No. 22-1801

CRIMINAL

In the

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

UNITED STATES OF AMERICA,

APPELLEE,

v.

HAITAO XIANG,

APPELLANT.

Appeal from the United States District Court
for the Eastern District of Missouri

BRIEF OF APPELLEE

SAYLOR A. FLEMING
United States Attorney

MATTHEW G. OLSEN
Assistant Attorney General
for National Security

JEFFREY M. SMITH
National Security Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Suite 6500
Washington, DC 20530
(202) 532-0220

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Defendant Haitao Xiang pleaded guilty to one count of conspiracy to engage in economic espionage, in violation of 18 U.S.C. § 1831(a)(5). In this appeal, Xiang presents a Fourth Amendment challenge to the search, conducted pursuant to the government's broad border-search authority, of electronic media that Xiang was attempting to take with him from the United States to the People's Republic of China. The search uncovered evidence of Xiang's criminal activity. Xiang moved to suppress the evidence, but the district court denied Xiang's motion, holding that the search was consistent with the Fourth Amendment.

The United States requests 15 minutes for oral argument to explain why the district court's judgment should be affirmed.

Appellate Case: 22-1801 Page: 2 Date Filed: 08/24/2022 Entry ID: 5190712

TABLE OF CONTENTS

Page

Summary and Request for Oral Argument i

Table of Authorities iv

Statement of the Issues 1

Statement of the Case 2

I. Xiang's Admitted Criminal Conduct 3

II. The Investigation of Xiang 7

III. The Border Search 8

IV. The Prosecution and Xiang's Guilty Plea 12

Summary of the Argument 21

Argument 24

I. The District Court Correctly Denied Defendant's Motion To Suppress 24

A. Standard of Review 24

B. The Government Conducted a Lawful Border Search of the Electronic Devices Xiang Sought To Take to China 25

1. Electronic Devices Are Not Exempt from the Border-Search Doctrine 27

2. Xiang Was Subject to a Lawful Border Search 33

C. The District Court Correctly Found that the Search Was Supported by Reasonable Suspicion 40

Appellate Case: 22-1801 Page: 3 Date Filed: 08/24/2022 Entry ID: 5190712

D. The District Court Correctly Found that the Search Was Conducted Reasonably 50

E. Suppression Would Be Unwarranted in Any Event Because Law Enforcement Agents Acted in Good Faith..... 62

II. Xiang's Procedural Challenge to the Imposition of a Fine Was Waived and Lacks Merit 64

A. Standard of Review 64

B. Xiang's Argument Lacks Merit..... 64

Conclusion..... 70

Certificate of Compliance 71

Certificate of Service..... 72

TABLE OF AUTHORITIES

Cases **Page**

Alasaad v. Mayorkas,
988 F.3d 8 (1st Cir. 2021) 15, 27, 28, 29, 31, 33, 34, 35, 37

Boyd v. United States, 116 U.S. 616 (1886) 33, 35

California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) 25

Carpenter v. United States, 138 S. Ct. 2206 (2018) 31

Carroll v. United States, 267 U.S. 132 (1925) 26

Davis v. Dawson, 33 F.4th 993 (8th Cir. 2022) 39

Davis v. United States, 564 U.S. 229 (2011) 62

Gall v. United States, 552 U.S. 38 (2007) 65, 67

Garza v. Idaho, 139 S. Ct. 738 (2019) 66

Herring v. United States, 555 U.S. 135 (2009) 62

Navarette v. California, 572 U.S. 393 (2014) 42, 43

Nebraska ex rel. Bruning v. Dep't of Interior,
625 F.3d 501 (8th Cir. 2010) 32

Puckett v. United States, 556 U.S. 129 (2009) 66

Riley v. California, 573 U.S. 373 (2014) 15, 30

Robbins v. City of Des Moines, 984 F.3d 673 (8th Cir. 2021) 48, 57

United States v. Aigbekaen, 943 F.3d 713 (4th Cir. 2019) 37

Appellate Case: 22-1801 Page: 5 Date Filed: 08/24/2022 Entry ID: 5190712

United States v. Alfonso, 759 F.2d 728 (9th Cir. 1985) 52

United States v. Allmon, 500 F.3d 800 (8th Cir. 2007) 64, 68

United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008) 33

United States v. Arvizu, 534 U.S. 266 (2002) 43, 46

United States v. Barraza-Maldonado,
732 F.3d 865 (8th Cir. 2013) 62, 63

United States v. Bercier, 506 F.3d 625 (8th Cir. 2007) 63

United States v. Berndt, 86 F.3d 803 (8th Cir. 1996) 68

United States v. Boumelhem, 339 F.3d 414 (6th Cir. 2003) 51

United States v. Brooks, 648 F.3d 626 (8th Cir. 2011) 68

United States v. Caceres, 440 U.S. 741 (1979) 61

United States v. Cano, 934 F.3d 1002 (9th Cir. 2019) 29, 34, 39

United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013) 45, 55

United States v. Dautovic, 763 F.3d 927 (8th Cir. 2014) 65

United States v. Eustaquio, 198 F.3d 1068 (8th Cir. 1999) 49

United States v. Flannery, 850 F. App'x 984 (8th Cir. 2021) 68

United States v. Flores-Montano, 541 U.S. 149 (2004) 25, 26, 41

United States v. Gurr, 471 F.3d 144 (D.C. Cir. 2006) 34, 36, 50, 51

United States v. Guzman, 926 F.3d 991 (8th Cir. 2019) 53

United States v. Hassanshahi, 75 F. Supp. 3d 101 (D.D.C. 2014) 56

Appellate Case: 22-1801 Page: 6 Date Filed: 08/24/2022 Entry ID: 5190712

United States v. Hsu, 155 F.3d 189 (3d Cir. 1998) 2, 13

United States v. Ickes, 393 F.3d 501 (4th Cir. 2005) 27, 33, 38,

United States v. Jennings, 662 F.3d 988 (8th Cir. 2011) 66

United States v. Klanecky, 393 F. App'x 409 (8th Cir. 2010) 67, 68

United States v. Kolsuz, 890 F.3d 133 (4th Cir. 2018) 29, 34, 55, 57

United States v. Laynes,
481 F. Supp. 3d 657 (S.D. Ohio 2020) 30, 61, 62

United States v. Levy, 803 F.3d 120 (2d Cir. 2015) 35, 41, 50, 52, 53

United States v. Linarez-Delgado, 259 F. App'x 506 (3d Cir. 2007) .. 27

United States v. Molina-Isidoro, 884 F.3d 287 (5th Cir. 2018) 28, 32

United States v. Montoya de Hernandez, 473 U.S. 531 (1985) 26, 40

United States v. Moreno, 988 F.3d 1027 (8th Cir. 2021) 24, 42

United States v. Oriakhi, 57 F.3d 1290 (4th Cir. 1995) 25

United States v. Oyekan, 786 F.2d 832 (8th Cir. 1986) 32, 49

United States v. Quinn, 812 F.3d 694 (8th Cir. 2016) 46

United States v. Ramsey, 431 U.S. 606 (1977) 25, 26, 31, 38

United States v. Raymonda, 780 F.3d 105 (2d Cir. 2015) 47

United States v. Robinson, 781 F.3d 453 (8th Cir. 2015) 63

United States v. Saboonchi, 48 F. Supp. 3d 815 (D. Md. 2014) 31

United States v. Saboonchi, 990 F. Supp. 2d 536 (D. Md. 2014) 56

Appellate Case: 22-1801 Page: 7 Date Filed: 08/24/2022 Entry ID: 5190712

United States v. Saddler, 19 F.4th 1035 (8th Cir. 2021) 33, 57

United States v. Schoor, 597 F.2d 1303 (9th Cir. 1979)..... 52

United States v. Skaggs, 25 F.4th 494 (7th Cir. 2022)..... 28, 46

United States v. Stewart, 729 F.3d 517 (6th Cir. 2013) 28, 56

United States v. Touset,
890 F.3d 1227 (11th Cir. 2018)..... 28, 31, 41, 46, 50

United States v. Udofot, 711 F.2d 831 (8th Cir. 1983)..... 27, 30

United States v. Vergara, 884 F.3d 1309 (11th Cir. 2018)..... 29

United States v. Villamonte-Marquez, 462 U.S. 579 (1983) 52

United States v. Wanjiku,
919 F.3d 472 (7th Cir. 2019).....28, 29, 31, 41, 45, 49, 54, 63

United States v. Williams, 942 F.3d 1187 (10th Cir. 2019) ... 28, 46, 49

United States v. Wohlman, 651 F.3d 878 (8th Cir. 2011) 67

Wabun-Inini v. Sessions, 900 F.2d 1234 (8th Cir. 1990) 32

Warden v. Hayden, 387 U.S. 294 (1967)..... 33, 34, 35, 57, 58

Statutes

6 U.S.C. § 211(c)(2) 9, 38

6 U.S.C. § 211(c)(9) 9, 38

18 U.S.C. § 1831..... 12, 13, 19

18 U.S.C. § 1832..... 12, 13, 35

Appellate Case: 22-1801 Page: 8 Date Filed: 08/24/2022 Entry ID: 5190712

18 U.S.C. § 1839(3) 54

19 U.S.C. § 507(a)(2) 54

19 U.S.C. § 1401(c) 38

19 U.S.C. § 1581 38

19 U.S.C. § 1595a(d) 38

Other Authorities

CBP Directive No. 3340-049 (Aug. 20, 2009) 60, 61

H.R. Rep. No. 104-788, *as reprinted in* 1996 U.S.C.C.A.N. 4021 13

S. Rep. No. 104-359 (1996) 13

U.S.S.G. § 5E1.2(a) 64

STATEMENT OF THE ISSUES

I. WHETHER THE ELECTRONIC DEVICES DEFENDANT SOUGHT TO TAKE WITH HIM TO CHINA WERE SUBJECT TO A BORDER SEARCH

United States v. Ramsey, 431 U.S. 606 (1977)
Warden v. Hayden, 387 U.S. 294 (1967)
Alasaad v. Mayorkas, 988 F.3d 8 (1st Cir.),
cert. denied, 141 S. Ct. 2858 (2021)
United States v. Wanjiku, 919 F.3d 472 (7th Cir. 2019)

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE BORDER SEARCH OF XIANG'S DEVICES WAS SUPPORTED BY REASONABLE SUSPICION

Navarette v. California, 572 U.S. 393 (2014)
United States v. Moreno, 988 F.3d 1027 (8th Cir. 2021)
United States v. Touset, 890 F.3d 1227 (11th Cir. 2018)
United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013) (en banc)

III. WHETHER THE BORDER SEARCH THAT INTERRUPTED XIANG'S CONSPIRACY TO ENGAGE IN ECONOMIC ESPIONAGE WAS CONDUCTED REASONABLY

United States v. Kolsuz, 890 F.3d 133 (4th Cir. 2018)
United States v. Levy, 803 F.3d 120 (2d Cir. 2015)
United States v. Stewart, 729 F.3d 517 (6th Cir. 2013)
United States v. Gurr, 471 F.3d 144 (D.C. Cir. 2006)

IV. WHETHER DEFENDANT'S FINE SHOULD BE VACATED WHERE HE WAIVED HIS PROCEDURAL CHALLENGE AND DID NOT DISPUTE HIS ABILITY TO PAY A FINE

Gall v. United States, 552 U.S. 38 (2007)
United States v. Wohlman, 651 F.3d 878 (8th Cir. 2011)

Appellate Case: 22-1801 Page: 10 Date Filed: 08/24/2022 Entry ID: 5190712

STATEMENT OF THE CASE

Unlike the imagined "employment contract breach" case that defendant portrays, Br. 2, 4,[1] this case concerns a conspiracy to engage in economic espionage against an American company for the benefit of the People's Republic of China ("PRC"). In doing so, defendant Haitao Xiang violated the Economic Espionage Act of 1996, enacted by Congress to "safeguard our national security." *United States v. Hsu*, 155 F.3d 189, 195 (3d Cir. 1998) (quotation marks omitted).

