach applies only when there are alternative ways to violate a statute—usually connoted by the word "or" in the statute's text. *See Descamps*, 570 U.S. at 264. A statute of that sort is said to be "divisible." *Id.* at 263. But not all statutes that list alternatives contain more than one crime. Sometimes the alternatives are different "means" of committing a single crime rather than elements of distinct crimes. *Mathis*, 136 S. Ct. at 2250.

A three-part test is used to determine whether alternative ways of violating a statute are elements or means. *See Mathis*, 136 S. Ct. at 2256-57. First, courts consult prior decisions that consider whether the statute is divisible. *Id.* at 2256; *United States v. Aviles*, 938 F.3d 503, 513 (3d Cir. 2019). Unless a prior decision "definitively answers the question," courts then turn to the statute's text. *Aviles,* 938 F.3d. at 513 (quoting *Mathis*, 136 S. Ct. at 2256). If the statute's text requires juries to explicitly agree on the way the defendant violated the statute, or if the statute assigns different punishments to the different violations, then they are different crimes. *Id.* at 513-14. Finally, if those

inquiries are inconclusive, the court may "peek" at the charging documents to see if they "plainly" required that the jury explicitly choose among the alternatives. *Mathis*, 136 S. Ct. at 2256-57. If so, the statute contains multiple crimes, and the modified categorical approach must be used to determine the crime of conviction. *Id.* at 2257.

B. The categorical approach, not the modified categorical approach, should be applied to Rad's crimes of conviction, 8 U.S.C. § 1037(a)(3) and (4).

Because it is indisputable that Rad was charged with the separate crimes described in Paragraphs 1037(a)(3) and (4), it makes no difference whether the analysis is governed in the first instance by the categorical approach or the modified categorical approach. Whether the modified categorical approach must be employed depends at which level of the statute—Subsection (a) or Paragraphs (a)(3) and (4)—the analysis begins.

If the starting points are the narrow statutory provisions under which Rad was convicted, Paragraphs 1037(a)(3) and (4), then the categorical approach may be applied directly. One then asks whether those two paragraphs criminalize conduct beyond what is encompassed within the INA's particular characterizations of an "aggravated felony."

If Subsection 1037(a) is the starting point, then the modified categorical approach leads to the same conclusion: (a)(3) and (4) are the crimes of conviction that must be analyzed under the categorical approach. The jury instructions reveal that, to convict under Count One, the jury was required to find unanimously that the conduct described in two paragraphs of Subsection 1037(a)—(a)(3) and (4)—was the object of

the conspiracy. Jury Instruction 29C at 46, *United States v. Rad*, No. 11-cr-161 (D.N.J. Nov. 30, 2012) (Doc. 62), 2012 WL 7176858. Because the jury agreed that each of the elements of (a)(3) and (4) was met, those paragraphs describe the crimes of conviction.[5]

When, as here, a defendant was charged and convicted under separately enumerated statutory provisions, the categorical approach should be applied directly. *See United States v. Henderson*, 841 F.3d 623, 625-26 (3d Cir. 2016) (beginning the analysis at 35 PA Stat. Ann. § 780-113(a)(30), one crime in a list of separately enumerated crimes); *see also* U.S. Sentencing Commission, *Primer on Categorical Approach* 13 (2019). In these cases, a peek at the documents will always reveal each provision to be a separate crime. The modified categorical approach—which, it should be remembered, "merely helps implement the categorical approach," *Descamps*, 570 U.S. at 263—would add unnecessary steps to the analysis but come to the same conclusion.

[5] Paragraph 1037(a)(4)'s text could be describing more than one crime: falsification of email accounts *or* falsification of online user accounts *or* falsification of domain names. But the jury instructions reveal that Rad was charged with falsifying registration information for email accounts only. Jury Instruction 23 at 32, *United States v. Rad*, No. 11-cr-161 (D.N.J. Nov. 30, 2012) (Doc. 62), 2012 WL 7176858. The modified categorical approach should be applied only when "at least one, but not all" of the alternative crimes are aggravated felonies. *United States v. Brown*, 765 F. 3d 185, 191 (3d Cir. 2014). In any case, there is no reason to believe that one discrete way of violating 1037(a)(4) categorically requires fraud or deceit while the other similar violations of (a)(4) do not.

C. This case should not be remanded to the BIA because application of the categorical approach is a purely legal task that this Court should undertake.

This Court should not remand to the BIA to determine how the categorical (or modified categorical) approach applies to the CAN-SPAM Act. Applying the categorical approach is a purely legal task. *Valansi v. Ashcroft*, 278 F.3d 203, 207 (3d Cir. 2002). Courts remand purely legal questions to an agency only when the agency's reasoning would be entitled to *Chevron* deference. *Da Silva v. Att'y Gen.*, 948 F.3d 629, 634-35 (3d Cir. 2020).

An agency interpretation is entitled to *Chevron* deference only when it "implicates agency expertise in a meaningful way." *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) (quoting *Sandoval v. Reno*, 166 F.3d 225, 239 (3d Cir. 1999)). Interpretations of criminal statutes are "outside the authority or expertise of the BIA." *Bobb v. Att'y Gen.*, 458 F.3d 213, 217 n.4 (3d Cir. 2006). Those interpretations involve "a pure question of statutory construction for the courts to decide." *Sandoval*, 166 F.3d at 240 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). Accordingly, the BIA's application of the categorical approach is entitled to no deference when, as here, it turns on the meaning of the criminal statute under which the defendant was convicted. *Salmoran v. Att'y Gen.*, 909 F.3d 73, 77 (3d Cir. 2018).

Moreover, remand is necessary only when the agency has not considered the issue or there has been an intervening event or change in the law. *Da Silva*, 948 F.3d at 634. Neither circumstance is present here. For these reasons, remand would be a "mere formality," prolonging the proceedings without changing the result. *See Calle v. Att'y Gen.*, 504 F.3d 1324, 1330 (11th Cir. 2007) (citation omitted).

II. Convictions under Paragraphs 1037(a)(3) and (4) of the CAN-SPAM Act do not categorically involve fraud or deceit.

Paragraphs 1037(a)(3) and (4) are aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i) only if each offense categorically "involves fraud or deceit." As noted earlier (at 14), before there can be a categorical match, even the "least of the acts criminalized," *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (cleaned up), by Paragraphs 1037(a)(3) and (4) must "necessarily entail fraudulent or deceitful conduct," *Kawashima v. Holder*, 565 U.S. 478, 484 (2012). Because the minimum conduct criminalized by these two paragraphs is not fraudulent or deceitful, the BIA wrongly concluded that these offenses are aggravated felonies. This Court should reverse.

A. Paragraphs 1037(a)(3) and (4) prohibit "material falsification," which—as defined by the CAN-SPAM Act—is not necessarily fraudulent or deceitful.

