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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASSIE WILL-DARNALL,

Defendant.

Case No.: CR 24–00292 PCP

DEFENDANT'S SENTENCING MEMORANDUM AND PRESENTENCE REPORT OBJECTIONS

Court: Courtroom 8, 4th Floor
Hearing Date: September 3, 2025
Hearing Time: 9:00 a.m.

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INTRODUCTION

Defendant Cassie Will-Darnall respectfully submits this sentencing memorandum to assist the Court in fashioning an appropriate sentence. Ms. Will-Darnall stands convicted of two counts of bank fraud, in violation of 18 U.S.C. § 1344(2), and one count of wire fraud, in violation of 18 U.S.C. § 1343, arising from false statements she made to obtain Paycheck Protection Program ("PPP") loans during the COVID-19 pandemic. She is deeply remorseful for her conduct and ashamed of the choices she made during an especially difficult period in her life.

Ms. Will-Darnall is a divorced single mother, a former teacher, and a former successful businesswoman whose financial stability was severely impacted, in part, by the COVID-19 pandemic and a perfect storm of destabilizing life events. Around the time of the offense, she was quarantined at home, overwhelmed by debt, embroiled in a contentious divorce involving a $1 million settlement and child custody, facing a $1 million civil suit from a developer for breach of contract, and losing the business she had built from the ground up. In desperation, clouded by excessive drinking and mounting financial and emotional stress, she made the regrettable decision to apply for PPP loans, mistakenly believing they would resolve her escalating personal and economic situation. The instant offense is an aberration and wholly out of character with Ms. Will-Darnall's otherwise law-abiding life as a businesswoman, mother, and active, productive member of her community. She is a non-violent, first-time offender who has never been incarcerated, and thus, a significant period of custody is not necessary to deter her.

Probation has calculated an adjusted offense level of 22, with a Criminal History Category of I, resulting in an advisory guidelines range of 41 to 51 months. *See* Presentence Report ("PSR") at ¶ 82. Probation, however, recognizes there are numerous mitigating factors under 18 U.S.C. 3553(a), and recommends a downward variance to 24 months. *See* PSR Sentencing Recommendation at 1.[1] Ms. Will-Darnall appreciates Probation's recommendation and joins its request for a variance.

As discussed below, since the issuance of the final Presentence Investigation Report (PSR), the

[1] Following issuance of the Final PSR, the government conceded that § 2B1.1(b)(17)(A) does not apply. This reduces the applicable guideline range to 33–41 months and, presumably, will also result in a lower sentencing recommendation by Probation, as discussed on the following page.

defense has raised an *ex post facto* concern regarding the application of the 2024 Sentencing Guidelines and an objection under *Kisor v. Wilkie*, 588 U.S. 558 (2019). The defense submits that the 2021 Guidelines Manual applies, and under that version, Ms. Will-Darnall objects to using unrealized "intended loss" to calculate the Guidelines range. Excluding intended loss would reduce her total offense level by two levels under the 2021 Guidelines.

However, § 4C1.1, the Zero Point Offender provision, is not included in the 2021 Guidelines Manual. Although the provision is retroactive and became effective on November 1, 2023, it was enacted after the 2021 Guidelines were adopted but before the 2024 Manual went into effect. Accordingly, Ms. Will-Darnall respectfully requests that the Court apply the Zero Point Offender provision retroactively to the 2021 Guidelines, or grant a variance consistent with § 4C1.1, in accord with Congress's clear intent to give the provision retroactive effect, even though it is not technically part of the 2021 Guidelines.

In the alternative, if the Court is not inclined to adopt the defense position that relying on intended loss from the 2021 version of § 2B1.1 would violate *Kisor v. Wilkie* and declines to grant the requested § 4C1.1 variance or apply it retroactively, the defense respectfully requests that the Court apply the 2024 Guidelines, including the Zero Point Offender adjustment.

PRESENTENCE REPORT OBJECTION

(1) The final PSR notes the defense's objection to the application of U.S.S.G. § 2B1.1(b)(17)(A), which adds two levels if a defendant derives more than $1 million in gross receipts from a financial institution. After the PSR's disclosure, the government advised Probation and the defense that it was withdrawing that argument, but would argue instead that § 2B1.1(b)(10)(C) (sophisticated means) applies. The defense agrees that § 2B1.1(b)(17)(A) does not factually apply. Accordingly, the advisory range should be amended to adjusted offense level 20, or 33–41 months. With Probation's recommended variance, the sentence would be 16 months.

(2) The defense concurs with Probation's finding that U.S.S.G. § 2B1.1(b)(10)(C) (sophisticated means) does not apply.

(3) The defense objects to ¶ 39 of the PSR and Probation's application of the 18-level enhancement under § 2B1.1(b)(1)(J), which is arrived at relying on $9.1 million in intended loss.