Xiang admitted his participation in this conspiracy and pleaded guilty. Xiang's economic espionage was prevented, at least in part, because U.S. Customs and Border Protection, acting on information from the FBI and using longstanding border-search authority, intercepted stolen trade secrets Xiang was attempting to take with him to China to benefit the PRC.

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[1] "Br." refers to defendant's opening brief. "A." refers to the addendum to defendant's brief. "R. Doc." refers to the district court's docket entries. "Tr." refers to the evidentiary hearing transcript (R. Doc. 112). "Sent. Tr." refers to the sentencing transcript (R. Doc. 160).

Appellate Case: 22-1801 Page: 11 Date Filed: 08/24/2022 Entry ID: 5190712

I. Xiang's Admitted Criminal Conduct

From 2008 until June 9, 2017, Xiang, a citizen of the PRC, was employed by The Climate Corporation, which was acquired by Monsanto in 2013. R. Doc. 136, at 3. Xiang worked as an Advanced Imaging Scientist and Senior Research Applications Engineer. *Id.* at 4. When Xiang began his employment, he signed a contract in which he agreed that he would not use or disclose any of his employer's confidential information for so long as it remained proprietary or protectable as confidential or trade secret information, except as necessary for the performance of his employment duties. *Id.* He also agreed that, at the termination of his employment, he would return all copies of all documents and files, including electronic documents and files, that were provided to him or created by him pursuant to his employment duties. *Id.* at 4-5.

While employed by Monsanto, Xiang worked on a project known as the Nutrient Optimizer, which is a proprietary predictive algorithm designed to assist farmers in the optimal application of plant nutrients through a web-based digital framing software platform. *Id.* at 4. Xiang knew that the Nutrient Optimizer was a

Appellate Case: 22-1801 Page: 12 Date Filed: 08/24/2022 Entry ID: 5190712

trade secret of Monsanto. *Id.* Monsanto maintained the Nutrient Optimizer within a computer system that required multiple factor login identification credentials and limited access to individuals who needed access to perform their employment duties. *Id.* at 5.

Beginning by mid-2015, Xiang began discussions with individuals in the PRC about applying for a job in the PRC and joining the Chinese Academy of Sciences. *Id.* The Academy is a ministry under the State Council, the highest executive body of the PRC. *Id.*

In February 2016, while his discussions about potential employment in China were ongoing, Xiang downloaded the Nutrient Optimizer from Monsanto's computer system to his work laptop computer. *Id.* at 8. He also transferred the Nutrient Optimizer onto a Micro SD Card. *Id.* On March 14, 2016, Xiang conducted the following Google searches from a Monsanto computer:

- "company information to the third party";
- "as evidence to accuse me";
- "can use it against me in the future";
- "I don't want it to be an evidence"; and

- "to be a piece of evidence that."

Id.

The following month, Xiang travelled to China to interview for a position and to meet recruiters from China's Hundred Talents Program, which seeks to recruit high-level scientific talent primarily among Chinese nationals working abroad. *Id.* at 6, 8. On August 18, 2016, Xiang received an email from a PRC recruiter informing Xiang that he had been selected as a 2016 Chinese Academy of Sciences Hundred Talents Program Technical Talent. *Id.* at 8.

On May 24, 2017, Xiang verbally notified Monsanto of his intent to resign, and the following day, he submitted a letter of resignation. *Id.* On, June 9, 2017, Xiang's last day of employment with Monsanto, he signed an exit agreement and a Termination Certification. *Id.* Xiang certified that he did not have in his possession, and had not failed to return, any physical or intellectual property belonging to The Climate Corporation. *Id.* In his exit interview, Xiang stated that he had not retained any confidential business information on any devices or computers and that he did

Appellate Case: 22-1801 Page: 14 Date Filed: 08/24/2022 Entry ID: 5190712

not have any company property physically or electronically stored in any location. *Id.* at 8-9.

The next day, Xiang travelled to O'Hare International Airport for a one-way flight to Shanghai. *Id.* at 9. As he prepared to board his flight, U.S. Customs and Border Protection ("CBP") officers met him on the jetway. *Id.* The officers interviewed Xiang and conducted a search of his checked and carry-on luggage, which led to the detention of several electronic devices, including a laptop computer. *Id.* In a subsequent review of the laptop, federal law enforcement agents found the Micro SD Card, which contained the Nutrient Optimizer. *Id.*

While Xiang's devices were detained, he was permitted to board his flight. Xiang went to China where he worked as a Hundred Talents Program member for the Chinese Academy of Sciences and the PRC and operated a scientific lab where he conducted agricultural research. *Id.* As Xiang would later admit: "By taking the Nutrient Optimizer from [The Climate Company], transferring it to the Micro SD Card, and attempting to take the Micro SD Card to the PRC, [Xiang] intended and knew that the trade secret would

Appellate Case: 22-1801 Page: 15 Date Filed: 08/24/2022 Entry ID: 5190712

benefit the [Chinese Academy of Sciences], a foreign instrumentality[,] and the PRC, a foreign government." *Id.*

II. The Investigation of Xiang

On June 5, 2017, five days before Xiang left the United States, Anne Luther, a Senior Investigator for Monsanto's Security Team, contacted FBI Special Agent Jaret Depke with concerns about Xiang. Tr. 7. She informed SA Depke that Xiang had submitted his resignation to leave Monsanto; that he had conducted suspicious Google searches suggesting a plan to provide company information to a third party; that he had sent packets of information to Nercita, a Chinese competitor of The Climate Corporation; and that he had also sent confidential Monsanto information from his work email to his personal email account. Tr. 7-8.

Luther also informed SA Depke that Xiang had had significant communications with a former Monsanto scientist whom SA Depke was familiar with from an earlier FBI investigation. Tr. 9-10. That former Monsanto scientist, also a national of the PRC, had taken his work laptop on a trip to China where he interviewed for and accepted a position at China National Seed, a direct competitor to Monsanto.

Appellate Case: 22-1801 Page: 16 Date Filed: 08/24/2022 Entry ID: 5190712

Tr. 10. Subsequent investigation revealed that, before he left, he downloaded 63 documents containing Monsanto's trade secrets into a personal cloud storage system, and he sent numerous emails containing Monsanto confidential information from his work email to his personal email. *Id.*

After receiving this information, SA Depke opened a national security investigation and began to investigate Xiang. Tr. 11, 14-15, 68. On June 8, 2017, SA Depke met with Luther a second time. Tr. 12. She told him that Monsanto had determined that, in 2008, while working for The Climate Corporation, Xiang had misrepresented himself as a University of Illinois student to a U.S. technology company that provides advanced imaging and analysis to other companies. *Id.*

III. The Border Search

After his June 8th meeting with Luther, SA Depke reached out to CBP Officer Art Beck, who served with SA Depke on both the Counterintelligence Squad and the Joint Terrorism Task Force in St. Louis. Tr. 14, 92-93. SA Depke relayed the information he had

Appellate Case: 22-1801 Page: 17 Date Filed: 08/24/2022 Entry ID: 5190712

gathered and explained that he suspected Xiang might be involved in stealing trade secrets. Tr. 14-15, 93-95.

Among its duties, CBP is charged with "ensur[ing] the interdiction of persons and goods illegally entering or exiting the United States." 6 U.S.C. § 211(c)(2); *see also id.* § 211(c)(9). CBP thus has a responsibility not to allow contraband, such as stolen trade secrets, to cross the border and to prevent cross-border crimes, such as economic espionage.

Consistent with this responsibility, Officer Beck placed a travel notification into a CBP computer system. Tr. 15, 94-96. A travel notification alerts any CBP officer who comes into contact with a subject at a border crossing. Tr. 95-96. Placing a travel notification into the system also allows the originating officer to receive a notification if the subject books international air travel. Tr. 96.

When Officer Beck placed a travel notification for Xiang, Officer Beck was immediately notified that Xiang had purchased a one-way ticket to travel from O'Hare Airport to China for the morning of June 10, 2017, which was the day after Xiang's scheduled exit interview at Monsanto. Tr. 15-17, 96-97.

Appellate Case: 22-1801 Page: 18 Date Filed: 08/24/2022 Entry ID: 5190712

On June 9, 2017, after Xiang's exit interview, SA Depke met with the Monsanto employees who had been present at the exit interview. Tr. 21. The Monsanto employees reported that Xiang had appeared extremely nervous and blatantly deceptive when asked about his Google searches, and again when signing documents assuring Monsanto that he had not retained its confidential information. Tr. 20-22, 26-28.

Suspecting that Xiang might be taking stolen trade secrets with him to China, CBP decided to conduct a border search of the items Xiang was taking with him. Tr. 20, 29, 61, 85, 98-103; *see also* 109-10 ("If somebody leaves the country on a one-way ticket and they resign from their job, that's a trend that we normally see and that's a red flag for us."). CBP officers interviewed Xiang at O'Hare Airport and conducted a full inspection of his checked and carry-on luggage. Tr. 31-32, 103-04. The CBP officers found numerous electronic items, including a laptop, a cellular phone, a flash drive, and two SIM cards. Tr. 32. The officers detained the devices to continue the search, while permitting Xiang to board his flight. *Id.*

Appellate Case: 22-1801 Page: 19 Date Filed: 08/24/2022 Entry ID: 5190712

The CBP officers at O'Hare Airport were not well-positioned to determine whether the electronic media contained trade secrets because they lacked the subject-matter expertise as to Monsanto's business, the relationship with Monsanto that would be necessary to confirm whether any documents were trade secrets, and proximity to Monsanto's headquarters. Tr. 36-37, 85-86. They thus requested subject-matter assistance from the Task Force in St. Louis, sending the electronic items to SA Depke and Officer Beck. Tr. 35-37, 85-86, 105-06.