1.a. Paragraphs 1037(a)(3) and (4) prohibit the material falsification of commercial emails: 1037(a)(3) prohibits the material falsification of email headers (including the "to" and "from" lines of an email, *see* 15 U.S.C. § 7702(8)), and 1037(a)(4) prohibits the material falsification of online registration information, including for email accounts and website domain names. 18 U.S.C. § 1037(a)(3), (4). The CAN-SPAM Act defines material falsification as follows: Among other things, "information is materially falsified if it is altered or concealed in a manner that would impair the ability of a recipient of the message … to identify, locate, or respond to a person who initiated the electronic mail message … ." 18 U.S.C. § 1037(d)(2).

In light of this definition, among the "least of the acts criminalized," *Moncrieffe*, 569 U.S. at 191 (cleaned up), by Paragraphs (a)(3) and (4) is simple concealment of an email sender's identity. To conceal is to "prevent disclosure or recognition of" the email sender's identity by "withhold[ing] knowledge" from the recipient. *United States v. Kilbride*, 584 F.3d 1240, 1257 (9th Cir. 2009) (quoting Webster's Third New International Dictionary Unabridged 469 (1993)). That withholding must be done with an intent to impair a recipient's ability to identify the sender. *Id.* at 1258 n.9. And "impair" "merely means to decrease," not to "completely obstruct," the ability of a recipient to locate the sender. *Id.* at 1258. So, it "constitute[s] 'material falsification'" when the author of an email purposefully "conceals" his "actual … identity" to "diminish[] the ability of recipients to identify" him. *Id.* at 1257, 1259.

b. On the other hand, fraud and deceit both demand conduct that intentionally misleads. Courts have treated fraud and deceit under 8 U.S.C. § 1101 as interchangeable terms. *See, e.g.*, *Kawashima*, 565 U.S. at 488; *Al-Sharif v. U.S. Citizenship & Immigration Servs.*, 734 F.3d 207, 213 (3d Cir. 2013); *Mowlana v. Lynch*, 803 F.3d 923, 927 (8th Cir. 2015). Under both, a speaker must intend to mislead a recipient, who in turn must be reasonably likely to be misled. Fraud is the "false representation[] of a material fact" made with the "intent to deceive," which causes "justifiable reliance." *Valansi v. Ashcroft*, 278 F.3d 203, 209 (3d Cir. 2002). Deceit is the "process of deceiving," that is, to "cause" another "to believe" what is "false." *Id.* (citing Webster's Third New International Dictionary Unabridged 584).

c. The statutory language adjacent to Paragraphs 1037 (a)(3) and (4) underscores that fraud or deceit is not necessary to prove material falsification. Paragraph

1037(a)(2) prohibits using a "protected computer" to send commercial emails with the "intent to *deceive or mislead* recipients" about the "origin" of the emails. 18 U.S.C. § 1037(a)(2) (emphasis added). Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). The inclusion of deceit in Paragraph 1037(a)(2) and its omission in Paragraphs 1037(a)(3) and (4) suggests that "Congress' omission" of deceit (and its synonym "fraud") from the latter "was purposeful." *Fan Wang v. Att'y Gen.*, 898 F.3d 341, 348 (3d Cir. 2018). Put simply, this Court should not read into (a)(3) and (4) a deceit requirement that Congress refused to include.

d. Material falsification (as expressly defined by the CAN-SPAM Act) thus sweeps more broadly than fraudulent or deceitful conduct. By prohibiting impairment—that which makes it more difficult to identify an email sender—the CAN-SPAM Act "potentially subjects a wide swath of conduct to regulation." *Kilbride*, 584 F.3d at 1258. And that wide swath of prohibited conduct, unlike fraud and deceit, does not require that an email recipient believe anything false or be misled in any way.

e. An understanding of how people actually use email helps illustrate that violations of Paragraphs 1037(a)(3) and (4) are not necessarily fraudulent or deceitful.

An email address or domain registration alone does not always create a false impression on the recipient because the recipient is not being led to believe something false. For example, an email sender can conceal his identity in violation of (a)(3) by choosing a random alias for his email address. A recipient who received a commercial

email from SportsFan@gmail.com, for example, would not necessarily be able to identify the actual sender. Likewise, a sender could choose a factually correct name and still materially falsify his email address. If someone named John chose to conceal his last name and sent a commercial email from john@gmail.com, the recipient would not be able to pinpoint exactly which John sent the email. *See* 18 U.S.C. § 1037(d)(2). Yet these materially falsified email addresses would not necessarily deceive a recipient into thinking the sender was any particular person; they would likely create no impression at all about the actual person who sent the email.

Similarly, a materially falsified domain name under (a)(4) would not necessarily mislead anyone. The domain "company.com," for example, is registered to Network Solutions, LLC.[6] But Network Solutions is not the actual owner of company.com; Network Solutions is a contractor that the actual owner pays to register and manage her domain names.[7] By using this privately registered domain, the sender of an email from company.com would conceal the identity of the actual domain owner, thus violating (a)(4) by making it harder for a recipient to find her. *See Kilbride*, 548 F.3d at 1259. But it would not deceive the recipient into thinking she was someone else.

To be sure, the CAN-SPAM Act targets some fraudulent and deceitful behavior too. For example, if someone sends an email pretending to be the recipient's friend, by using the friend's name for the email address, that *could* deceive the recipient. But in

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[6] *Domain Name Registration Data Lookup: Company.com*, ICANN, https://lookup.icann.org/lookup (last visited Apr. 18, 2020).

[7] *New Domain Frequently Asked Questions*, Network Solutions, https://www.networksolutions.com/new-domain-faqs/index.jsp (last visited Apr. 18, 2020).

reality, many recipients have no idea who the sender of an email is in the first place. So recipients of materially falsified emails often have nothing to be misled about.

f. Concealment of one's identity on the internet is not necessarily motivated by an intent to deceive the recipient but instead may be "motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). And this desire for privacy extends to commercial transactions covered by the CAN-SPAM Act.

For example, a cryptocurrency engineer who promotes his software online concealed his identity when he was the target of vicious threats.[8] The engineer had to go to extreme measures to ensure his privacy and protect himself.[9] Because of how thoroughly he concealed his digital identity, any new promotional emails sent to his customers would be materially falsified under the CAN-SPAM Act. Yet his attempt to protect his privacy—to protect his life—had nothing to do with fraud or deceit.

Likewise, people often sell goods and services anonymously to protect themselves and their products from social stigma. Some conceal out of embarrassment. Auction sellers, for example, often sell art anonymously to protect their "personal privacy" and

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[8] Jameson Lopp, *Reflections on a Swatting: Inside One Bitcoin Engineer's Security Battle*, Coindesk (July 27, 2018). https://www.coindesk.com/reflections-on-a-swatting-one-bitcoin-engineers-private-security-battle.

[9] Nathaniel Popper, *How a Bitcoin Evangelist Made Himself Vanish, in 15 (Not So Easy) Steps*, N.Y. Times (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/technology/how-to-disappear-surveillance-state.html.