Because *ex post facto* concerns require application of the 2021 Guidelines, and under *United States v. Kisor* and *United States v. Castillo*, the Court may not rely on Application Note 3(A) to expand "loss" to mean intended loss, only the $2.8 million actual loss is properly counted. The correct calculation is a 16-level enhancement under § 2B1.1(b)(1)(I).[2]

DEFENSE SENTENCING RECOMMENDATION

Ms. Will-Darnall respectfully submits that the Guidelines should be correctly calculated based on the actual loss in accord with the plain, unambiguous everyday definition of "loss" under § 2B1.1; § 2B1.1(b)(10)(C) sophisticated means does not apply; and a zero-point offender variance or departure is warranted. Accordingly, the adjusted offense level is 18, resulting in an advisory Guidelines range of 27 to 33 months. The defense submits that a Guidelines sentence is not necessary to satisfy the purposes of sentencing outlined in 18 U.S.C. § 3553(a). A downward variance is warranted, and the Court should impose a non-custodial sentence of extended home confinement to allow Ms. Will-Darnall to continue caring for her aging mother and minor child. Alternatively, the defense respectfully requests, as outlined below, that the Court impose a sentence of no more than 12 months and 1 day, in recognition of the mitigating circumstances that justify a variance below the advisory Guideline range.

In support, the defense asks the Court to consider: (1) The correct base offense level is 16 because, under *Kisor v. Wilkie*, the Guidelines must be calculated based on actual loss, and the enhancement under § 2B1.1(b)(10)(C) for sophisticated means does not apply; (2) The nature and circumstances of the offense support a downward variance; (3) Ms. Will-Darnall's personal history and characteristics, including a difficult childhood marked by domestic violence, alcoholism, and abuse, her excessive drinking and mental health issues, contributed to the offense; (4) Her incarceration will impose a hardship on her family; (5) Home confinement or a sentence of 12 months and 1 day, together with a $1.4 million money judgment, is sufficient to promote respect for

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[2] Ms. Will-Darnall did not object to the draft PSR but raises this objection now at sentencing. Sentencing objections are preserved for appeal when timely and specifically presented to the district court, either in writing before sentencing or during the hearing. *United States v. Hammond*, 742 F.3d 880, 884 (9th Cir. 2014). Consistent with that principle, on August 16, 2025, the defense notified government counsel and Probation of its intent to raise this objection at sentencing, thereby affording the government an opportunity to address and brief the issue in advance.

the law and deterrence; and (5) Ms. Will-Darnall is a zero point offender, and a departure or variance is warranted.

BACKGROUND

Cassie Will-Darnall née Skalkos is fifty-three years old. PSR ¶57. She is of Greek ancestry and was born and raised in San Jose, California. PSR ¶58. She is an only child. PSR ¶57. Her parents were schoolteachers. PSR ¶58. The family initially struggled financially, but their circumstances improved after her parents earned master's degrees and became college professors. *Id.* Although she was raised in a middle-class family where her basic needs were met, her childhood was traumatic. Her father was an alcoholic, easily angered, and physically abused both Ms. Will-Darnall and her mother. *Id.* Her mother attempted to protect her from his violent outbursts, but was not always successful. On one occasion, Ms. Will-Darnall suffered injuries as a child when she tried to protect her mother. PSR ¶59. She also witnessed her father's anger toward her mother and the beatings her mother endured for such minor transgressions as failing to iron his clothes to his standards. *Id.* Although the beatings stopped when Ms. Will-Darnall was seven years old, the memory remained. *Id.* She also lacked emotional support and nurturing from her mother, as her friend recalled to Probation. PSR ¶67. Despite these challenges, Ms. Will-Darnall was an active student in high school, playing percussion in the band, serving in student government, and holding her first job as a manager at a pizzeria. She later earned a B.A. in Criminal Justice from San Diego State University. She first tried alcohol at age 13, though it did not become problematic until her mid-20s. In 2011, she married Sheri Darnall in New York. PSR ¶63. Together, they adopted Ms. Will-Darnall's son, who is now eleven years old. *Id.* Ms. Will-Darnall filed for divorce in 2016, which was finalized in September 2018. Ms. Will-Darnall shares custody of her eleven-year-old son, with her ex-wife; however, because her ex-wife suffers from significant mental health issues, friends have observed that her ex-wife would not be able to care for her son on her own adequately. PSR ¶63.

Ms. Will-Darnall has a proven track record of success as a businesswoman. In 2015, she co-founded Rosswood Properties, LLC ("Rosswood"), a company that provided furnished short-term housing for business executives in Santa Clara County. Rosswood operated from approximately 2015 to 2020. PSR ¶77. Its business model relied on leasing vacant units in apartment buildings, furnishing

them, and then subleasing them to corporate clients. *Id.* At its height, Rosswood leased approximately 200 units, employed staff members, including cleaning teams, maintained offices in Santa Clara, and generated significant revenue. Rosswood's sole client was Oakwood Worldwide, one of the largest and most established corporate housing companies in the world. In February 2017, Oakwood was acquired by Singapore-based Mapletree Investments, which resulted in Rosswood losing its only client.[3] This forced Rosswood to back out of several lease agreements, including fifty apartment units it had rented from the developer. As a result, in November 2018, Rosswood and Ms. Will-Darnall were sued by a developer for breach of lease after Rosswood could no longer fulfill its commitment to lease the fifty units due to the loss of its only client. The lawsuit sought nearly $1 million in damages.[4] The litigation was protracted, and Ms. Will-Darnall incurred significant legal fees, which further deepened both her personal and business debt.