The items arrived in St. Louis three days later, while Officer Beck was on vacation. Tr. 37. SA Depke took possession of the items and immediately consulted with an FBI Chief Division Counsel and attorneys from the U.S. Attorney's Office to ensure that he could appropriately assist CBP with the border search. Tr. 37-38. Assured that he could do so, on June 14, 2017, SA Depke sent the devices to the FBI's Computer Analysis Response Team ("CART"), which began creating forensic images of the devices. Tr. 38-39.

On June 20, 2017, CART provided SA Depke with forensic copies of three of the devices. Tr. 39. SA Depke immediately began a

Appellate Case: 22-1801 Page: 20 Date Filed: 08/24/2022 Entry ID: 5190712

preliminary review of the material, using keywords such as "confidential" and "trade secret" to identify possible Monsanto documents. Tr. 39-40. SA Depke quickly identified six documents that might contain Monsanto information. Tr. 40. SA Depke printed the six documents and brought them to Monsanto officials, who confirmed that all six documents contained trade secrets. Tr. 40-41.

At this point, it was clear that Xiang's electronic devices could not be permitted to cross the border, and SA Depke seized them as evidence in a criminal investigation. Tr. 81, 106. SA Depke subsequently sought and obtained a search warrant to conduct further searches of the devices. Tr. 41.

IV. The Prosecution and Xiang's Guilty Plea

Xiang was arrested on November 18, 2019, while visiting the United States. *See* R. Doc. 7. Three days later, a grand jury in the Eastern District of Missouri indicted Xiang on eight felony counts. R. Doc. 17. Count I charged Xiang with conspiracy to commit economic espionage, in violation of 18 U.S.C. § 1831(a)(5). Counts II through IV charged him with substantive counts of economic espionage and attempted economic espionage, in violation of 18

Appellate Case: 22-1801 Page: 21 Date Filed: 08/24/2022 Entry ID: 5190712

U.S.C. § 1831(a)(1), (a)(3), and (a)(4). Count V charged Xiang with conspiracy to commit theft of trade secrets, in violation of 18 U.S.C. § 1832(a)(5). And Counts VI through VIII charged him with substantive counts of theft of trade secrets and attempted theft of trade secrets, in violation of 18 U.S.C. § 1832(a)(1), (a)(2), (a)(3), and (a)(4).

1. 18 U.S.C. §§ 1831 and 1832 were enacted as part of the Economic Espionage Act of 1996. In enacting that statute, "Congress recognized 'the importance of developing a systematic approach to the problem of economic espionage' and stressed that 'only by adopting a national scheme to protect U.S. proprietary economic information can we hope to maintain our industrial and economic edge and thus safeguard our national security.'" *Hsu*, 155 F.3d at 195 (quoting legislative history). Congress did so in response to "considerable evidence that foreign governments are using their espionage capabilities against American companies," S. Rep. No. 104-359, at 6-7 (1996), and by doing so, threatening the United States' "vital security interests," H.R. Rep. No. 104-788, at 4, *as reprinted in* 1996 U.S.C.C.A.N. 4021, 4023.

Appellate Case: 22-1801 Page: 22 Date Filed: 08/24/2022 Entry ID: 5190712

2. Xiang moved to suppress the evidence found on his electronic devices. R. Doc. 93. Xiang argued that the district court should not allow "officers to search any electronic devices capable of storing records similar to a cell phone, such as Mr. Xiang's hard drive, under the border exception" to the Fourth Amendment's warrant requirement. *Id.* at 11. In the alternative, Xiang argued that a border search of an electronic device should require reasonable suspicion and that it was lacking in this case. *Id.* at 21-23. Xiang also argued that "[t]he prolonged, ten-day nature of the search of Mr. Xiang's electronic devices far exceeded the scope and duration of a border search, rending [sic] it unreasonable under the Fourth Amendment." *Id.* at 23.

a. Magistrate Judge Bodenhausen held an evidentiary hearing and issued a Report and Recommendation finding that Xiang's motion lacked merit. A. 20, 54; R. Doc. 117, at 3, 37.

Surveying caselaw from five circuits, Judge Bodenhausen found that every circuit to have considered the issue has upheld searches of electronic devices under the border-search doctrine, and no court has required more than reasonable suspicion for such a search. *See* A.

Appellate Case: 22-1801 Page: 23 Date Filed: 08/24/2022 Entry ID: 5190712

30-39; R. Doc. 117, at 13-22. Judge Bodenhausen next found that there was a nexus between the search and border-related activity because the search "was related to an investigation involving the possible exfiltration of trade secret information" and did not involve only "a purely domestic criminal matter." A. 41; R. Doc. 117, at 24. The magistrate judge then explained that *Riley v. California*, 573 U.S. 373 (2014), a case that does not involve the border-search doctrine, does not exempt electronic devices from border searches, observing that "every circuit that has faced this question has agreed that *Riley* does not mandate a warrant requirement for border searches of electronic devices." A. 41.; R. Doc. 117, at 24 (quoting *Alasaad v. Mayorkas*, 988 F.3d 8, 17-18 (1st Cir.), *cert. denied*, 141 S. Ct. 2858 (2021)) (alteration omitted).

Judge Bodenhausen found it unnecessary to determine whether reasonable suspicion was required for the border search in this case "[b]ecause the investigators in this case possessed reasonable suspicion." A. 42; R. Doc. 117, at 25. Judge Bodenhausen noted that, at the time they detained Xiang's electronics at O'Hare Airport, "the FBI and CBP investigators were aware of several key facts and

Appellate Case: 22-1801 Page: 24 Date Filed: 08/24/2022 Entry ID: 5190712

circumstances that, when viewed together, provide[d] sufficient reasonable articulable suspicion to justify a [border] search of Xiang's electronics." A. 43; R. Doc. 117, at 26. Those known facts included:

- "Xiang had recently left his employment with Monsanto";
- "Xiang conducted several suspicious Google searches which involved terms like 'evidence to accuse me,' [and] 'company information to third parties'";
- "Xiang had transferred company information from his company e-mail account to a personal e-mail account";
- "Xiang had been in correspondence with" a former Monsanto employee who "had previously downloaded numerous Monsanto trade secret documents to a cloud account, and sent e-mails containing Monsanto confidential information to a personal e-mail account before leaving the company to work for a Chinese competitor";
- "Xiang had sent packets of information of unknown content to a Chinese competitor of Monsanto";
- while he was an employee of The Climate Corporation, Xiang "misrepresented himself as a University of Illinois student in

Appellate Case: 22-1801 Page: 25 Date Filed: 08/24/2022 Entry ID: 5190712

an attempt to acquire information about a United States imaging company";

- Monsanto employees reported that "Xiang appeared visibly nervous during [his] exit interview when he was confronted with his suspicious Google searches and when he reviewed his termination agreement, which discussed his obligations regarding Monsanto's intellectual property";
- "just one day after his exit interview, Xiang was scheduled to leave the country and travel to China, on a one-way ticket, without his family"; and
- when leaving the country, "Xiang was in possession of numerous electronic devices."

A. 44-45; R. Doc. 117, at 27-28.

Judge Bodenhausen concluded that, "having considered the totality of the facts and circumstances in the record," officers "possessed sufficient reasonable suspicion to conclude that Xiang's electronic devices contained Monsanto trade secret information." A. 47; R. Doc. 117, at 30.

Appellate Case: 22-1801 Page: 26 Date Filed: 08/24/2022 Entry ID: 5190712

Finally, Judge Bodenhausen found that the search had been conducted reasonably. A. 47-53; R. Doc. 117, at 30-36. Judge Bodenhausen found that the FBI's participation in the underlying investigation of Xiang did not render the border search improper, and he found that "CBP, not the FBI, made the ultimate decisions" regarding the search. A. 48; R. Doc. 117, at 31. Judge Bodenhausen further found that the duration of the search was reasonable. A. 48-51; R. Doc. 117, at 31-34. And he concluded that the conduct of the border search of Xiang's electronic devices was "constitutionally reasonable." A. 53; R. Doc. 117, at 36.

b. Xiang filed written objections to the magistrate judge's Report and Recommendation. R. Doc. 84. The district court conducted a "careful *de novo* review," overruled Xiang's objections, adopted the Report and Recommendation in its entirety, and denied Xiang's motion to suppress. A. 9-17; R. Doc. 130.

The district court "agree[d] with Judge Bodenhausen's conclusion that the searches of Defendant's electronic devices fall within the border search exception to the warrant requirement." A. 12; R. Doc. 130, at 4. The district court found that "taken together

Appellate Case: 22-1801 Page: 27 Date Filed: 08/24/2022 Entry ID: 5190712

with his one-way trip to China, the day after he left Monsanto, and his behavior during the exit interview, the culmination of all the facts resides in a reasonable suspicion that Defendant was currently engaging in activity which may violate the law." A. 13; R. Doc. 130, at 5.

The district court also found that Xiang's "disagreement" with the magistrate judge's factual findings was "insufficient to overrule credibility determinations, for example, the finding that Officer Beck was making his decisions as a CBP officer." A. 15; R. Doc. 130, at 7. And the district court agreed with both Judge Bodenhausen's "finding [that] the transfer of the devices was reasonable under the circumstances" and his conclusion that "the amount of time which elapsed" from the detention of the devices at the airport until the search of their contents "was justified, with no prejudice to Defendant." A. 16-17; R. Doc. 130, at 8-9.

3. The parties subsequently reached a plea agreement. *See* R. Doc. 136. Xiang agreed to plead guilty to conspiracy to engage in economic espionage, in violation of 18 U.S.C. § 1831(a)(5), which prohibits conspiring to engage in the theft of a trade secret

Appellate Case: 22-1801 Page: 28 Date Filed: 08/24/2022 Entry ID: 5190712

"intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent." R. Doc. 136, at 1-3. The government agreed to move to dismiss the other seven charges. R. Doc. 136, at 1-2.

Xiang agreed that he "fully" understood "that the maximum possible penalty . . . is imprisonment of not more than 15 years, a fine of not more than $5,000,000, or both." *Id.* at 9. Xiang also agreed to the forfeiture of the devices that were detained by CBP at O'Hare Airport and later seized by SA Depke. *Id.* at 2.