"cloak the embarrassment of debt."[10] Others conceal out of necessity. For drag queens, who often use email newsletters sent under their stage names to promote their performances, concealing their birth names and identities can be a shield against hate crimes.[11]

Finally, some conceal their identities to let their works speak for themselves. The famously unknown author who goes by the pseudonym Elena Ferrante has chosen to publish anonymously because "books, once … written, have no need of their authors."[12] Many of Ferrante's readers agree and indeed "care about *not* finding out" her identity.[13] Any email from elenaferrante.com promoting her books, therefore, would conceal the author's true identity. In all of these cases, privacy would not be

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[10] Tom Mashberg, *Lawyers Fight to Keep Auction Sellers Anonymous*, N.Y. Times (Feb. 3, 2013), https://www.nytimes.com/2013/02/04/arts/design/battling-to-keep-auction-sellers-anonymous.html.

[11] *See, e.g.*, Caitlin Dewey, *Why the Debate Over 'Real Names' Matters—For Drag Queens on Facebook and Everyone Else*, Wash. Post (Oct. 6, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/10/06/why-the-debate-over-real-names-matters-for-drag-queens-on-facebook-and-everyone-else/; *Join Our Mailing List for Queen-tastic Updates and Exclusive Offers!*, Drag Queen Ent., https://www.dragqueenentertainment.com/ (last visited Apr. 18, 2020) (private signup for a mailing list promoting drag shows); Samantha Schmidt, *Callers Threatened to Burn Down this Restaurant that Has Drag Brunch. The Queens are Dancing On*, Wash. Post (Jan. 3, 2020), https://www.washingtonpost.com/local/social-issues/callers-threatened-to-burn-down-this-restaurant-with-a-drag-brunch-the-queens-are-dancing-on/2020/01/03/6cac1bde-2dbf-11ea-9b60-817cc18cf173_story.html.

[12] James Wood, *Women on the Verge*, New Yorker (Jan. 14, 2013), https://www.newyorker.com/magazine/2013/01/21/women-on-the-verge.

[13] Alexandra Schwartz, *The "Unmasking" of Elena Ferrante*, New Yorker (Oct. 3, 2016), https://www.newyorker.com/culture/cultural-comment/the-unmasking-of-elena-ferrante.

deceiving because the creators do not intend to mislead, and their consumers are not misled.

Paragraphs 1037(a)(3) and (4) prohibit all of these acts of concealment. But because none of them is intentionally misleading, Paragraphs 1037(a)(3) and (4) do not necessarily entail fraud or deceit.

2.a. On the question whether Paragraphs 1037(a)(3) and (4) require deceit, the BIA (and the Government) relied on *Kawashima v. Holder*, 565 U.S. 478, 484 (2012), which, according to the Government, equated "falsification" with "deceit" for all time and all purposes, AR 4; Gvt. Br. 25-26. That is wrong on two levels.

First, *Kawashima* itself did not sweep so broadly; it merely held that falsification on a tax document requires deceit, not that *all* falsification requires deceit. *Kawashima*, 565 U.S. at 484. Second, *Kawashima*'s description of falsification is irrelevant here because the CAN-SPAM Act provides its own definition of material falsification, one that, as explained (at 19-21), does not involve fraud or deceit. "As a rule, a [statutory] definition which declares what a term means excludes any meaning that is not stated." *Biskupski v. Att'y Gen.*, 503 F.3d 274, 280 (3d Cir. 2007) (cleaned up). This rule of statutory interpretation is a powerful one. So, when "a statute includes an explicit definition, [a court] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). It is the CAN-SPAM Act's definition of "material falsification," not the Government's and the BIA's understanding of that term, that controls.

b. Moreover, *Kawashima* itself shows that concealment is not necessarily deceitful and so affirmatively supports the conclusion that material falsification, as defined by the CAN-SPAM Act, is not an aggravated felony.

Kawashima differentiated two tax crimes, one that is always deceitful (falsifying a tax return) and another that is not necessarily so (tax evasion), and found that the dispositive distinction is that tax evasion is possible without intentionally misleading anyone. 565 U.S. at 484-85, 487-88.

The Internal Revenue Code prohibits falsifying income on a tax return, swearing it is "true and correct," and then submitting it to the IRS. *Kawashima*, 565 U.S. at 483-84; *see* 26 U.S.C. § 7206(1). When someone falsifies her reported income, she does so intending to have the IRS believe she owes less taxes. She will always mislead because the IRS bases tax liability on whatever income is reported. *See Neder v. United States*, 527 U.S. 1, 16 (1999) (any failure to report income is material because it always has the "natural tendency" to influence the IRS) (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). Because a falsified tax return is always intentionally misleading, this crime is always deceitful. *Kawashima*, 565 U.S. at 484.

Tax evasion, on the other hand, "[does] not *necessarily* involve fraud or deceit." *Kawashima*, 565 U.S. at 488. Usually, an individual will evade payment of taxes, by "an affirmative act of concealment," after the IRS has already correctly established how much she owes.[14] For example, someone could "file[] a truthful tax return, but [] also

[14] *See* Edward F. Cronin, Criminal Tax Division, U.S. Dep't of Justice, *Tax Crimes Handbook* 2, (Office of Chief Counsel Criminal Tax Division, 2009), at 2, https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf.

… evade payment by moving his assets beyond the reach of the Internal Revenue Service." *Kawashima*, 565 U.S. at 488. This concealment would impair the IRS from collecting owed taxes, but it would not mislead the IRS into thinking that less was owed.

The situation here is like tax evasion and unlike falsifying a tax return. Much like tax evasion, material falsification under the CAN-SPAM Act prohibits concealment that merely impairs the recipient. And just like the IRS is not always misled when an individual commits tax evasion, the recipient of an email is not always misled when an email sender materially falsifies an email in violation of Paragraphs 1037(a)(3) and (4).

B. Paragraphs 1037(a)(3) and (4) have been used to prosecute conduct that is not misleading.

Because, as just explained, material falsification under the CAN-SPAM Act does not require deceit, a conviction under the Act cannot be an aggravated felony. As a result, "no legal imagination" is needed to find a "realistic probability" that the Government will use this statute to prosecute conduct that is not deceitful. *Salmoran v. Att'y Gen.*, 909 F.3d 73, 77, 82 (3d Cir. 2018) (cleaned up). In any event, even the "very little case law interpreting this statute," *United States v. Simpson*, 741 F.3d 539, 551 (5th Cir. 2014), reveals that the Government has prosecuted conduct that is not deceitful.

In *United States v. Kilbride*, 507 F. Supp. 2d 1051, 1055, 1062 (D. Ariz. 2007), the government charged two individuals for not using their own name when they sent unsolicited emails containing explicit images to promote a pornographic website. The defendants earned a commission every time a recipient clicked on the promotion and paid for a subscription to the website. *Id.* at 1055.

In sending the pornographic spam, the defendants violated Paragraphs 1037(a)(3) and (4) by materially falsifying the email address and registration information of the domain used to send the emails. *Kilbride*, 507 F. Supp. 2d at 1064-66, 68. The defendants took the recipient's own username and added after it a domain name registered to a shell company, *id.* at 1062, intending to conceal their true identity from the email recipients and impairing the recipients' ability to identify them. *Id.* This concealment was enough for the Government to prosecute and convict the defendants under Paragraphs 1037(a)(3) and (4). *Id.* at 1064-66, 68.