In September 2018, Ms. Will-Darnall's divorce, requiring her to pay her ex-wife $1 million, was finalized after two years of litigation.[5] That same month, lenders recorded a default on her childhood home, located at 1868 Rosswood Drive, for unpaid debt. The property was sold at a trustee's sale in 2020, with approximately $865,000 of the proceeds used to settle business debt that was in arrears, resulting in the loss of her childhood home.[6] In November 2019, with Rosswood in litigation and plagued by rumors that it was going out of business, Ms. Will-Darnall attempted to use Alternative Health Services, Inc. to rebrand the company. PSR ¶ 8. She did so to save her business despite having already lost its only client. She remained hopeful because Rosswood still controlled hundreds of units and had secured a lucrative corporate housing opportunity with Apple. In anticipation of fulfilling that contract, she borrowed heavily to furnish new units and expand leasing operations.

However, in March 2020, shelter-in-place orders were issued throughout all Bay Area counties, effectively ending any hope of restoring her business. Ms. Will-Darnall was is in debt to her mother,

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[3] https://www.relocatemagazine.com/serviced-apartments-oakwood-worldwide-acquired-by-mapletree-investments last visited on August 17, 2025.
[4] *See* Bates 1658.
[5] *Id.*
[6] *See* Bates US-0010818.

having taken out a January 2018 loan to buy out her ex-wife. She is also in debt with her business and facing a lawsuit by a developer.

I. The offense conduct

In late December 2019, the first cases of a novel coronavirus, later named COVID-19, were detected in Wuhan, China. The first confirmed U.S. case followed on January 21, 2020. The virus spread rapidly. On March 16, 2020, all six Bay Area counties issued a shelter-in-place order, effectively shutting down all non-essential economic activity, including Ms. Will-Darnall's business, Rosswood. In response to the financial crisis, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which established the Paycheck Protection Program ("PPP") and allocated $349 billion in relief to small businesses affected by the pandemic. PSR ¶¶ 11-16.

Over twelve days, between March 31, 2020, and April 11, 2020, Ms. Will-Darnall first applied for three different PPP loans, all of which were denied in reasonably short order. PSR ¶31. As to Count One, on May 20, 2020, Ms. Will-Darnall submitted a PPP loan application to Cross River Bank, seeking $968,989 under the name Alternative Health Services. PSR ¶ 31. Although her business had been adversely affected by the pandemic, its business operations had ceased when she applied, and the loan application contained materially false information. The loan was funded that day and deposited into Rosswood's Wells Fargo account.

As to Count Two, on July 12, 2020, Ms. Will-Darnall submitted a second PPP loan application in the amount of $1.8 million. PSR ¶ 31. Ms. Will-Darnall's offense was not particularly sophisticated. To support the PPP loan applications, she submitted altered business records that falsely suggested her non-operating business remained active. In total, she received $2,833,544 in PPP loan proceeds. Of that amount, $625,952.60 was later seized from a Vanguard investment account, which shall be returned to the government, leaving approximately $2,207,592. Ms. Will-Darnall primarily used the PPP loan proceeds to pay debts. She used the PPP loan proceeds to repay a $1 million personal loan from her mother, resolve a civil lawsuit through an approximately $200,000 settlement payment, and pay roughly $200,000 in attorneys' fees related to that litigation. The remainder was used to pay down other debts and to cover living expenses.

On August 8, 2023, Ms. Will-Darnall received a target letter from the United States Attorney's

Office advising that she was under investigation for potential wire fraud. On August 21, 2023, the Court appointed the Federal Public Defender to represent her pre-charge. On May 30, 2024, she waived indictment and agreed to proceed by information. On January 15, 2025, she entered an open plea.

ARGUMENT

I. The Correct § 2B1.1 Base Offense Level Is 16, Based on Actual Loss Under *Kisor v. Wilkie*, and § 2B1.1(b)(10)(C) (Sophisticated Means) Does Not Apply

Ms. Will-Darnall's offense conduct ended on March 1, 2021, the last date she submitted any PPP loan application. PSR ¶31. Accordingly, the Court should apply the 2021 version of § 2B1.1 to to determine "loss" in this case-. Under that version, enhancements are pegged to the amount of "loss" exceeding $6,500. Notably, the guideline text makes no mention of "intended" loss. That distinction appears only in Application Note 3(A). As outlined below, the commentary's inclusion of "intended loss" constitutes an impermissible expansion of the guideline text, because the ordinary meaning of the term "loss" does not include "intended loss." Thus, as applied in this case, the Court may only calculate loss based on the PPP loans that Ms. Will-Darnall actually obtained.