4. The Probation Office prepared a Presentence Investigation Report. R. Doc. 148. Based on interviews with Xiang and its review of relevant documents, the Probation Office found that Xiang and his wife had a seven-figure net worth. *Id.* at 15-16. The Probation Office concluded that, "[b]ased upon the defendant's current financial condition, it does appear that the defendant has the ability to pay a fine." *Id.* at 16.

At his sentencing hearing, Xiang told the district court that he had been "feeling shame" since he was arrested and wanted to "repent [his] wrongdoings." Sent. Tr. 35. He said that "most of all,"

Appellate Case: 22-1801 Page: 29 Date Filed: 08/24/2022 Entry ID: 5190712

he wanted "to apologize to the Government and the Court of this country." *Id.*

The district court found that the applicable Sentencing Guidelines range—10-16 months in prison—"was considerably lower than it should be" for Xiang's crime. Sent. Tr. 36-37. The court observed:

> It's not a crime just against a corporation. The nature of the crime is far more significant than that.
>
> The offense is entitled "Conspiracy to Commit Economic Espionage," and that type of offense is far reaching and does far greater harm than just on [Monsanto]. Those trade secrets affect a far greater group of people. They affect the nation. I would go so far to say it's an offense that has global impact in its occurrence.
>
> It's not a little crime.

Id. at 37.

The district court accordingly sentenced Xiang to 29 months in prison and a fine of $150,000. Sent. Tr. 37-38. The court then asked the defense if it had "[a]nything else" to raise. *Id.* at 41. Defense counsel responded: "No, your Honor." *Id.*

Appellate Case: 22-1801 Page: 30 Date Filed: 08/24/2022 Entry ID: 5190712

SUMMARY OF THE ARGUMENT

Xiang's challenges to the border search, which interrupted his admitted conspiracy to commit economic espionage for the PRC, are unsupported by any authority.

1. Under the longstanding border-search doctrine, travelers entering or exiting the country are subject to warrantless searches of their persons and of property they intend to take across the border. Consistent with this longstanding principle, numerous courts have held that warrantless searches of electronic devices, such as those Xiang attempted to take to China, are permissible. No court has held to the contrary.

Moreover, the search in this case, which interrupted cross-border criminal activity and stopped, at least in part, an economic espionage plot for the benefit of the PRC, was closely tethered to the purposes underlying the border-search doctrine, which include both countering cross-border crime and protecting national security.

2. This Court need not decide whether the search of Xiang's electronic devices required reasonable suspicion because, even if it did, the government easily met that standard. Xiang provides no

basis for this Court to set aside the findings of the district court that officials had an objectively reasonable basis to suspect that Xiang was seeking to exfiltrate to the PRC stolen trade secrets contained on his electronic devices.

3. A wealth of case authority holds that CBP may use information from other law enforcement agencies, such as the FBI, in deciding who and what should be searched at the border and may utilize assistance from another agency in identifying material that constitutes contraband or evidence of a crime. Indeed, Xiang's contrary argument—that CBP was required to allow Xiang to take stolen trade secrets from the United States to China because (1) CBP's (numerous) bases for suspecting Xiang came initially from the FBI, and (2) CBP could not practically identify the stolen trade secrets without assistance from the FBI—would greatly impair border security and risk grave harm to our national security.

There is similarly ample caselaw supporting the commonsense notion that electronic devices detained at a point of entry may be taken to an alternative location for review, particularly given the specialized equipment and expertise that may be needed. The

Appellate Case: 22-1801 Page: 32 Date Filed: 08/24/2022 Entry ID: 5190712

district court correctly determined that the timeframe for the search was reasonable and did not prejudice Xiang. Moreover, Xiang has identified no violation of CBP procedures, and, in any event, any such regulatory error would not support suppression.

4. Finally, even if Xiang could establish a Fourth Amendment violation—and he cannot—suppression would be unwarranted because officials acted in good faith in reasonable reliance on precedent.

5. Xiang's sentencing claim also lacks merit. In his plea agreement, Xiang waived his right to appeal any alleged procedural errors in the imposition of a fine. His claim that the district court committed a procedural error in imposing a fine as part of his sentence should therefore be rejected as waived. Even if Xiang had not waived this claim, this Court could review it only for plain error because Xiang did not lodge an objection below. And this Court has made clear that it will not find plain error where, as here, the defendant has failed to establish that he cannot pay a fine.

ARGUMENT

I. The District Court Correctly Denied Defendant's Motion To Suppress

Appellate Case: 22-1801 Page: 33 Date Filed: 08/24/2022 Entry ID: 5190712

A. Standard of Review

On appeal from the denial of a motion to suppress, this Court reviews the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Moreno*, 988 F.3d 1027, 1031 (8th Cir. 2021). This Court will "affirm unless the denial of the motion is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake was made." *Id.* (quotation marks omitted).

B. The Government Conducted a Lawful Border Search of the Electronic Devices Xiang Sought To Take to China

Pursuant to the border-search doctrine, "those entering and leaving the country may be examined as to their belongings and effects." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 63 (1974). Border searches "are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

"It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States v. Flores-Montano*,

Appellate Case: 22-1801 Page: 34 Date Filed: 08/24/2022 Entry ID: 5190712

541 U.S. 149, 153 (2004). Indeed, "inherent in national sovereignty are the overarching rights of a nation to defend itself from outside threats, to act in relation to other nations, and to secure its territory and assets." *United States v. Oriakhi*, 57 F.3d 1290, 1296 (4th Cir. 1995). The ability to conduct warrantless searches of people and property entering or leaving the United States serves the need for "national self-protection." *Carroll v. United States*, 267 U.S. 132, 154 (1925).

The border-search doctrine is a "longstanding, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained" for a search. *Ramsey*, 431 U.S. at 621. The Supreme Court has explained that the "longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself." *Id.* at 619.

This history reflects an understanding that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). The government's

Appellate Case: 22-1801 Page: 35 Date Filed: 08/24/2022 Entry ID: 5190712

interests are at their "zenith at the international border," *Flores-Montano*, 541 U.S. at 152, while a traveler's "expectation of privacy [is] less at the border than in the interior," *Montoya de Hernandez*, 473 U.S. at 539. Consequently, "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is . . . struck much more favorably to the Government at the border." *Id.* at 540.

This Court has accordingly recognized that "the Government's sovereign authority to protect itself justifies a warrantless search without probable cause of persons crossing the United States border and of their personal effects." *United States v. Udofot*, 711 F.2d 831, 839 (8th Cir. 1983). Where a passenger is travelling internationally, an airport is "the functional equivalent of a border." *Id.* at 840. And, as this Court has explained, "the rationale behind [the border-search doctrine] applies with equal force to persons or objects leaving the country" as to those entering. *Id.* at 839.

1. Electronic Devices Are Not Exempt from the Border-Search Doctrine

All persons and property entering or exiting the United States are thus subject to border search, and every circuit that has

Appellate Case: 22-1801 Page: 36 Date Filed: 08/24/2022 Entry ID: 5190712

considered the matter has concluded that the border-search doctrine permits the warrantless search of electronic devices such as computers and cell phones. *Alasaad v. Mayorkas*, 988 F.3d 8, 16-21 (1st Cir. 2021); *United States v. Linarez-Delgado*, 259 F. App'x 506, 508 (3d Cir. 2007); *United States v. Ickes*, 393 F.3d 501, 505-06 (4th Cir. 2005); *United States v. Stewart*, 729 F.3d 517, 525-26 (6th Cir. 2013); *United States v. Cotterman*, 709 F.3d 952, 960-68 (9th Cir. 2013) (en banc); *United States v. Williams*, 942 F.3d 1187, 1190 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 235 (2020); *United States v. Touset*, 890 F.3d 1227, 1231-37 (11th Cir. 2018); *see also United States v. Molina-Isidoro*, 884 F.3d 287, 292-93 (5th Cir. 2018) (affirming denial of motion to suppress and stating that no court has "required a warrant even for forensic searches [of electronic devices] occurring at the border"); *United States v. Wanjiku*, 919 F.3d 472, 486-88 (7th Cir. 2019) (affirming denial of motion to suppress and stating that "agents acted lawfully because they possessed reasonable suspicion" that "a search of [defendant's] electronic devices would reveal

Appellate Case: 22-1801 Page: 37 Date Filed: 08/24/2022 Entry ID: 5190712

evidence of criminal activity involving minors") (quotation marks omitted).

As the Seventh Circuit explained this year, "[n]o court has ever required more than reasonable suspicion for a border search" of an electronic device or anything else. *United States v. Skaggs*, 25 F.4th 494, 500 (7th Cir. 2022); *accord Alasaad*, 988 F.3d at 17-18 ("Every circuit that has faced this question" has held "that neither a warrant nor probable cause is required for a border search of electronic devices."). Indeed, every circuit to consider the issue has found that at least some searches of electronic devices do not require individualized suspicion at all. *See Alasaad*, 988 F.3d at 19.

Against this overwhelming weight of authority, Xiang argues that this Court should be the first to find that electronic devices are exempt from warrantless border searches. Xiang relies on the Supreme Court's ruling in *Riley v. California*. But "[e]very circuit that has faced this question has agreed that *Riley* does not mandate a warrant requirement for border searches of electronic devices." *Alasaad*, 988 F.3d at 17; *accord United States v. Cano*, 934 F.3d 1002, 1015 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 2877 (2021);

Wanjiku, 919 F.3d at 483-84; *United States v. Kolsuz*, 890 F.3d 133, 147 (4th Cir. 2018); *United States v. Vergara*, 884 F.3d 1309, 1312 (11th Cir. 2018). And for good reason.

The border-search doctrine is markedly different from the search-incident-to-arrest exception to the Fourth Amendment warrant requirement at issue in *Riley*. *See*, *e.g.*, *Cano*, 934 F.3d at 1015 ("here we deal with the border search exception—not the search incident to arrest exception—and the difference in context is critical"); *United States v. Laynes*, 481 F. Supp. 3d 657, 664 (S.D. Ohio 2020). The search-incident-to-arrest exception permits a warrantless search of the person and the immediate vicinity of the arrestee. That is fully consistent with the limited purposes of that exception, which are to locate any weapons that might endanger the arresting officer and to prevent the destruction of evidence. *See Riley*, 573 U.S. at 383. As the Supreme Court explained in *Riley*, "there are no comparable risks" of harm to the arresting officer or destruction of evidence "when the search is of digital data." *Id.* at 386.