But the defendants' conduct was not fraudulent or deceitful. Many recipients—presumably caring more about the content of the emails than their source—paid for a subscription without being misled about who *really* sent the emails. *Kilbride*, 507 F. Supp. 2d at 1055. That is because the defendants sent the email from a modified version of the recipient's own email address. No reasonable recipient would have been misled into thinking he sent himself pornography. The defendants may have spammed the recipients, but they did not scam them.

On appeal, the Ninth Circuit noted that even private registration—a common form of concealment used to protect an email sender's identity—could constitute material falsification. *See United States v. Kilbride*, 584 F.3d 1240, 1259 (9th Cir. 2009). Private registration allows the owner of a web domain to conceal her registration information by paying an organization to privately register for her, replacing her

personal and publicly searchable data with the organization's own.[15] Businesses routinely conceal their domain information to protect their privacy and avoid spam, not to defraud or deceive customers.[16] Yet the Ninth Circuit recognized that so long as a registrant is trying to conceal her actual identity, even this common conduct done to protect businesses is prohibited by "the plain meaning of the relevant terms" of Paragraph 1037(a)(4). *Kilbride*, 584 F.3d at 1259.

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Paragraphs 1037(a)(3) and (4) target conduct that is broader than fraud or deceit. Rad's convictions are therefore categorically not aggravated felonies under Section 1101(a)(43)(M)(i), which means Rad may not be removed from the United States. That is true regardless of whether Rad's convictions resulted in over $10,000 in victim losses. We now turn to that issue.

III. The Government failed to carry its burden of proving that Rad's offenses resulted in actual victim losses exceeding $10,000.

To prove Rad committed the "aggravated felonies" on which the Government relies for Rad's removal, the Government must also prove Rad's offenses involved over $10,000 in victim losses. 8 U.S.C. § 1101(a)(43)(M)(i). Determining the amount of victim loss under Section 1101(a)(43)(M)(i) requires application of the circumstance-specific approach, which looks to the "specific way in which an offender committed the crime on a specific occasion." *Nijhawan v. Holder*, 557 U.S. 29, 34

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[15] *5 Reasons You Need Private Domain Registration*, Network Solutions, http://www.networksolutions.com/education/you-need-private-registration/ (last visited Apr. 18, 2020).

[16] *Id.*

(2009). Accordingly, courts may look to materials beyond the record of conviction, including sentencing materials, when determining whether victim loss exceeded $10,000. *Id.* at 42.

The Government bears the burden of proof in demonstrating an offense involved over $10,000 in victim losses. *See* 8 U.S.C. § 1229a(c)(3)(A). It must show by "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." *Kiareldeen v. Ashcroft*, 273 F.3d 542, 553 (3d Cir. 2001) (quotation marks omitted). The clear-and-convincing-evidence standard requires the Government to show that the truth of its factual contentions is "highly probable." *Araujo v. N.J. Transit Rail Ops.*, 708 F.3d 152, 159 (3d Cir. 2013). This "highly probable" standard, *id.*, imposes a "heavy burden of persuasion on the Government," *In re G-1 Holdings*, 385 F.3d 313, 318 (3d Cir. 2004).

In ascertaining whether Rad's offense involved the necessary loss amount, the IJ determined that the district court must have found over $10,000 in losses tied to Count One when it sentenced Rad, even though the district court never explicitly made that finding. AR 448-49. The IJ assumed that the sentencing court used Rad's pecuniary *gain* from the offense—calculated at $2.8 million in the PSR—as the measure of victim *loss*, as the Sentencing Guidelines permit when loss cannot reasonably be determined. *Id.* Relying on the findings it ascribed to the sentencing court, the IJ then found that Rad's CAN-SPAM Act convictions involved losses over $10,000. *Id.*

In affirming the IJ's decision, the BIA made three related errors. First, Section 1101(a)(43)(M)(i)'s text does not permit using gain as a proxy for loss amount.

Second, a sentencing judge's loss finding (regardless of whether it is based on a defendant's gain) is never alone clear-and-convincing evidence of victim loss under Section 1101(a)(43)(M)(i). Even when a sentencing judge finds losses exceeding $10,000 tied to the crime of conviction—and it's unclear that occurred here—the BIA cannot simply rely on that conclusion. Removal is lawful only if the Government demonstrates in the removal proceeding that the evidence underlying the loss finding establishes over $10,000 in losses. Third, even if gain can serve as the measure of loss under Section 1101(a)(43)(M)(i) in some circumstances, it cannot serve as the measure of loss unless the Government proves that gain is a necessary and accurate measure of victim loss, which it failed to do here.

A. Section 1101(a)(43)(M)(i)'s text does not authorize using gain as a measure of loss.

Section 1101(a)(43)(M)(i)'s text requires courts to consider "loss to the victim" and nowhere says that courts can use gain as a measure of that loss. 8 U.S.C. § 1101(a)(43)(M)(i); *see Madrane v. Att'y Gen.*, 648 F. App'x 271, 274 (3d Cir. 2016) (noting the BIA rejected using forfeiture amount to measure loss because it was "based on the offender's gain rather than the victim's loss"). Had Congress intended for courts to use gain as a loss proxy, "it easily could have drafted language to that effect," *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014), just as the Sentencing Commission did when it drafted express language to that effect for sentencing proceedings, *see* U.S.S.G. § 2B1.1 cmt.3(B) (allowing use of gain as an alternative measure of loss).

Although the BIA concluded that the Sentencing Guidelines' gain-for-loss proxy was transferable to the Section 1101(a)(43)(M)(i) analysis, this Court has emphasized that the "statutory language of subparagraph (M)(i) provides no indication that Congress wanted loss to be defined in accordance with the Sentencing Guidelines." *Singh v. Att'y Gen.*, 677 F.3d 503, 511 (3d Cir. 2012). Amicus has found no context where this Court has used gain as a proxy for loss—where the statute requires a loss calculation, as here—without express statutory authorization. *See United States v. Badaracco*, 954 F.2d 928, 938, 942-43 (3d Cir. 1992) (finding use of gain at sentencing authorized by the Guidelines but rejecting use of gain for calculating restitution under Victim and Witness Protection Act, where no congressional authorization was provided).

B. A sentencing court's loss finding cannot be taken at face value as clear-and-convincing evidence of loss in removal proceedings.

1. A sentencing court's finding of loss (or gain) does not conclusively establish victim loss under Section 1101(a)(43)(M)(i). The Supreme Court has instructed that noncitizens in removal proceedings must have a fair opportunity to contest the Government's reliance on a sentencing court's loss finding. *See Nijhawan v. Holder*, 557 U.S. 29, 41-42 (2009); *see also Singh v. Att'y Gen.*, 677 F.3d 503, 515 (3d Cir. 2012) (rejecting Government's argument that legal permanent resident was collaterally estopped from challenging sentencing court's restitution order). Accordingly, rather than accept a sentencing court's loss finding at face value as clear-and-convincing evidence of loss under Section 1101(a)(43)(M)(i), immigration courts must instead evaluate the strength of the evidence underlying that finding and consider conflicting

evidence to determine whether the Government has met its burden. *See Singh*, 677 F.3d at 512-15.