The Sentencing Commission promulgates the Guidelines under authority delegated by Congress, and they are subject to congressional review and approval. As such, they are "the equivalent of legislative rules adopted by federal agencies." *United States v. Castillo*, 69 F.4th 648, 655 (9th Cir. 2023). Commentary, by contrast, is not enacted through that process; it is merely the Commission's interpretation of its own regulation. *Id*. Under *Stinson v. United States,* courts historically deferred to such commentary unless "plainly erroneous or inconsistent" with the guideline. 508 U.S. 36, 45 (1993). But *Kisor v. Wilkie*, 588 U.S. 558 (2019), significantly altered that analysis.

Kisor holds that deference to an agency's interpretation of its regulations is appropriate only if, after using all the traditional tools of construction, the regulation is genuinely ambiguous. "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means, and the court must give it effect as it would any law." *Kisor*, 588 U.S.at 575. The reviewing court must consider "the text structure, history, and purpose of the regulation before resorting to deference." *Kisor*, 588 U.S.at 559. If genuine ambiguity remains, the agency's reading

must 'still fall within the bounds of reasonable interpretation.'" *Id.* And even then, it may not be appropriate to defer to an agency's reasonable construction; instead a court must "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* (internal citations omitted); *see id*. at 559 ("not all reasonable agency constructions of those truly ambiguous rules are entitled to deference").

In 2023, the Ninth Circuit in *Castillo* held that *Kisor*'s narrowed *Auer*-deference framework applies to the Sentencing Guidelines. 69 F.4th at 655 ("The more demanding deference standard articulated in *Kisor* applies to the Guidelines' commentary."). Thus, under *Kisor* and *Castillo*, courts cannot defer to the Commission's commentary to expand the scope of clear Guideline text. *Castillo*, 69 F.4th at 662-63. In *Castillo*, the Ninth Circuit concluded that to "'follow *Stinson*'s instruction to treat the commentary like an agency's interpretation of its own rule, we must apply *Kisor*'s clarification of *Auer* deference to *Stinson*.'" *Id*. at 656 (citation omitted).

As the Ninth Circuit explained in *Castillo*, deference to commentary may "raise[] grave constitutional concerns." *Castillo*, 69 F.4th at 663. "[U]nlike the Sentencing Guidelines themselves, the Guidelines' commentary is not required to undergo notice and comment requirements, nor is it subject to any other mandated safeguards to cabin the Sentencing Commission's broad authority." *Id.* Thus, the Sentencing Commission's lack of accountability in its creation and amendment of the commentary raises constitutional concerns when [courts] defer to commentary . . . that expands unambiguous Guidelines, particularly because of the extraordinary power the Commission has over individuals' liberty interests." *Id*. at 663-64.

Applying *Kisor* in *Castillo*, the Ninth Circuit rejected reliance on an application note to § 4B1.2 that expanded the definition of "controlled substance offense" to include inchoate offenses, which were not included in the text of the guideline definition. *Id*. The Ninth Circuit further noted that following *Kisor*, the Sentencing Commission had adopted a proposed amendment to the guideline that would add inchoate offenses to the definition of "controlled substance offense," which the *Castillo* court found "further supports our view that an inchoate offense is a separate crime from the crime conspired about, and that, at the time of Castillo's sentence, the commentary improperly expanded the Guideline's plain language." *Id*. at 663 n.7.

Subsequently, the Ninth Circuit in *United States v. Hackett*, 123 F.4th 1005 (9th Cir. 2024), addressed Application Note 3(A) of U.S.S.G. § 2B1.1 and specifically, whether "loss" can be based on "intended loss," finding that, under plain error review, the district court did not plainly err by applying the intended loss definition from the commentary because neither the Ninth Circuit nor the Supreme Court had definitively resolved the issue, and other circuits were split. *Id.* at 1012-1013. Because the defendant had not raised the issue at sentencing, the *Hackett* panel explicitly declined to address the effect of the *Kisor* decision on the degree of deference courts are to afford the definition of "loss" in the guideline commentary. *Id.* at 1013. Accordingly, this is an issue of first impression, as there is no binding Ninth Circuit authority.

Here, the text structure and purpose of § 2B1.1 make clear that the guideline text increases punishment based solely on the amount of pecuniary economic harm or actual "loss." The structure of § 2B1.1 confirms that "loss" is intended to measure the real, quantifiable harm caused by an economic offense, since the enhancement grid is tied to escalating ranges of actual economic damage. *See Kirilyuk* at 1138 (§ 2B1.1 is driven by the 'the amount of loss *caused by the crime*") (citing *United States v. Gainza*, 982 F.3d 762, 764 (9th Cir. 2020) (for economic crimes, §2B1.1 provides for graduated increases to the base offense level depending on the amount of loss caused by the crime). The guideline at § 2B1.1(b)(1) uses the past-tense verb "exceeded," which reflects a retrospective, factual assessment of the loss caused by the offense. If no funds were disbursed, then no loss "exceeded" any monetary threshold. This phrasing undermines any interpretation that would permit speculative, unrealized intended losses to trigger enhancements; and reflects the Guidelines text focus on actual, completed harm. The 2021 guidelines, which apply here, simply referred to "loss," without further elaboration. Despite this, the commentary, specifically Application Note 3(A), expanded "loss" to mean the greater of actual or intended loss. As in *Castillo*, the Sentencing Commission's post-*Kisor* amendments to expand the definition of "loss" in the guideline text further support the conclusion that "intended loss" is a separate form of harm than "loss," and that the pre-2024 "commentary improperly expanded the Guideline's plain language." 69 F.4th at 663 n.7.