The border-search doctrine, by contrast, serves different and broader purposes, including protecting the nation's core sovereignty in controlling the entry and exit of persons and property to protect national security and to detect threats to the citizenry. *See*, *e.g.*, *Udofot*, 711 F.2d at 839. Unlike with searches incident to arrest, the purposes underlying the border-search doctrine apply with full force to searches of electronic media, which can contain child pornography or, as in this case, stolen material that would facilitate economic espionage against the United States if transferred beyond our borders. *See*, *e.g.*, *Touset*, 890 F.3d at 1235 ("'digital' child pornography poses the same exact 'risk' of unlawful entry at the border as its physical counterpart"). In short, "*Riley* did not diminish the Government's interests in protecting the border or the scope of the border search exception," *United States v. Saboonchi*, 48 F. Supp. 3d 815, 819 (D. Md. 2014), because "warrantless electronic device searches are essential to the border search exception's purpose of ensuring that the executive branch can adequately protect the border," *Alasaad*, 988 F.3d at 17; *accord Wanjiku*, 919 F.3d at 484 (explaining that neither *Riley* nor *Carpenter v. United States*, 138 S.

Ct. 2206 (2018), "addresses searches at the border where the government's interests are at their zenith"). A warrant requirement "would hamstring the [government's] efforts to prevent border-related crime and protect this country from national security threats." *Alasaad*, 988 F.3d at 17.

Searches at the border are "not subject to the warrant provisions of the Fourth Amendment." *Ramsey*, 431 U.S. at 617. Routine border searches require no individualized suspicion, and even the most intrusive searches at the border require only reasonable suspicion. For example, this Court has held that the strip search and X-ray examination of passengers at the border was justified by reasonable suspicion. *United States v. Oyekan*, 786 F.2d 832, 837-38 (8th Cir. 1986). This Court observed that the Supreme Court had found reasonable suspicion to justify an arguably far more intrusive border search. *Id.* at 838 (citing *Montoya de Hernandez*). The search of Xiang's electronic devices also did not require a warrant.

"[I]t is telling that no post-*Riley* decision . . . has required a warrant for a border search of an electronic device." *Molina-Isidoro*,

Appellate Case: 22-1801 Page: 41 Date Filed: 08/24/2022 Entry ID: 5190712

884 F.3d at 292. This Court should decline Xiang's invitation to become the first.[2]

2. Xiang Was Subject to a Lawful Border Search

When Xiang approached his international flight to leave the United States, he subjected himself and the property he brought with him to a border search. Xiang's contrary arguments lack merit.

1. Xiang first argues that border searches are "limited to enforcing immigration laws and searching for physical objects subject to customs laws." Br. 28 (bolding omitted). This argument is made up out of whole cloth and has no support in any authority. As explained above, every court to consider the matter has found that

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[2] In the second of two amicus briefs filed in this case, amici argue that a higher standard should apply because of First Amendment interests. Because Xiang does not raise this argument, this Court should not consider it. *See Nebraska ex rel. Bruning v. Dep't of Interior*, 625 F.3d 501, 512 n.10 (8th Cir. 2010) (collecting cases). In any event, amici's argument is foreclosed by this Court's holding that the First Amendment can lead to greater protection than the Fourth Amendment "only" where a seizure constitutes a "prior restraint[]." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1240 (8th Cir. 1990). In the specific context of border searches of electronic devices, amici's argument has been rejected by at least three circuit courts and adopted by none. *See Alasaad*, 988 F.3d at 21-23; *Ickes*, 393 F.3d at 507; *United States v. Arnold*, 533 F.3d 1003, 1010 (9th Cir. 2008).

Appellate Case: 22-1801 Page: 42 Date Filed: 08/24/2022 Entry ID: 5190712

the border-search doctrine permits the search of electronic data resident on a device that a traveler seeks to take across the border.

Xiang relies on *Boyd v. United States*, 116 U.S. 616, 623 (1886), which distinguished searches for evidence from searches for contraband, fruits of a crime, or instrumentalities of crime. Br. 30. But *Boyd*'s holding on this point was overruled by *Warden v. Hayden*, 387 U.S. 294 (1967). *See United States v. Saddler*, 19 F.4th 1035, 1039 (8th Cir. 2021) (explaining that, in *Hayden*, "the Supreme Court did away with 'the distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband.'") (quoting *Hayden*, 387 U. S. at 301).

In *Hayden*, the Supreme Court "reject[ed] the distinction" made "by some [earlier] cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband" because that distinction was "based on premises no longer accepted as rules governing the application of the Fourth Amendment" and was "wholly irrational." *Hayden*, 387 U.S. at 300-02. Thus, the distinction between contraband and documentary evidence of a crime that Xiang urges on this Court "is without legal basis." *United*

Appellate Case: 22-1801 Page: 43 Date Filed: 08/24/2022 Entry ID: 5190712

States v. Gurr, 471 F.3d 144, 149 (D.C. Cir. 2006); *accord Alasaad*, 988 F.3d at 20; *Kolsuz*, 890 F.3d at 147 n.7.

Moreover, even in the one modern case that, *contra Hayden*, relied on *Boyd* and applied its "wholly irrational" distinction, *Hayden*, 387 U.S. at 302, the court did not limit the search to *physical* contraband. *See Cano*, 934 F.3d at 1014 ("We find no basis for the proposition that the border search exception is limited to searching for physical contraband."). It permitted a border search of electronic data for "*digital contraband*," such as "'stolen'" material. *Id.* at 1014, 1018 (quoting *Boyd*, 116 U.S. at 623). The border search in this case was a permissible search for stolen trade secrets. The stolen trade secrets were also the fruits of a crime, *see* 18 U.S.C. § 1832(a)(1)-(2), and the devices were instrumentalities of Xiang's crime. Thus, although it should not matter,[3] the search in this case was not for "mere evidence." *Hayden*, 387 U.S. at 301.

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[3] *See, e.g., Alasaad*, 988 F.3d at 21 ("We cannot agree with its narrow view of the border search exception because *Cano* fails to appreciate the full range of justifications for the border search exception beyond the prevention of contraband itself entering the country.").

2. Xiang next argues that the search lacked a nexus to any of the purposes underlying the border-search doctrine. Br. 31. This is wrong. As an initial matter, CBP officers have "the authority to search and review a traveler's documents and other items at the border when they reasonably suspect that the traveler is engaged in criminal activity, even if the crime falls outside the primary scope of their official duties." *United States v. Levy*, 803 F.3d 120, 124 (2d Cir. 2015); *see also Gurr*, 471 F.3d at 149 (upholding border search for evidence of financial institutions fraud). But, in any event, the search in this case, which prevented the export of stolen trade secrets and interrupted Xiang's economic espionage plot, had an extremely close nexus to the border-search doctrine's purposes of disrupting cross-border crime and protecting national security.

Xiang can contend otherwise only by repeatedly mischaracterizing this case as a contract dispute. Contrary to Xiang's assertion, SA Depke was never "investigating an employment contract breach," Br. 4; nor was he motivated by "concerns that [Xiang] would somehow breach the Termination Contract [that Monsanto] had not yet given him," *id.* at 6.

Appellate Case: 22-1801 Page: 45 Date Filed: 08/24/2022 Entry ID: 5190712

From its inception, this was a national security investigation based on evidence suggesting that Xiang was engaged in felony theft of trade secrets and economic espionage. The search in this case, which the magistrate judge correctly found "was related to an investigation involving the possible exfiltration of trade secret information," A. 41; R. Doc. 117, at 24, was thus firmly tethered to at least two core purposes of the border-search doctrine—protecting national security and disrupting transnational crime.

Xiang relies (Br. 33) on *United States v. Aigbekaen*, but that case recognized that a border search of an electronic device is permissible where, *inter alia*, it "bears some nexus to . . . protecting national security . . . or disrupting efforts to export or import contraband." 943 F.3d 713, 721 (4th Cir. 2019). Similarly, the First Circuit has held that border searches of electronic devices "for evidence of either contraband or a cross-border crime further[] the purposes of the border search exception to the warrant requirement." *Alasaad*, 988 F.3d at 19.

The border search here, which interrupted Xiang's economic espionage, was closely tethered to national security, was aimed at

disrupting the export of contraband, and was conducted to look for evidence of a cross-border crime. Under any measure, it had a close nexus to the purposes underlying the border-search doctrine.

3. Xiang further argues that the search was not proper because CBP can only seize "goods" and "merchandise," which "must be tangible." Br. 38-40. This is also wrong.

CBP has the authority to search any "trunk, package, or cargo" travelling internationally on any "vehicle," including an airplane. 19 U.S.C. § 1581; *cf. Ramsey*, 431 U.S. at 621 ("the border-search doctrine [applies regardless of] the mode of transportation across our borders"). And CBP has the responsibility to "ensure the interdiction of persons and goods illegally entering or exiting the United States." 6 U.S.C. § 211(c)(2), (9). Furthermore, CBP has the authority to seize and forfeit any "[m]erchandise exported or sent from the United States or attempted to be exported or sent from the United States contrary to law." 19 U.S.C. § 1595a(d); *see also id.* § 1401(c) (defining "merchandise" as "goods, wares, and chattels of every description"); *Ickes*, 393 F.3d at 505 ("The realization that important national security interests are at stake has resulted in courts giving the

Appellate Case: 22-1801 Page: 47 Date Filed: 08/24/2022 Entry ID: 5190712

broadest interpretation compatible with our constitutional principles in construing the statutory powers of customs officials.") (quotation marks omitted). Given its statutory responsibilities and authorities, CBP could not allow devices containing stolen trade secrets to be taken to China as part of an economic-espionage plot.

CBP thus detained the devices to continue the search to determine whether the devices would be allowed to cross the border to travel to China. The devices were physical, tangible items. *See Cano*, 934 F.3d at 1014 (explaining that "the physicality of the phone itself and the possibility that the phone's contents can be printed or shared electronically gives border officials sufficient reason to inspect it at the border," and thus "cellphones—including the phones' data—are subject to search at the border"). Their status, as exportable or not, depended on their content and necessitated a border search of the devices, which, as explained above, every court to consider the question has found to be legal.

4. Contrary to Xiang's argument, Br. 41-42, the border-search doctrine is not analogous to the use of writs of assistance prior to the American revolution. Writs of assistance "conferred breathtaking

Appellate Case: 22-1801 Page: 48 Date Filed: 08/24/2022 Entry ID: 5190712

powers on the government officials who held them." *Davis v. Dawson*, 33 F.4th 993, 1002 (8th Cir. 2022) (Stras, J., concurring). They allowed for "indiscriminate searches of people and property," including homes. *Id.* And they permitted conscription of private citizens, "premised on the notion that the Crown's interests stood above all others." *Id.*

By contrast, the border-search doctrine does not allow for searches of persons or property in the interior, but only for searches of persons seeking to cross the international border and the property they choose to take with them. And it is premised not on the notion that sovereign interests trump all others, but on the well-established understanding that "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is . . . struck much more favorably to the Government at the border." *Montoya de Hernandez*, 473 U.S. at 540.