In *Singh*, this Court observed that a sentencing court's restitution order "'may be helpful' to the [Section 1101(a)(43)(M)(i)] loss inquiry, but is not definitive." 677 F.3d at 515 (quoting *Munroe v. Ashcroft*, 353 F.3d 225, 227 (3d Cir. 2003)). Looking to the specific facts of the case, it then determined that the offense did not cause any actual loss to victims, rendering the immigrant not deportable. *Id.* at 515-18.

2. The INA and the Sentencing Guidelines are "like apples and oranges," *Fan Wang v. Att'y Gen.*, 898 F.3d 341, 351 n.18 (3d Cir. 2018) (quotation marks omitted) (quoting *Singh*, 677 F.3d at 511), and adopting a sentencing court's finding wholesale here would ignore the significant differences between how sentencing and immigration courts make factual findings.

a. For starters, the Government faces a higher evidentiary burden in removal proceedings than at sentencing. Immigration courts "must assess findings made at sentencing 'with an eye to … the burden of proof employed.'" *Nijhawhan*, 557 U.S. at 42 (quoting *In re Babaisakov*, 24 I. & N. Dec. 306, 319 (B.I.A. 2007)). The Sentencing Commission instructs that a preponderance-of-the-evidence standard is "appropriate" for finding facts supporting sentence adjustments. U.S.S.G. § 6A1.3 cmt.; *United States v. Gray*, 942 F.3d 627, 631-32 (3d Cir. 2019). In contrast, as already discussed, immigration courts must apply a heightened clear-and-convincing-evidence standard, requiring that the truth of the Government's facts be "highly probable" before a person may be removed. 8 U.S.C. § 1229a(c)(3)(A); *Araujo v. N.J. Transit Rail Ops.*, 708 F.3d 152, 159 (3d Cir. 2013). Accepting as conclusive the sentencing court's findings

would impermissibly allow a noncitizen's deportation under an unlawfully reduced burden of proof. *Cf.* Restatement (Second) of Judgments § 28(4) (Am. Law Inst. 1982) (noting that issue preclusion is impermissible if based on prior findings made under a lower burden of proof).

b. Sentencing courts may also consider a broader universe of losses than may immigration courts. *See Nijhawan*, 557 U.S. at 41-42. An IJ's face-value acceptance of a sentencing court's findings thus might lead to a deportation order predicated on losses forbidden by Section 1101(a)(43)(M)(i). Most importantly, sentencing judges may consider conduct for which the defendant was acquitted at trial. *See United States v. Snyder*, 762 F. App'x 118, 122-23 (3d Cir. 2019). Immigration courts, on the other hand, must focus more narrowly on losses tied to the noncitizen's convicted offense alone and may not consider acquitted conduct. *See Fang Ku v. Att'y Gen.*, 912 F.3d 133, 141 n.5 (3d Cir. 2019).

Sentencing courts may also consider a defendant's *intended* losses—that is, losses the offender intends to inflict on the victim regardless of the likelihood they would actually be inflicted—to promote the Guidelines' "overall theory of culpability for attempt[ed]" wrongdoing. *Singh*, 677 F.3d at 511 n.8 (quoting *United States v. Kopp*, 951 F.2d 521, 529 (3d Cir. 1991)); *see* U.S.S.G. § 2B1.1 cmt.3(A)(ii). Conversely, Section 1101(a)(43)(M)(i) looks only to *actual* victim loss, focusing on concrete harm rather than trying to divine the noncitizen's intent. *Singh*, 677 F.3d at 510-12.

c. Section 1101(a)(43)(M)(i) expressly requires the Government to prove over $10,000 in victim losses before a noncitizen is deportable—not 'approximately' $10,000, nor $9,999, but $10,000.01 and not a penny less. But sentencing courts may

be imprecise and need only make a "reasonable estimate" of losses. U.S.S.G. § 2B1.1 cmt.3(C). Accepting a sentencing court's findings would effectively (and unlawfully) write the "reasonable estimate" standard into Section 1101(a)(43)(M)(i). *Cf. Akinsade v. Holder*, 678 F.3d 138, 146 (2d Cir. 2012) (noting "the seriousness of deportation as a consequence of a criminal plea" and that "the need for precision and clarity in plea agreements" to support the "aggravated felony" determination "is especially acute") (quoting *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010)).

C. If gain is to serve as the measure of loss under Section 1101(a)(43)(M)(i), the Government must first prove that its gain calculation is a necessary and accurate estimate of loss amount.

Even if this Court holds that gain may serve as the measure of loss in some circumstances, the Government cannot use gain unless its gain calculation reflects actual victim loss and not some "alternative, unrelated value." *United States v. Dickler*, 64 F.3d 818, 826 (3d Cir. 1995) (describing use of gain at criminal sentencing). To that end, the Government must prove it cannot reasonably determine loss without resorting to gain and that "there is some logical relationship between the victim's loss and the [noncitizen's] gain so that the latter can reasonably serve as a surrogate for the former." *Id.* at 826.

For gain to serve as a surrogate for loss, the Government must make four showings by clear-and-convincing evidence. *First*, the Government must show that the victims suffered some actual losses tied to the noncitizen's crime of conviction. *Second*, if some loss exists, the Government must show that the actual loss amount cannot

reasonably be determined. *Third*, the Government must prove that the noncitizen's offense did not provide something of value to the victim, or if the victim did derive value from the offense, that this amount was deducted from the gain calculation. *Fourth*, the Government must show that the noncitizen derived the alleged gain through the crime of conviction. A failure to meet any of these requirements forecloses use of gain as the measure of loss. The Government's showing here failed at every turn. Rad cannot be deported.

1. The Government must show the noncitizen's crime caused some actual loss tied to the crime of conviction.

a. In sentencing, a defendant's gain cannot be used as the measure of loss unless there is "persuasive evidence of monetary loss." *United States v. Andersen*, 45 F.3d 217, 221-22 (7th Cir. 1995); *see also United States v. Galloway*, 509 F.3d 1246, 1250-53 (10th Cir. 2007). Thus, under the heightened burden for removal, the Government must show some actual victim loss by clear-and-convincing evidence before immigration courts may rely on gain as the measure of loss. The Government's failure to show at least some loss also means that it has not met its burden of proving more than $10,000 in losses under Section 1101(a)(43)(M)(i).

The Government has not proved *any* losses incurred by recipients of Rad's spam emails. This is true, among other reasons, because spam-based crimes generally are not zero-sum violations and often do not cause any victim loss, even when the sender earns money from the offense. Put differently, violations of the CAN-SPAM Act, 18 U.S.C. § 1037(a)(3) and (4), "do not inherently deprive a victim of value" because "unlike traditional economic crimes, spam violations do not require a sender's gain at

a victim's expense. No unwitting victim sends a check to the sender. No cash drawer comes up short."[17] Violations of Paragraphs (a)(3) and (4) are "not the kind of misconduct that causes what we typically consider as harm to victims."[18] For example, an offender may be paid $10,000 to deliver unsolicited bulk emails promoting a certain product, where the majority of those emails are caught by the recipient's spam filter and never viewed.