Other circuits have reached differing conclusions regarding reliance on the intended-loss commentary. *United States v. Banks* is instructive. 55 F.4th 246, 258 (3d Cir. 2022). There, the Third

Circuit rejected the intended-loss commentary, holding that "in the context of basic economic offenses, the ordinary meaning of the word loss is the loss the victim actually suffered," not hypothetical losses a defendant intended. *Id.* at 258. The Third Circuit explained that if commentary "sweeps more broadly than the plain language of the guideline," courts cannot reflexively defer. *Id.* That reasoning is especially compelling here because, as in *Banks*, this case involves straightforward economic harm. *Banks* addressed a scheme where false deposits and withdrawals created the appearance of loss, but the victims ultimately suffered no actual pecuniary harm. The Third Circuit rejected reliance on intended loss because the true economic loss was readily identifiable; there was none. Similarly, here, the actual loss is readily identifiable: the PPP loan proceeds Ms. Will-Darnall improperly obtained. This case, like *Banks*, is a basic economic harm case that can and should be measured by actual loss, not by speculative or hypothetical intended amounts.

Hackett is also readily distinguishable on this basis. That case involved a pump-and-dump securities fraud scheme, in which the court calculated a $2.2 million intended loss based on the defendant's ownership of stock that he intended to sell at an artificially inflated (or "pumped") price. The context here, unlike in *Hackett*, is straightforward: the question is how much money Ms. Will-Darnall actually received in PPP loan proceeds to which she was not entitled. That amount is the actual loss, not what she may have hoped, wished for, or intended, which cannot be found in the text of §2B1.1.

Circuits that have continued to defer to the "intended loss" commentary have frequently done so without adequate consideration of *Kisor*, and without adequate regard for the constitutional concerns recognized in *Castillo*. Indeed, while the Ninth Circuit in *Hackett* discussed some of these authorities in its own survey of circuit authority, the Ninth Circuit did not endorse their logic, instead concluding that there was no consensus among the circuits for purposes of plain error review. *Hackett*, 123 F.4th at 1013-14. As one example, the Ninth Circuit cited the Sixth Circuit's holding in *United States v. Smith*, 79 F.4th 790 (6th Cir. 2023), but the *Smith* Court relied in part on the "relevant conduct" definition in § 1B.1.3 to conclude that the term "loss" in § 2B1.1 was ambiguous, even while acknowledging that under its own precedent, "the dictionary definition of the term 'loss' does not contemplate anything close to intended loss." *Id*. at 798. However, reliance on the "relevant

conduct" definition could lead to an internally contradictory outcome, as occurred in *Smith*, and could also effectively allow the expansion of virtually any guideline through its commentary, without a meaningful consideration of the specific guideline text at issue. In the context of the guideline text here, *Smith*'s reliance on the relevant conduct provision of the Guidelines would effectively nullify *Kisor*. Incorporating intended loss through relevant conduct, for a basic economic offense, as here, when the guideline itself refers to past-tense "loss exceeded," invites precisely the sort of commentary-over-text interpretation that *Kisor* rejects.

The *Hackett* court also cited the Tenth Circuit's decision in *United States v. Maloid*, 71 F.4th 795, 808 (10th Cir. 2023), which involved a different guideline provision than the one at issue here. The *Maloid* court held that "[t]he Supreme Court has not abrogated *Stinson* or the deference we have routinely given the Guidelines' commentary," and distinguished *Kisor* in the guideline context. *Id*. at 806-07, 813. That approach, however, conflicts with *Castillo*, which applied *Kisor* to the guidelines and is controlling here. In short, reliance on the reasoning of out-of-circuit cases—as the defense anticipates the government will do, is misplaced, because those cases arose in materially different contexts and are readily distinguishable. At bottom, *Kisor* requires the Court to consider context, that is, how the regulation is being applied to the specific facts before it. There is no one-size-fits-all rule. In some cases, loss is clear; in others, it is not, depending on the specific factual scenario.