C. The District Court Correctly Found that the Search Was Supported by Reasonable Suspicion

This Court need not decide whether officers needed reasonable suspicion to conduct the border search of Xiang's electronic devices because, even if they did, they had ample reasonable suspicion, as the magistrate judge and the district court both found.

1. Neither the Supreme Court nor this Court has ever required reasonable suspicion for a border search of property, as opposed to an intrusive search of the person that implicates personal dignity. As the Eleventh Circuit has observed, "[t]he Supreme Court has never required reasonable suspicion for a search of property at the border, however non-routine and intrusive," and it has been "unwilling to distinguish between different kinds of property" at the border. *Touset*, 890 F.3d at 1233; *accord Levy*, 803 F.3d at 123 n.3 ("Like the Supreme Court . . . we have suggested that the label 'non-routine' should generally be reserved for intrusive border searches of the person (such as body-cavity searches or strip searches), not belongings.").

And "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the

Appellate Case: 22-1801 Page: 50 Date Filed: 08/24/2022 Entry ID: 5190712

person—dignity and privacy interests of the person being searched—simply do not carry over" to property. *Flores-Montano*, 541 U.S. at 152; *see also Touset*, 890 F.3d at 1234 (level of suspicion for a border search is based on "the indignity that will be suffered by the person being searched" rather than the amount of information that may be revealed) (quotation marks omitted). Thus, there is little basis for requiring individualized suspicion for a nondestructive search of property. *See Flores-Montano*, 541 U.S. at 155-56; *Wanjiku*, 919 F.3d at 485 ("For non-destructive searches of property at the border, the [Supreme] Court [has] required no particularized suspicion at all.").

This is particularly true with regard to the search in this case. Far from Xiang's allegation of "unlock[ing] password-protected files and retriev[ing] deleted files and browsing histories," Br. 27, SA Depke merely "conducted limited key-word searches that were closely tailored to the purpose of identifying Monsanto trade secret and confidential information." A. 50; R. Doc. 117, at 33. This type of limited search for business documents does not implicate the dignity interests that has led courts to require reasonable suspicion for highly intrusive searches of the person.

2. Like the district court, this Court need not determine whether reasonable suspicion was required here as it was clearly present. Reasonable suspicion is "considerably less than proof of wrongdoing by a preponderance of the evidence and is obviously less demanding than that for probable cause." *Moreno*, 988 F.3d at 1031 (quotation marks omitted). Reasonable suspicion requires only "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, 572 U.S. 393, 404 (2014) (quotation marks omitted). Officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quotation marks omitted). And "reasonable suspicion need not rule out the possibility of innocent conduct." *Navarette*, 572 U.S. at 403 (quotation marks omitted).

Here, at the time of the border search, officials knew that Xiang (1) had access to Monsanto's valuable, proprietary trade secrets; (2) conducted Google searches regarding how to share commercial information with a third party without leaving "evidence";

Appellate Case: 22-1801 Page: 52 Date Filed: 08/24/2022 Entry ID: 5190712

(3) emailed confidential corporate information to his personal account; (4) sent unknown information to Nercita, a Chinese company that competes with Monsanto; (5) became nervous when asked at his exit interview about the Google searches and again when asked to attest that he had not retained any confidential Monsanto information;[4] (6) booked a one-way trip to China; and (7) sought to take "numerous electronic devices" out of the country. A. 44-45; R. Doc. 117, at 27-28. They were further aware of the PRC's role in economic espionage, including the Thousand Talents Program through which the PRC "provide[d] financial incentives for people who are outside of China to transfer intellectual property or foreign technology." A. 29; R. Doc. 117, at 12 (quotation marks and alterations omitted). And they were aware that Xiang had been deceptive in a previous interaction with a U.S. technology company and that he had been in contact with a former colleague who, the FBI

[4] As the magistrate judge explained, "this case does not involve generic claims of nervousness," but rather nervousness indicated in a non-law enforcement setting "when confronted with specific facts and issues," which is "relevant in assessing the likelihood that [Xiang] might have taken company secrets." A. 46-47; R. Doc. 117, at 29-30.

Appellate Case: 22-1801 Page: 53 Date Filed: 08/24/2022 Entry ID: 5190712

had concluded, had downloaded 63 documents containing Monsanto trade secrets and sent emails containing Monsanto confidential information to a personal account and then left for a job at a direct competitor of Monsanto in China. A. 22, 44; R. Doc. 117, at 5, 27.

This information, taken together, easily meets the standard for reasonable suspicion that Xiang was engaged in cross-border criminal activity and that his devices contained stolen trade secrets. Compare, for example, the Ninth Circuit's en banc decision in *Cotterman*. There, the court found that (1) the defendant's 15-year-old conviction, combined with the fact that (2) he was returning to the United States from Mexico, "a country associated with sex-tourism," and (3) he was travelling with a "collection of electronic equipment," together "gave rise to reasonable suspicion of criminal activity." 709 F.3d at 968-69 (quotation marks omitted)

Here, as in *Cotterman*, there was: (1) connection to criminal activity—Cotterman's 15-year-old conviction and Xiang's far more recent Google searches about how to get away with conveying corporate information to a third party; (2) travel involving a country frequently connected with the crime at issue—Mexico in *Cotterman*,

Appellate Case: 22-1801 Page: 54 Date Filed: 08/24/2022 Entry ID: 5190712

the PRC in this case; and (3) a substantial amount of electronic media. But here there was much more—Xiang had emailed confidential corporate information to his personal account; he had sent information to a competitor in China; and he had become visibly nervous when asked about the Google searches and again when asked to attest that he had not taken confidential information from Monsanto. *See Wanjiku*, 919 F.3d at 488 (observing that both "nervous or unusual conduct" and "tips from informants" may support reasonable suspicion and finding it suspicious that defendant "appeared visibly nervous").

In response, Xiang attempts "a 'divide-and-conquer' analysis of each fact and circumstance." A. 13; R. Doc. 130, at 5. But the applicable "totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.'" *United States v. Quinn*, 812 F.3d 694, 698 (8th Cir. 2016) (quoting *Arvizu*, 534 U.S. at 274). Moreover, Xiang's arguments fail on their own terms.

Xiang all but concedes that the Google searches indicate criminal planning but argues that this evidence was not "current." Br. 47 (emphasis omitted). But the information about the

Appellate Case: 22-1801 Page: 55 Date Filed: 08/24/2022 Entry ID: 5190712

inculpatory Google searches was not at all stale. *See, e.g., Skaggs*, 25 F.4th at 495, 500 (finding a conviction from 1997 supportive of reasonable suspicion for a border search conducted in 2015); *Williams*, 942 F.3d at 1190-91 (that defendant had been banned from Germany in 2011 supported reasonable suspicion for a border search in 2015); *Touset*, 890 F.3d at 1238 (in child pornography border search case, evidence that the defendant "made three separate payments to the Western Union account associated with [a] Philippine phone number was not stale about a year and a half later").[5]

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[5] *United States v. Raymonda*, 780 F.3d 105 (2d Cir. 2015), which Xiang relies on, is not to the contrary. That case concerned the probable-cause standard rather than the lower reasonable-suspicion standard. *See id.* at 113. And the court found probable cause lacking in that case because there was no evidence that the defendant had *ever* accessed child pornography "in circumstances sufficiently deliberate or willful to suggest that he was an intentional 'collector' of child pornography, likely to hoard those images." *Id.* at 117. Had there been such evidence, even in the distant past, there would have been probable cause for the search. *See id.* at 115. Moreover, it is noteworthy that the court in that case did not suppress the fruits of the search because the agents acted in good faith. *Id.* at 117-20.

Appellate Case: 22-1801 Page: 56 Date Filed: 08/24/2022 Entry ID: 5190712

As one would expect with a course of conduct that involves a major career shift, Xiang's plot unfolded over a relatively long period of time. He began discussing employment with individuals in the PRC in mid-2015, interviewed in April 2016, received an offer in August 2016, and left for China in June 2017. And it was logical both that his Google searches about how to commit the crime without leaving evidence that could be used against him would occur early in the plot and that his criminal activity would culminate with him taking trade-secret information when he left the company and the country. The information about the Google searches thus remained highly probative at the time of the search.

Xiang next suggests that it is possible that the suspicious transfers of information to his personal account and to a Monsanto competitor in China might have had an innocent explanation. Br. 45-46. But the reasonable suspicion inquiry "deals with probabilities, not hard certainties, and it need not rule out innocent conduct." *Robbins v. City of Des Moines*, 984 F.3d 673, 679 (8th Cir. 2021) (quotation marks omitted).

Appellate Case: 22-1801 Page: 57 Date Filed: 08/24/2022 Entry ID: 5190712

Xiang similarly argues that "resign[ing] to work for a potential competitor" and "plann[ing] to visit his parents in China" evince "innocent conduct." Br. 49. That Xiang resigned to work for a potential competitor does not alone create reasonable suspicion, but it is relevant to assessing other evidence such as the Google searches and the suspicious transmissions of information. And the government has never alleged that anything about Xiang's parents was relevant to reasonable suspicion. To the contrary, Xiang's one-way ticket suggested that he was *not* travelling simply to visit but was planning to stay and work in China.[6] Xiang admitted as much in his plea agreement. R. Doc. 136, at 9.

Xiang next argues that government agents could not rely on their knowledge regarding the PRC's pattern of inducing economic espionage. Br. 49-51. But this is wrong. Like the Ninth Circuit in

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[6] That a person travels on a one-way ticket may or may not be relevant depending on the nature of the suspected crime. *Compare Williams*, 942 F.3d at 1191 (travel on one-way ticket relevant to reasonable suspicion of terrorism-related offenses), *with United States v. Eustaquio*, 198 F.3d 1068, 1071 (8th Cir. 1999) (travel on one-way ticket was not supportive of inference that traveler was transporting drugs). Here, that Xiang did not have a return trip booked suggested that he planned to remain in China.

Cotterman, this Court has found that the identity of a foreign nation and its connection to a particular type of criminal activity are relevant to the reasonable suspicion determination. *Oyekan*, 786 F.2d at 836 n.5 (finding it relevant that a traveler "arrived on a direct flight from Colombia (a drug source country)"). Other courts have as well. *See, e.g., Williams*, 942 F.3d at 1191 (finding support for reasonable suspicion from the fact that the defendant's "itinerary included Belgium, France, and Morocco, three countries intimately linked to [recent terrorist] attacks"); *Wanjiku*, 919 F.3d at 487-88 (finding support for reasonable suspicion in the fact that defendant was returning from the Philippines, "which was a known destination for sex tourism"); *Touset*, 890 F.3d at 1237 (finding support for reasonable suspicion in government's awareness "that the Philippines was a source country for child pornography").