The sparse caselaw under the CAN-SPAM Act affirms that spam offenses often do not cause pecuniary harm to the recipient. *See United States v. Kilbride*, No. 05-cr-870, 2007 WL 2774487, at *5 (D. Ariz. Sept. 21, 2007). In *Kilbride*, as noted earlier (at 27-29), the defendants were convicted for sending emails promoting fee-based pornography websites. *Id.* After recipients registered with the website and paid the fee, a portion was paid to the defendants. The Government argued at sentencing that the defendants' gain should be used to measure victim losses. *Id.* The court disagreed, holding that the defendants' gain did "not represent someone else's loss" because it was "not a case where Defendants' gain consists of money stolen or defrauded from victims." *Id.* As in *Kilbride*, the recipients of Rad's spam did not necessarily suffer any harm from receiving or opening the emails.

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[17] Letter from Michael O'Hear & Eric Goldman, Professors of Law, Marquette Univ. Law Sch., to U.S. Sentencing Comm'n (Mar. 11, 2004), https://www.ericgoldman.org/Articles/crimspamcomments.pdf?time=20200313123558.

[18] Paul Festa, *Stiff Spam Penalties Urged*, ZDNet (Apr. 14, 2004), https://www.zdnet.com/article/stiff-spam-penalties-urged/ (quoting Jack King, representative for the National Association of Criminal Defense Lawyers).

Although it is possible Rad's emails caused internet service providers to spend money, for example if they investigated customer complaints, the Government never made that allegation let alone proved it through clear-and-convincing evidence. That should end the inquiry.

b. Instead of showing that Rad's CAN-SPAM Act crimes of conviction caused any loss, the Government urges this Court to consider losses tied to the alleged securities fraud for which Rad was charged, but not convicted. Gvt. Br. 38-39, 43-44; *see* AR 218-19. But those losses, to the extent they exist, may not be considered.

In identifying victim loss under Section 1101(a)(43)(M)(i), courts may consider only losses caused by (1) the crime of conviction and (2) *uncharged* conduct, where the losses are tied to the crime of conviction. *See Fan Wang v. Att'y Gen.*, 898 F.3d 341, 350-51 (3d Cir. 2018). Courts "may not consider dismissed charges when calculating the loss attributable to the conviction" under Section 1101(a)(43)(M)(i). *Fang Ku v. Att'y Gen.*, 912 F.3d 133, 141 n.5 (3d Cir. 2019) (citing *Alaka v. Att'y Gen.*, 456 F.3d 88 (3d Cir. 2006)). Nor may they consider acquitted charges. *Singh v. Att'y General*, 677 F.3d 503, 508 (3d Cir. 2012). All told, courts may not consider losses tied to charged, but unconvicted conduct, even where that conduct was "part of a common scheme or plan as the offense of conviction." *Alaka*, 456 F.3d at 106 (refusing to consider losses tied to dismissed charges that were related to a broader fraudulent-check scheme involving the convicted offense).

The upshot of these legal principles is that the only conduct that can be considered here is the sending of spam emails. That is because although Rad was indicted under Count One on conspiracy to commit both securities fraud and

spamming, he was convicted on only the spam-conspiracy charges, 18 U.S.C. § 1037(a)(3) and (4), and not on the securities-fraud charge for the alleged pump-and-dump scheme. AR 104; *see supra* at 2-3.

Yet the (supposed) losses relied on by the Government are tied exclusively to the *unconvicted* securities-fraud charge. The Government argued to the BIA that investors "lost some of their investments as the conspirators sold ('dumped') their shares at fraudulently inflated ('pumped') prices," which "caused actual losses to countless victims." AR 219 (quoting PSR). Here, the Government reiterates that "Rad was involved in a 'pump and dump' scheme defrauding multiple investors … resulting in the loss to the victims." Gvt. Br. 43-44. But even if these losses existed, they could not be counted because they would be the consequence of the securities-fraud charge "that was neither admitted nor proven beyond a reasonable doubt." *Alaka*, 456 F.3d at 107-08.

Holding otherwise would give the Government a second crack at punishing Rad when it failed to convince the jury to convict the first time, undermining the principle that deportation is a "purely civil action[] to determine eligibility to remain in this country, not to punish." *Scheidemann v. INS*, 83 F.3d 1517, 1520 n.4 (3d Cir. 1996) (quoting *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)). And as the Government itself points out, "the circumstance-specific approach is not an invitation to relitigate [Rad's] criminal conviction." Gvt. Br. 40-41 (quoting *Singh*, 677 F.3d at 512).

c. Even assuming (incorrectly) that the BIA could properly consider investment losses incurred by traders of the promoted stock, the Government has failed to prove by clear-and-convincing evidence that investors suffered any loss.

Rather than identify specific losses (which on this record is not possible), the Government vaguely asserts that "individuals" "lost *some* of their investments." AR 218-19 (emphasis added) (quoting PSR). But the Government neither identifies these "individuals" nor specifies the value of "some of their investments." The Government did not provide the Probation Office with a victim list nor produce trading records to aid with the loss calculation. AR 69. Not a single investor—nor email recipient—testified at trial to having suffered a loss. To the contrary, as the PSR notes, "the government [did] not identify victims who incurred actual losses." AR 48.

Moreover, "there is no loss attributable to a [securities fraud] unless … the price of the stock … declines." *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005). The Government has proffered no evidence showing that the inflated shares dropped in price after Elliott sold his holdings or that the unnamed "victims" suffered net losses when others sold. The PSR itself only vaguely contends that the price of the promoted shares "typically fell" after the sales, without providing any evidence supporting this contention. AR 33; *see also* Pet. Rep. at 19. The investors may have actually enjoyed a return if the share price increased over the long run or if they sold before the price dropped (assuming that it did).

And even if the Government had shown there was a price drop, it would have been required to show that any drop was caused by the alleged scheme and not by unrelated factors. To ensure that a defendant is truly responsible, courts must consider factors other than the fraud that may have contributed to a market downturn. *See, e.g.*, *United States v. Rutkoske*, 506 F.3d 170, 178-80 (2d Cir. 2007); *Olis*, 429 F.3d at 546. A shareholder's loss could reflect several factors including "changed economic

circumstances, changed investor expectations, [and] new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all" of the loss. *Dura Pharm. v. Broudo*, 544 U.S. 336, 342-43 (2005) (describing loss causation in civil securities cases). Because the Government failed to make even the most threadbare causation showing, any (alleged) losses incurred could not have been attributable to Rad.

d. Instead of proving any actual loss, the Government (Gvt. Br. 34-37), like the BIA (AR 4-5), tries to cobble together a justification for its assertion that Rad's sentencing judge found victim loss tied to Count One. The Government concludes (Gvt. Br. 37) that because Rad's sentence under Count One was for thirty-five months, it must have been based on an offense level of twenty under the Guidelines' Sentencing Table. *See* U.S.S.G. Sentencing Table, Ch. 5, Pt. A (2012). And based on its breakdown of these twenty levels, the Government asserts, "it would have been mathematically impossible for the District Court to have imposed the sentence that it did without finding that the loss to victims exceeded $10,000." Gvt. Br. 34; *see* AR 5.