Where loss is speculative or incalculable, such as when assigning value to stolen trade secrets, it may be appropriate for the court to consult the commentary and apply intended loss as a proxy. In *United States v. You*, 74 F.4th 378 (6th Cir. 2023), also discussed in *Hackett*, the Sixth Circuit addressed § 2B1.1 in the context of trade secret misappropriation. The case did not involve a straightforward economic offense with quantifiable harm; instead, the value of the trade secrets could not be easily computed. Similarly, in *United States v. Yafa*, 136 F.4th 1194 (9th Cir. 2025), the Ninth Circuit addressed a securities fraud scheme in which the victims' actual losses could not be reasonably determined. *Yafa* involved Note 3(B), which permits gain as a proxy for actual loss when actual loss cannot be determined. That provision is not at issue in this case. By contrast, Note 3(A) and the expansion of "loss" to intended loss, as in *Banks*, is an entirely different question. *Yafa* expressly addressed this difference, noting that *Banks* addressed an expansion of "loss," whereas

Note 3(B) supplies only an alternative method of calculating actual loss. *Yafa*, 136 F.4th at 1199. *Yafa* then expressly reserved this issue, stating in a footnote, "We note that our conclusion is limited to Application Note 3(B) and says nothing about the reasonableness of Application Note 3(A)'s instruction defining loss as the 'greater of actual loss or intended loss.'" *Id.* at 199 n.5. Additionally, to the extent that *Yafa* discussed the meaning of the term "loss" in the context of that case, it is also notable *Yafa* provided two definitions that would not appear to encompass "intended" loss. *See id*. at 1198 ("In the economic context, for example, a reasonable person might define "loss" narrowly as an "amount lost" whereas another may use the term to express more broadly the entire "detriment or disadvantage involved in being deprived of something.") (citing *Loss*, OXFORD ENG. DICTIONARY). Accordingly, *Yafa* is instructive here only insofar as it reaffirms that under *Castillo*, *Kisor* applies to Guidelines commentary and that ambiguity must be assessed in context, i.e., it depends on the facts of how the provision is being applied relative to the facts at issue.[7] Here, by contrast, the government readily concedes that the actual loss is no more than $2.8 million. This is not a case where the loss is incalculable or contested. The offense is a basic economic fraud, and the actual pecuniary harm is clearly established. The question, therefore, is not whether the Court must rely on the commentary in the absence of measurable harm, but whether it should invoke the commentary to add an additional amount as "intended loss" in a case where actual loss is both known and uncontested.

The text here is straightforward. Section 2B1.1 provides for graduated increases based on the amount of "loss." Section 2B1.1's enhancement is designed to punish the *economic harm caused* by financial crimes. The text refers simply to "loss," a term with an unambiguous, common-sense meaning: the actual decrease or diminution suffered. Section 2B1.1 "is driven by the amount of loss caused by the crime." *Hackett*, 123 F.4th at 1013 (quoting *United States v. Kirilyuk*, 29 F.4th 1128, 1138 (2022)).

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[7] *Yafa* also discussed relevant conduct, but in a different context. There, the issue was whether gain could be used as a proxy when actual loss was difficult to ascertain. The Ninth Circuit found that the term "loss" was ambiguous in that setting and turned to relevant conduct as a permissible interpretive aid. *See Yafa*, 13 F.4th at 1197–98. That is not the situation here, which involves a straightforward economic offense with quantifiable harm, precisely the context addressed in *Banks*.

The Ninth Circuit's decision in *Kirilyuk* is instructive here. In *Kirilyuk*, the Ninth Circuit considered Application Note 3(F)(i) to § 2B1.1, which set a fixed $500-per-access-device minimum "loss" amount. The Ninth Circuit observed that this commentary effectively expanded the definition of "loss" beyond its ordinary meaning, since no reasonable person would define "loss" to include an arbitrary $500 figure divorced from any actual or intended pecuniary harm, and therefore violated *Stinson*. 29 F.4th at 1138. Instead, the *Kirilyuk* panel reasoned that § 2B1.1 "is driven by the 'amount of loss *caused by the crime*." *Id.* (citing *United States v. Gainza*, 982 F.3d 762, 764 (9th Cir. 2020) (emphasis in original) (Guidelines prescribe a graduated offense level increase based on the amount of loss caused by the crime, not on speculative or presumed amounts)). *Kirilyuk* further held that Application Note 3(F)(i) to § 2B1.1 functioned as an enhanced punishment, not a fact-based assessment of loss, because it imposed a fixed $500-per-access-device figure untethered to actual or intended pecuniary harm. *Id.* at 1138.[8] The same reasoning applies to Application Note 3(A), which expands "loss" to include "intended loss," thereby sweeping in unrealized economic harm that never occurred and, in many cases, was impossible or highly unlikely to occur. Similarly, as in *United States v. Kirilyuk*, no reasonable person would interpret "loss" stemming from a fraudulent PPP loan application to mean the amount the defendant unsuccessfully attempted to obtain. That figure does not represent an actual economic loss caused by the offense; to the contrary, it is a loss that was avoided. The term "loss," in ordinary usage, refers to actual, realized detriment, not hypothetical or intended gain. Merriam-Webster defines "loss" as destruction or privation, and in legal usage, as a harm or deprivation resulting from losing or being separated, referring to a real, measurable detriment.[9] Black's Law Dictionary provides "loss is a generic and relative term. It signifies the act of losing or the thing lost; it is not a word of limited, hard-and-fast meaning and has been held synonymous with, or equivalent to, 'damage,' 'damages,' 'deprivation,' 'detriment,' 'injury,' and

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[8] In passing, *Kirilyuk* mentioned that the Probation Office in that case had calculated both actual and intended loss, and noted that neither figure had incorporated the $500-per-card multiplier. *Kirilyuk*, 29 F.4th at 1138. While *Hackett* cited that passing comment, *Hackett*, 123 F.4th at 1013, *Kirilyuk*'s passing mention of intended loss provides no support for the government here, given that *Kirilyuk* was not addressing the issue before this Court, and *Kirilyuk*'s own holding was an express rejection of reliance on commentary.