In sum, there was ample basis for reasonable suspicion in this case, as the district court correctly found.

D. The District Court Correctly Found that the Search Was Conducted Reasonably

1. Xiang argues that he was not subjected to a proper border search because CBP received information from the FBI that informed

Appellate Case: 22-1801 Page: 59 Date Filed: 08/24/2022 Entry ID: 5190712

CBP's decision to conduct a border search and obtained assistance from the FBI in determining whether Xiang's devices contained stolen trade secrets. *See* Br. 57-60. But "[c]ourts have routinely rejected the notion that cooperation among federal agencies renders a border search unlawful." *Gurr*, 471 F.3d at 148. To the contrary, "[o]fficial interagency collaboration, even (and perhaps especially) at the border, is to be commended, not condemned." *Levy*, 803 F.3d at 123. And, of course, CBP is not "prevented by the Fourth Amendment from conducting [a border] search merely because it furthers another federal agency's criminal investigation." *Id.* at 124.

In *Gurr*, for example, the defendant argued that a border search was improper because it was initiated based on FBI suspicions that he was engaged in financial institutions fraud, the FBI agents were on site and advised CBP as to which documents to seize, and the seized documents were immediately given to the FBI. 471 F.3d at 148. The D.C. Circuit rejected those arguments, holding that "it is apparent that the Customs officials conducted a permissible border search and lawfully seized the documents." *Id.* at 150.

Appellate Case: 22-1801 Page: 60 Date Filed: 08/24/2022 Entry ID: 5190712

Similarly, in *United States v. Boumelhem*, the defendant claimed that the search of a cargo container he was seeking to export—a search jointly conducted by customs agents and the FBI—"was unconstitutional because the FBI used Customs as a means of circumventing the warrant requirement that would apply if the FBI were acting on its own." 339 F.3d 414, 423 (6th Cir. 2003). The Sixth Circuit rejected that argument and held that the border search was "not tainted by the participation or direction of the FBI." *Id.* The court concluded that border officers "may properly exercise [their] statutory authority at the behest of FBI." *Id.* at 424.

Gurr and *Boumelhem* are consistent with a long line of authority. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (holding that the participation of a state police officer in a search was consistent with the use of border-search authority); *Levy*, 803 F.3d at 122-24 (CBP officer had reasonable suspicion sufficient to conduct a border search based on information from a DEA task force that the defendant was engaged in stock fraud); *United States v. Alfonso*, 759 F.2d 728, 735 (9th Cir. 1985) (rejecting the argument that "participation in a search by" an FBI agent

Appellate Case: 22-1801 Page: 61 Date Filed: 08/24/2022 Entry ID: 5190712

"nullified the search as a border search" and holding that "there is no reason why the limited forces" of the border agencies "cannot enlist the aid of other forces"); *United States v. Schoor*, 597 F.2d 1303, 1305-06 (9th Cir. 1979) (Kennedy, J.) (finding that a lawful border search occurred after the DEA, suspecting heroin smuggling, requested a border search and specifically "instructed Customs to look for air cargo bills and other documents of radio shipments in defendants' possession").

As these cases indicate, it is perfectly appropriate for CBP to use information provided to it from other government agencies in determining whether to conduct a border search. *See, e.g.*, *United States v. Guzman*, 926 F.3d 991, 997 (8th Cir. 2019) (when "deciding whether there is reasonable suspicion, an officer may rely on information provided by other officers") (quotation marks omitted); *Levy*, 803 F.3d at 123 ("the CBP officer was entitled to rely on information provided by the DEA task force to justify the border search in this case"). And it similarly is appropriate to employ the expertise of another law enforcement agency to determine whether a device contains contraband such as stolen trade secrets. *Levy*, 803

Appellate Case: 22-1801 Page: 62 Date Filed: 08/24/2022 Entry ID: 5190712

F.3d at 123 ("DEA or [FBI] agents frequently assist customs officials in the execution of border searches") (quotation marks omitted). That the collaboration may benefit the FBI's criminal investigation as well as enabling CBP to carry out its own border-control functions is of no moment. *Id.* (validity of border search "does not depend on whether it is prompted by a criminal investigative motive") (quotation marks omitted).

Indeed, Congress empowered CBP officers to seek assistance when conducting border searches. *See* 19 U.S.C. § 507(a)(2). And, as the magistrate judge explained, "it was reasonable for CBP to transfer the devices to the FBI in St. Louis to leverage the subject-matter expertise and close proximity to the victim, which also ensured that any sensitive information uncovered would remain under a tight chain of custody." A. 50; R. Doc. 117, at 33; *see Wanjiku*, 919 F.3d at 477 (CBP officer "turned the phone" detained at the border "over to [Homeland Security Investigations] because the HSI forensics team was better trained than he to identify child pornography").

Appellate Case: 22-1801 Page: 63 Date Filed: 08/24/2022 Entry ID: 5190712

The term "trade secret" is defined by statute to include tangible and intangible commercial information only if (1) the owner has "taken reasonable measures to keep such information secret," and (2) the information derives independent economic value from not being known. 18 U.S.C. § 1839(3). Confirming whether material stored on Xiang's devices constituted trade secrets under this definition required a level of subject-matter expertise that the CBP officers in Chicago did not have, but that SA Depke did, particularly given his proximity to Monsanto, which was uniquely able to identify what measures had been taken to maintain secrecy and whether information uncovered in a search derived economic value contingent on its secrecy. *See* A. 52; R. Doc. 117, at 35 ("Determining what, if any, records reflect Monsanto trade secrets could only reasonably be accomplished by consulting with Monsanto experts.").

2. Additionally, the border-search doctrine "is not rendered inapplicable because a search initiated at a border ultimately is conducted at some physical or temporal remove." *Kolsuz*, 890 F.3d at 142 (citing cases).

Appellate Case: 22-1801 Page: 64 Date Filed: 08/24/2022 Entry ID: 5190712

a. Because of the time, specialization, and equipment that are often needed to conduct searches of electronic devices, including to copy or mirror them so as not to inadvertently alter the original in a way that could affect its evidentiary value, such searches are often conducted at sites removed from the relevant border point.

For example, in *Cotterman*, the defendant's laptop was detained at the border and taken 170 miles away for a forensic search. *See* 709 F.3d at 962. The Ninth Circuit, sitting en banc, found that this was a proper border search because the "computer never cleared customs so entry was never effected." *Id*. The Sixth Circuit followed similar reasoning when it found that an offsite examination of two computers fell within the border-search exception. *Stewart*, 729 F.3d at 526; *accord United States v. Hassanshahi*, 75 F. Supp. 3d 101 (D.D.C. 2014) (laptop computer was detained at Los Angeles International Airport and forensically searched in Virginia); *United States v. Saboonchi*, 990 F. Supp. 2d 536, 548-49 (D. Md. 2014) (electronic devices were detained at border in Buffalo, shipped, imaged, and returned to defendant in Baltimore).

Appellate Case: 22-1801 Page: 65 Date Filed: 08/24/2022 Entry ID: 5190712

b. The district court correctly found that "the transfer of the devices was reasonable under the circumstances" and that "the amount of time which elapsed from seizure to search was justified, with no prejudice to Defendant." A. 16-17; R. Doc. 130, at 8-9. As the magistrate judge explained, both "CBP and the FBI acted with reasonable diligence." A. 48; R. Doc. 117, at 31.

The border search took ten days, which was used to transport the devices to St. Louis and to create forensic images of the devices so the data could be searched without altering the data on the devices. *See* A. 48-49; R. Doc. 117, at 31-32. Xiang provides no basis for overturning the district court's conclusion that this was a reasonable amount of time. *Compare Kolsuz*, 890 F.3d at 136-37 (border search of single phone took one month).

Once it was determined that the devices contained contraband, *i.e.*, stolen trade secrets, the border search was complete, and the devices could not cross the border. At that point, the FBI, under its own authority, seized the devices as instrumentalities of a crime that contained contraband, the fruits of a crime, and evidence of a crime. *See* Tr. 81, 106.

It is well-established that the Fourth Amendment allows a law enforcement officer to seize evidence, instrumentalities, and stolen property before trial based only on probable cause and without a warrant. *See Carroll*, 267 U.S. at 149–52; *Saddler*, 19 F.4th at 1041-42; *compare Robbins*, 984 F.3d at 681 ("seizure was unreasonable in the absence of arguable probable cause"). There must merely be a "nexus . . . between the item to be seized and criminal behavior." *Hayden*, 387 U.S. at 307. Where there is probable cause to believe that items are "fruits, instrumentalities or contraband," that nexus is "automatically provided." *Id.* In the case of evidence of a crime, "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Id.*

SA Depke's decision to seize the evidence was clearly lawful because, once he had confirmed that the devices contained Monsanto's stolen trade secrets, he had probable cause to believe that the materials consisted of fruits of a crime, instrumentalities of a crime, contraband, *and* evidence that would "aid in a particular

apprehension or conviction," any one of which would have been sufficient to support seizure. *Hayden*, 387 U.S. at 307.

Additionally, the magistrate judge (in a Report and Recommendation adopted in full by the district court) correctly found that, "[r]egarding the time from when SA Depke confirmed he had probable cause until he actually applied for a warrant, any such delay was also reasonable" given the need, in a national security investigation, to "consult with experts at the Department of Justice." A. 50-51; R. Doc. 117, at 33-34.

Moreover, the district court was correct that the duration of the search, in addition to being "justified," caused "no prejudice" to Xiang. A. 16-17; R. Doc. 130, at 8-9. Xiang never asked for his devices back, A. 49; R. Doc. 117, at 32, and could not, in any event, have had access to his devices during this period because (1) he was in China and the devices could not cross the border because they contained contraband; (2) the devices would not have been returned to him during the pendency of the criminal investigation because they contained evidence of a crime; and (3) the devices would not be, and were not, returned to him even after the prosecution because, as

instrumentalities of a crime, they were forfeitable. Indeed, Xiang agreed to their forfeiture as part of his plea agreement. R. Doc. 136, at 14-15.

3. Finally, Xiang argues that the border search of his electronic devices "violated CBP's directive in multiple ways," Br. 53, but he does not demonstrate any such violations.

Xiang argues that a search lasting more than five days required supervisory approval. Br. 54. But the record reflects that supervisory approval was obtained. Tr. 65, 118.

Next, Xiang argues that seeking assistance from the FBI violated CBP's directive. Br. 54. But the 2009 directive on which he relies[7] explicitly permits CBP to seek subject-matter expertise from other agencies.