But the Government's reliance on the Sentencing Table to conclude that Rad's thirty-five-month Count One sentence was based on twenty offense levels fundamentally misunderstands how the Guidelines operate and, in particular, how counts are grouped at sentencing. Under the 2012 Sentencing Guidelines, certain counts of conviction are sentenced (and adjusted) in a group as if they were a single count of conviction. *See* U.S.S.G. §§ 3D1.2(d), 3D1.3(b) (2012). This means that any sentencing adjustment applies to the group as a whole and is determined using the aggregate harm caused by *all* counts in the group. For example, if an offense (with a

base offense level of six) caused $5 in losses, and a different offense (also with a base level of six) caused $30,000 in losses, the sentencing court would start with a group base level of six (not twelve) and employ a single group adjustment based on $30,005 in losses, with no need to specify the loss caused by the individual offenses. *See* U.S.S.G. § 3D1.3 cmt.3 (2012). The resulting total offense level, after all group adjustments are applied, determines the collective sentence for the group under the Sentencing Table. *See* U.S.S.G. 3D1.3(b), Sentencing Table, Ch. 5, Pt. A (2012).

Here, Rad was convicted of six counts. *See supra* at 2-3. As the PSR recognized, the Guidelines required that Rad's six convictions be treated as one group of counts for sentencing purposes. *See* AR 45; *see also* U.S.S.G. § 3D1.2(d) (2012). This means Rad could not be sentenced separately under Count One based on an independent offense level of twenty; rather, Rad's thirty-five-month sentence was part of his total seventy-one-month sentence for *all six* convicted counts combined, which was based on a *collective* offense level of twenty-five. *See* Gvt. Br. 11; Sentencing Table, Ch. 5, Pt. A (2012).

The Government, however, in trying to divine the sentencing court's reasoning, looks to Rad's six-count sentence, cherry-picks certain adjustments applied to that six-count group (which were based on the harm caused by all six offenses *combined*), and applies those adjustments to a single count—that is, Count One. *See* Gvt. Br. 36-37. Even if the Government could sensibly allocate portions of the sentence (which it cannot), it would not make sense to attribute to Count One—which represents less than half of the total sentence—twenty of the twenty-five offense levels, leaving five offense levels to be distributed among the other five counts. But that is exactly what

the Government has done. In any event, the Government may not justify the BIA's decision here by inferring that the sentencing court calculated Rad's sentence contrary to the Guidelines.

Rather, even if Rad's sentencing court had found $2.8 million in losses caused by the six convicted offenses collectively, *see* Gvt. Br. 42—and accordingly adjusted Rad's total sentence eighteen levels upward under U.S.S.G. § 2B1.1(b)(1)—there is no indication that any of these losses can be attributed to Rad's crimes of conviction under Count One. The eighteen-level adjustment could have been grounded entirely in losses related to the other five convicted counts (or even to unconvicted conduct, which can be considered at sentencing but not in removal proceedings). *See* U.S.S.G. § 3D1.3 cmt.3 (2012); *supra* at 34, 38. In short, the Government's approach ignores the Guidelines and runs headlong into the circumstance-specific approach, which looks only to the circumstances of the offenses at issue, *see Nijhawan*, 557 U.S. at 34—here, the Count One convicted offenses—not to all offenses that are sentenced as one group.

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The Government has not shown by clear-and-convincing evidence that there was any loss to victims, let alone that Rad's offense caused recipients of the spam emails the $10,000.01 in loss required by Section 1101(a)(43)(M)(i). Rad therefore has not committed an aggravated felony, and the BIA erred in affirming the IJ's deportation order.

2. The Government must show that victim-loss amount is indeterminable.

Because at sentencing "[a] defendant's gain is only to be used where the loss 'reasonably cannot be determined,'" *United States v. Rice*, 699 F.3d 1043, 1049 (8th Cir. 2012); *see also Dickler*, 64 F.3d at 827, the Government must show by clear-and-convincing evidence that the amount of actual loss—if any—is indeterminable, before turning to gain as a backup measure.

The Government has not shown by clear-and-convincing evidence that it cannot reasonably determine victim loss (assuming loss exists at all). The Government, quoting the PSR, argued below that "due to the scope of the offense and the vast number of potential and actual victims in this case, ... loss cannot reasonabl[y] be determined." AR 219. But it has offered no persuasive reason why the sheer number of alleged victims renders a loss determination unattainable.

For example, the Government has not demonstrated why it did not examine securities-transaction records to ascertain victim loss, as Rad suggested at sentencing. AR 280. Moreover, if there were truly a "vast number" of victims with an aggregate loss of $2.8 million, it should have been relatively simple to identify the fraction of victims necessary to surpass the $10,000 threshold. The Government would not be required to interview every purchaser of the promoted shares. Regardless of whether these methods would work, the Government has failed to show that it could not determine victim loss before resorting to gain as a proxy.

3. The Government must show the noncitizen's crime did not also give victims something of value.

Gain bears the strongest correlation to loss where the crime involves a shift of money in one direction—from the victim of the crime to the offender—as in theft cases. *Dickler*, 64 F.3d at 824-25; *see also United States v. Yeaman*, 194 F.3d 442, 457 (3d Cir. 1999). But where the offender also gives the victim something of value—for example, an ownership interest in a company, despite the offender inducing the sale through misrepresentation—the offender's gain will often overstate the victim's loss (if any). *See United States v. Mitrow*, No. S3-13-cr-633, 2015 WL 5245281, at *5 (S.D.N.Y. Sept. 8, 2015); *see also Dickler*, 64 F.3d at 825.

For gain to be an effective surrogate for loss, then, the Government must prove that either (1) the noncitizen's crime did not also give victims something of value, or (2) if a victim did derive value, that amount was deducted from the noncitizen's gain calculation. *See Dickler*, 64 F.3d at 828-29 (noting district court deducted from gain calculation payments defendants made to victims). *Cf. United States v. Laurienti*, 611 F.3d 530, 557 (9th Cir. 2010) (sentencing courts should offset the value a victim receives when calculating that victim's losses from securities fraud).

Because stocks often are valuable, when calculating investment losses from a pump-and-dump scheme, courts look at the stock's value after the scheme. *See United States v. Zolp*, 479 F.3d 715, 719 (9th Cir. 2007). Where the stock continues to have value, the court may not (of course) assume the loss inflicted equals the amount the investor paid the offender for the share. *See id.* Rather, courts must "disentangle the underlying value of the stock [absent the fraud from the] inflation of that value due

to the fraud," excluding from the loss calculation any underlying value the shares maintain. *See id.*; *Laurienti*, 611 F.3d at 558. That is because "for any given victim, it is the net loss that matters," not the purchase price. *Id.* at 557.

Here, if the promoted-share price fell after the alleged "dump" (which has not been proved), but the shares retained value, Rad's gains would be (at the least) an overestimation of the investors' losses unless this value was deducted from the $2.8 million. For this reason, too, Rad's gain is an inappropriate measure of loss.