[9] *See Loss*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/loss (last visited Aug. 22, 2025).

'privation.'"[10]

Moreover, actual loss and intended loss are two distinct concepts under U.S.S.G. § 2B1.1, each governed by separate legal standards and requiring different evidentiary showings. In the Ninth Circuit, "actual loss" means the reasonably foreseeable pecuniary harm that actually resulted from the offense. *See United States v. Berger*, 587 F.3d 1038, 1044 (9th Cir. 2009); *United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008). In cases involving government loan programs like the Paycheck Protection Program (PPP), actual loss typically refers to the fraudulently obtained portion of funds that were not recovered, rather than the full-face value of the loan or the total amount applied for. By contrast, "intended loss" is defined as the pecuniary harm that the defendant purposely sought to inflict, even if that harm was impossible or unlikely to occur, consistent with Application Note 3(A)(ii) to § 2B1.1. *See United States v. Treadwell*, 593 F.3d 990, 1000 (9th Cir. 2010); *United States v. Popov*, 742 F.3d 911 (9th Cir. 2014). While actual loss focuses on the consequences of the conduct, intended loss focuses on the defendant's purpose and state of mind at the time of the offense.

As in *Kirilyuk*, such commentary enlarges the scope of punishment beyond the plain text of § 2B1.1 and thus cannot be afforded deference under *Kisor.* This is particularly true because the commentary does not reflect any congressional delegation of authority to define penalties for economic crimes, but instead represents the Commission's unilateral expansion of the definition of "loss" to punish what a defendant may have intended, even if that harm never materialized or was impossible to occur.

Additionally, the plain text of 2B1.1 does not invite courts to speculate about a defendant's intentions or potential harms that never materialized. Expanding the guideline text to cover "intended loss" imports a *mens rea* requirement utterly absent from the text. Nothing in the text directs courts to consider what a defendant may have intended to cause. Reading "intended loss" into the guideline expands the provision beyond its text and contradicts both *Kisor* and *Castillo*.

Accordingly, the Court should apply the 16-level enhancement under §2B1.1(b)(1)(I), based on

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[10] *See Loss*, Black's Law Dictionary (Henry Campbell Black, 2d ed. 1990).

the $2.8 million actual loss. Probation's reliance on intended loss to impose an 18-level increase under § 2B1.1(b)(1)(J) is legally unsupported.

II. Section 2B1.1(b)(10)(C) Sophisticated Means Does Not Apply

The defense anticipates the government will argue that a two-level enhancement under §2B1.1(b)(10)(C), applies, asserting that the offense involved "sophisticated means." The government is incorrect, that enhancement does not apply here. Section 2B1.1(b)(10)(C) applies if "the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means." The commentary describes sophisticated means as:

> "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means."

U.S.S.G. § 2B1.1, comment. (n.9(B)).

None of those factors applies here, and there is no evidence that Ms. Will-Darnall attempted to conceal her offense. The government contends that Ms. Will-Darnall generated false supporting documents, including fabricated tax returns, bank statements, and voided checks, and that she used multiple corporate entities to submit applications. They further assert that she diverted PPP funds to personal use and assets now subject to forfeiture, and that her admission that Alternative Health Services "was never established" demonstrates that no legitimate business existed. To support this position, the government relies on Ninth Circuit cases finding that "coordinated and repetitive steps" or the use of fabricated documentation may justify the enhancement. *See United States v. Jennings*, 711 F.3d 1144, 1146–47 (9th Cir. 2013) (upholding the enhancement where the defendant routed funds through shell accounts to conceal his scheme); *United States v. Augare*, 800 F.3d 1173, 1180 (9th Cir. 2015) (finding that repeated falsifications went "beyond the garden-variety fraud"); and *United States v. O'Neil*, 2024 WL 5074908, at *2 (9th Cir. August 16, 2024) (unpublished) (affirming application of the enhancement in a PPP fraud case where fabricated supporting documents and coordinated steps rendered the conduct especially intricate). According to the

government, Ms. Will-Darnall's conduct mirrors the kind of "especially complex or especially intricate" scheme that § 2B1.1(b)(10)(C) is intended to capture.