As an initial matter, the directive provides that searches of electronic devices "are essential to enforcing the law at the U.S. border" and "help detect evidence relating to terrorism and other

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[7] In January 2018, CBP issued an updated Directive. *See* www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

national security matters" and can "reveal information about financial and commercial crimes, such as those relating to copyright, trademark and export control violations." CBP Directive No. 3340-049, § 1 (Aug. 20, 2009), www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf.

The policy states that "[t]he use of other federal agency analytical resources outside of CBP and ICE, such as . . . subject matter expertise, may be needed to assist CBP in reviewing the information contained in electronic devices or to determine the meaning, context, or value of information contained in electronic devices." *Id.* § 5.3.2.1. It further provides that CBP officers "may transmit electronic devices or copies of information contained therein to other federal agencies for the purpose of obtaining subject matter assistance when they have reasonable suspicion of activities in violation of the laws enforced by CBP." *Id.* § 5.3.2.3.

These policies were followed. As explained above, CBP had reasonable suspicion that there was unlawful activity involving the transportation of stolen trade secrets across the border; CBP could

not practically identify the trade secrets without assistance; and CBP asked FBI for assistance.

Moreover, as the district court correctly found, a violation of CBP policy would not, in any event, require suppression of evidence. A. 16, R. Doc. 130, at 8. Exclusion based on failure to follow a regulatory procedure is warranted only if (1) the procedure is mandated by the Constitution, or (2) the defendant reasonably relied on the procedure in governing his conduct. *United States v. Caceres*, 440 U.S. 741, 755-56 (1979). Neither of these requirements was satisfied here. A. 16, R. Doc. 130, at 8.[8]

E. Suppression Would Be Unwarranted in Any Event Because Law Enforcement Agents Acted in Good Faith

Even where, unlike here, there has been an unlawful search, a defendant has no automatic right to suppression. *Herring v. United*

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[8] Unlike the procedures Xiang cites in this case, the procedure at issue in *United States v. Laynes*, which prevented agents from searching remotely stored information, implemented a Fourth Amendment safeguard. *See* 481 F. Supp. 3d at 667. Because remotely stored information is not traversing the border, it is not a proper subject of a border search. Thus, as Judge Bodenhausen explained, "Xiang's case is easily distinguished from the situation in *Laynes*." A. 53; R. Doc. 117, at 36 n.20.

States, 555 U.S. 135, 141 (2009); *accord United States v. Barraza-Maldonado*, 732 F.3d 865, 867 (8th Cir. 2013). Because suppression imposes a "costly toll upon truth-seeking and law enforcement objectives" and "offends basic concepts of the criminal justice system" by "letting guilty . . . defendants go free," a court must also find that "the benefits of deterrence . . . outweigh the costs," which are heavy. *Herring*, 555 U.S. at 141 (quotation marks omitted). It is well established that "when the police act with an objectively reasonable good-faith belief that their conduct is lawful . . . the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Davis v. United States*, 564 U.S. 229, 238 (2011) (internal citations and quotation marks omitted). Thus, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.* at 241.

The search in this case was conducted in objectively reasonable, good-faith reliance on the Supreme Court's longstanding border-search precedents. *See United States v. Robinson*, 781 F.3d 453, 459-60 (8th Cir. 2015) (agents reasonably relied on Supreme Court's beeper cases in concluding they could attach a GPS monitor to a car

without a warrant). The search was also consistent with precedent from this Court and the Seventh Circuit, where O'Hare Airport is located. *See Barraza-Maldonado*, 732 F.3d at 868-69 (where search was begun in Arizona, agents could rely on Ninth Circuit precedent). Thus, suppression would not be available even if Xiang's Fourth Amendment arguments had merit.[9] *See, e.g.*, *Wanjiku*, 919 F.3d at 489.

II. Xiang's Procedural Challenge to the Imposition of a Fine Was Waived and Lacks Merit

A. Standard of Review

"A district court's imposition of a fine and the determination of the amount of the fine will not be reversed unless clearly erroneous." *United States v. Allmon*, 500 F.3d 800, 807 (8th Cir. 2007) (quotation marks omitted).

B. Xiang's Argument Lacks Merit

The Sentencing Guidelines provide that "[t]he court shall impose a fine in all cases, except where the defendant establishes

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[9] This Court "may affirm a district court's judgment on any basis supported by the record." *United States v. Bercier*, 506 F.3d 625, 629-30 (8th Cir. 2007) (quotation marks omitted).

that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). The Probation Office found in the Presentence Investigation Report ("PSR") that Xiang and his wife had a seven-figure net worth and that Xiang had the ability to pay a fine. R. Doc. 148, at 15-16. Xiang did not object to those findings, and the district court adopted them along with the rest of the PSR before assessing a fine of $150,000, well below the statutory maximum of $5,000,000. Sent. Tr. 16, 38.

Xiang argues for the first time on appeal that the district court did not state on the record that "it ha[d] considered Dr. Xiang's ability to pay a fine." Br. 60-61. But Xiang waived this claim, and any other procedural challenge to the imposition of a fine, in his plea agreement. And, in any event, this Court's precedent establishes that the district court did not commit plain error.

1. There are two types of sentencing review that an appellate court can undertake. The first is for "significant procedural error," which includes "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly

erroneous facts, or failing to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 51 (2007). The second type of review is for "substantive reasonableness," *id.*, under which the appellate court considers whether "the district court imposed a substantively unreasonable sentence in th[e] case," *United States v. Dautovic*, 763 F.3d 927, 934 (8th Cir. 2014).

In his plea agreement, Xiang "waive[d] all rights to appeal all sentencing issues" except for those explicitly preserved. R. 136, at 12. Regarding procedural review, Xiang preserved the right to seek appellate review of "the Court's determination of the applicable Sentencing Guidelines" and, under certain circumstances, the calculation of his criminal history. *Id.* Regarding substantive review, Xiang preserved the right to seek appellate review only of "the substantive reasonableness of a sentence imposed above the Sentencing Guidelines . . . or the imposition of any fine." *Id.*

Because "plea bargains are essentially contracts," *Puckett v. United States*, 556 U.S. 129, 137 (2009), "a valid and enforceable appeal waiver . . . precludes challenges that fall within its scope." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) (quotation marks and

Appellate Case: 22-1801 Page: 75 Date Filed: 08/24/2022 Entry ID: 5190712

alteration omitted); *accord United States v. Jennings*, 662 F.3d 988, 990-91 (8th Cir. 2011). Xiang's sentencing argument does not fall under any of the exceptions to his broad appellate waiver, and therefore it is waived.

Xiang does not challenge the "determination of the applicable Sentencing Guidelines" or the calculation of his criminal history. R. 136, at 12. And he does not challenge "the substantive reasonableness of . . . the imposition of [a] fine." *Id.* He makes no argument that the fine was disproportionate to the offense or that it was substantively unreasonable in any way. *See* Br. 60-61.

Instead, Xiang argues that the district court did not put its reasoning on the record, which is a procedural rather than substantive objection. *Gall*, 552 U.S. at 51 ("fail[ure] to adequately explain the chosen sentence" and failure to consider statutory factors are types of "procedural error"); *United States v. Wohlman*, 651 F.3d 878, 883, 886 (8th Cir. 2011)*; United States v. Klanecky*, 393 F. App'x 409, 411 (8th Cir. 2010). Xiang's plea agreement does not permit him to argue on appeal, as he does, that the district court committed

Appellate Case: 22-1801 Page: 76 Date Filed: 08/24/2022 Entry ID: 5190712

procedural error in imposing a fine at sentencing. The sentencing argument he raises is waived.

2. Even if he had not waived it, Xiang's argument would not succeed. Xiang did not object to the imposition of the fine, or to the procedures used or the explanations given by the district court at sentencing, even when provided an opportunity by the district court. Sent. Tr. 41. As such, to the extent it was not waived, Xiang's argument was forfeited and "may only be reviewed for plain error." *Wohlman*, 651 F.3d at 883-84 (quotation marks omitted). And where a defendant fails to raise a timely objection in district court, this Court "will find no plain error in a district court's imposition of a fine where the defendant fails to 'show that he could not pay the fine' and 'the record indicates the defendant's ability to pay the adjudged fine.'" *Id.* at 886 (quoting *United States v. Allmon*, 500 F.3d 800, 808 (8th Cir. 2007)).

Xiang has made no argument, either in the district court or in his brief to this Court, that he cannot pay the fine. And the record clearly indicates that he can. The PSR includes a detailed list of the assets and liabilities of Xiang and his wife; it shows that they have a

Appellate Case: 22-1801 Page: 77 Date Filed: 08/24/2022 Entry ID: 5190712

seven-figure net worth; and it concludes that Xiang has the ability to pay a fine. *See United States v. Flannery*, 850 F. App'x 984, 986 & n.2 (8th Cir. 2021); *Klanecky*, 393 F. App'x at 411 n.4 ("the facts reflected in the PSR included these asset and net worth figures, and [defendant] presented no evidence to rebut these findings"). Xiang has never contested any of this. *See United States v. Brooks*, 648 F.3d 626, 629 (8th Cir. 2011) (per curiam) ("Unless a defendant objects to a specific factual allegation contained in the PSR, the court may accept that fact as true for sentencing purposes."); *United States v. Berndt*, 86 F.3d 803, 808 (8th Cir. 1996) ("The defendant has the burden of proving that he cannot pay the fine."). And the district court explicitly adopted the PSR's findings. Sent. Tr. 16. Therefore, even if Xiang had not waived this argument, he would not be able to establish plain error.

Appellate Case: 22-1801 Page: 78 Date Filed: 08/24/2022 Entry ID: 5190712

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

August 23, 2022

SAYLOR A. FLEMING
United States Attorney

Respectfully submitted,

MATTHEW G. OLSEN
Assistant Attorney General
for National Security

/s/ Jeffrey M. Smith
JEFFREY M. SMITH
Appellate Counsel
National Security Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Suite 6500
Washington, DC 20530
(202) 532-0220

Attorneys for the United States

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the United States certifies:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(iii), the brief has 12,972 words proportionally spaced.

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In accordance with Eighth Circuit Rule 28A(h)(2), the brief has been scanned for viruses and is virus free.

/s/ Jeffrey M. Smith

Appellate Case: 22-1801 Page: 80 Date Filed: 08/24/2022 Entry ID: 5190712

CERTIFICATE OF SERVICE

The undersigned attorney certifies that the attached Brief of Appellee was served upon counsel for defendant by serving it through the CM/ECF system on August 23, 2022.

/s/ Jeffrey M. Smith

Appellate Case: 22-1801 Page: 81 Date Filed: 08/24/2022 Entry ID: 5190712