4. The Government must show that the noncitizen actually derived the alleged gain amount from the victim through the crimes of conviction.

a. For gain to serve as a loss proxy under Section 1101(a)(43)(M)(i), the Government must show by clear-and-convincing evidence that (1) the noncitizen in fact personally gained the amount alleged and (2) the gains were derived from the victim through the crimes of conviction and not through other activities. *See Dickler*, 64 F.3d at 829-30 (recognizing that value defendants later added to cars obtained through fraud should be deducted from gain calculation); *United States v. Hussain*, No. 16-cr-00462, 2019 WL 1995764, at *6 (N.D. Cal. May 6, 2019); *cf. supra* at 34, 38 (explaining that victim loss, in addition to offender gain, must also be tied to the crime of conviction). Put another way, gain must reflect the actual value of what the victims gave up through the convicted offense—and what the defendant personally gained from that offense. *Dickler*, 64 F.3d at 829-30. The Government failed to make that showing here.

b. The PSR indicates Rad was sometimes paid ahead of time for his stock-promotion work. AR 43. These payments are gains Rad earned regardless of whether the emails were ever later sent in violation of Paragraphs 1037(a)(3) and (4). In other words, Rad earned this money before he ever committed a spamming crime. The Government has not shown how these payments reflect what the victims gave up.

True, Rad's payments of $20,000 for his spam-campaign work (AR 42), paid after the promotion, are gains derived through his crime of conviction. But because the aggravated-felony determination hinges on victim loss, *not* gain, these gains, insofar as they are untied to any loss, are irrelevant under Section 1101(a)(43)(M)(i). Rad could have earned this money without any commensurate victim impact—for example, if his emails were caught by recipients' spam filters—rendering these gains an overestimation of victim loss, assuming there was any loss at all.

c. Further, the Government (AR 217-19) and the IJ (AR 447-49) attribute the full $2.8 million to Rad, even though both recognize that half of it was paid to co-conspirators. Yet these co-conspirator gains—paid to Rad's emailers, AR 42—cannot be attributed to Rad because they do not fall within "the scope of conduct for which [Rad] can fairly be held accountable." *See United States v. Metro*, 882 F.3d 431, 438-40 (3d Cir. 2018) (describing attribution of co-conspirator gains to defendant at sentencing). Rad was only a "middleman" in the broader spam-campaign scheme that Elliott "orchestrat[ed]." AR 32. Rad's role was limited and discrete. No evidence shows Rad ever personally sent the promotional emails, unlike the co-conspirators whose gains were attributed to him. Moreover, in declining to recommend a three-level adjustment based on management role (over the Government's objection), the

Probation Office contended that Rad's control and authority over the emailers was limited, stating that "it appears he did not supervise or manage these individuals." AR 66. The Government cannot pin the emailers' gains on Rad given his limited control over their conduct.

d. The Government's approximation of the $2.8 million in gains is also highly imprecise. The Government (AR 217-18), the IJ (AR 632-33), and the BIA (AR 4-5) rely on the PSR's gain computation, calculated by doubling the amount of Rad's wire transfers to co-conspirators. This method was informed by an FBI agent's trial testimony suggesting Rad "wired 25% to 50% of the proceeds" to co-conspirators. AR 217-28. But apparently no effort was made to identify specific illegal deposits to Rad's account. No effort was made to identify the actual source or nature of the money he transferred. And no effort was made to derive a more exact percentage of the proceeds transferred. Such an imprecise figure cannot be clear-and-convincing evidence of personal gain (and hence loss) and thus cannot form the basis for a deportation order.

CONCLUSION

Because Paragraphs (a)(3) and (4) of the CAN-SPAM Act do not require fraud or deceit, Rad's crimes of conviction are categorically not aggravated felonies. Remand to the BIA is unnecessary to determine that purely legal issue. *See Valansi v. Ashcroft*, 278 F.3d 203, 207, 217-18 (3d Cir. 2002). Rad is not removable for this reason alone.

Independently, because the Government has failed to show any loss, let alone clear-and-convincing evidence of actual loss exceeding $10,000, this Court should

hold that Rad is not removable. *See Singh v. Att'y Gen.*, 677 F.3d 503, 518-19 (3d Cir. 2012).

The judgment of the BIA should be reversed.

Respectfully submitted,

s/ Bradley Girard
Bradley Girard
D.C. Bar No. 1033743
Brian Wolfman
GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave. NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

Ana M. Builes
Student Counsel
Tyler D. Purinton
Student Counsel
Adam Walker
Student Counsel

Counsel for Amicus

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CERTIFICATE OF COMPLIANCE

1. Amicus has been informed by the Clerk's Office that this brief should comply with the word limit set in Federal Rule of Appellate Procedure 32(a)(7)(B). In accordance with Rule 32(g), I certify that this brief: (i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 12,992 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and (ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016, set in Garamond font in 14 point type.

2. In accordance with Local Rule 28.3(d), I certify that I am a member of the bar of the Third Circuit in good standing.

3. In accordance with Local Rule 31.1(c), I certify that (i) this brief has been scanned for viruses using McAfee LiveSafe 16.0, and is free of viruses; and (ii) when paper copies are required by this Court, the paper copies will be identical to the electronic version of the brief filed via CM/ECF.

s/ Bradley Girard
Bradley Girard
Counsel for Amicus

STATUTORY ADDENDUM

18 U.S.C. § 1037. Fraud and related activity in connection with electronic mail

(a) In general—Whoever, in or affecting interstate or foreign commerce, knowingly—

(1) accesses a protected computer without authorization, and intentionally initiates the transmission of multiple commercial electronic mail messages from or through such computer,

(2) uses a protected computer to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of such messages,

(3) materially falsifies header information in multiple commercial electronic mail messages and intentionally initiates the transmission of such messages,

(4) registers, using information that materially falsifies the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and intentionally initiates the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names, or

(5) falsely represents oneself to be the registrant or the legitimate successor in interest to the registrant of 5 or more Internet Protocol addresses, and intentionally initiates the transmission of multiple commercial electronic mail messages from such addresses,

or conspires to do so, shall be punished as provided in subsection (b).

* * *

(d) Definitions.—In this section:

* * *

(2) Materially.—For purposes of paragraphs (3) and (4) of subsection (a), header information or registration information is materially falsified if it is altered or concealed in a manner that would impair the ability of a recipient of the message, an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation.

* * *

8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

* * *

(2) Criminal offenses

(A) General crimes

* * *

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * *

8 U.S.C. § 1101. Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

* * *

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

* * *

(U) an attempt or conspiracy to commit an offense described in this paragraph.

* * *

CERTIFICATE OF SERVICE

I certify that on April 21, 2020 this brief was filed using the Court's CM/ECF system. Counsel for the United States Attorney General is a registered CM/ECF user and will be served electronically via that system. Petitioner Christopher Rad will be served a physical copy of the brief at:

Christopher Rad
Pike County Correctional Facility
175 Pike County Blvd.
Lords Valley, PA 18428

s/ Bradley Girard
Bradley Girard
Counsel for Amicus