While the government portrays Ms. Will-Darnall's conduct as "especially complex or especially intricate," the evidence shows otherwise. *United States v. Montano*, 250 F.3d 709 (9th Cir. 2001) is instructive. There, the court examined U.S.S.G. § 2T3.1, an analogous provision, and held that the defendant's concealment activities were all inherent in the offense, and therefore the enhancement was not warranted. *Id.* at 714. The same may be said here. Ms. Will-Darnall submitted the necessary documents to apply for the loan. Although those documents may appear complicated at first glance, they were not. Her submission of financial documents in support of the PPP loan application was a necessary step to commit the offense. She otherwise would not have been able to commit the offense, which would then have been only an attempt. The sophisticated means enhancement is just that, an enhancement that necessarily looks to conduct that went above and beyond the conduct that was necessary to commit the offense in the first instance. Here, the government has not identified any acts that were not essential to the commission of the offense. Here, Ms. Will-Darnall submitted the necessary documents to obtain the two loans. The denials of other loans support not applying this enhancement, as those applications were clearly deficient and were quickly denied. The offense lacked sophistication, which was arguably why it was so quickly discovered. In fact, the offense was so evident that the government proceeded by way of a target letter, which was arguably done because the evidence of her offense was obvious. She did not employ elaborate concealment, international transfers, open new bank accounts, employ others in the scheme, conduct transfers to conceal the funds, or use shell structures of the sort that typically warrant the "sophisticated means" enhancement. Rather, her conduct was comparatively rudimentary: she simply altered outdated business records from a non-operating company to make it appear as though it remained in operation. The fabrication of documents consisted of altered tax forms, bank statements, and voided checks, all of which are common and straightforward in PPP fraud prosecutions. She applied for the funds in her name, which were then deposited into accounts she controlled. Unlike the elaborate schemes in *Jennings* or *Augare*, Ms. Will-Darnall did not employ layered transactions, offshore accounts, or concealed transfers to obscure her conduct. Nor did she construct shell

corporations with ongoing operations to hide her activities. Indeed, her own admission that Alternative Health Services "was never established" underscores the lack of any sustained or concealed infrastructure, explaining why only two of her seven applications were approved while the remainder were promptly denied.

Moreover, her conduct does not rise to the level described in *O'Neil*, where the Ninth Circuit affirmed the enhancement in a PPP case involving the defendant's employing another to perpetrate the scheme. *United States v. Garro*, 517 F3d. 1163 (9th Cir. 2007), which the defense anticipates the government will rely on, similarly, involved a defendant who used and incorporated numerous shell corporations, many of which he incorporated during this scheme," intentionally "left behind numerous confusing and misleading documents" regarding investor funds, forged signatures on real estate transactions, and had associates sign for him on other purchases to conceal his involvement. *Id.* at 1169. Here, Ms. Will-Darnall's unsuccessful applications were facially deficient and quickly uncovered, hardly reflecting a scheme of unusual sophistication. In fact, the Sentencing Commission's intent behind § 2B1.1(b)(10)(C) is to capture schemes that are "especially complex" in execution or concealment, not routine misrepresentations that fall within the heartland of ordinary fraud. *See* U.S.S.G. § 2B1.1(b)(10)(C) (2021). At bottom, Ms. Will-Darnall's offense conduct was serious. Still, it was not sophisticated in the manner contemplated by the enhancement. The conduct involved steps essential to committing the offense in the first instance, and the two-level increase should not apply. The government's evidence does not demonstrate a "greater level of planning or concealment" than the baseline case.

III. A mitigated sentence is sufficient, but not greater than necessary, to achieve the goals of sentencing

While the sentencing court must respectfully consider the applicable guideline range, this is only one factor, which should not be given greater weight than any other. *See United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008). For this reason, even if the Court adopts Probation's sentencing guidelines calculation(after it has been adjusted downward to account for the deletion of the financial institution enhancement), it does not follow that a sentence in or near that range is appropriate.

Probation has identified several mitigating factors under 18 U.S.C. § 3553(a), including Ms.

Will-Darnall's lack of criminal history, childhood trauma, long-standing community involvement, alcohol dependency, family challenges stemming from her divorce from a partner with mental health issues, declining health, history of anxiety and depression, educational background, and consistent history of lawful employment. *See* PSR Sentencing Recommendation at 3. Ms. Will-Darnall appreciates Probation's careful consideration of these factors. The defense respectfully disagrees with Probation's assessment that Ms. Will-Darnall was motivated by greed to commit the offense. It is clear that she was deeply in debt and primarily used the funds to pay off ever-mounting business and financial obligations. Here, numerous other mitigating factors support either an extended period of home confinement, or a sentence of 12 months and 1 day as "sufficient, but not greater than necessary." In applying the § 3553 factors, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense. 18 U.S.C. § 3661.

Here, the Court may also wish to consider the following mitigating factors in support of the defense sentencing recommendation: (1) the nature and circumstances of the instant offense; (2) Ms. Will-Darnall's personal history and characteristics, which include childhood trauma, a history of mental health issues, her compromised physical health, excessive drinking that contributed to the offense, and family hardship; (4) a longer sentence is not needed to promote respect for the law and deterrence; and (5) a zero point offender reduction should be applied retroactively, or the Court should depart or vary on this basis.

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensure." *Pepper v. United States*, 562 U.S. 476, 487-88 (2011). In determining the appropriate sentence in a particular case, the "overarching statutory charge for the district court" under 18 U.S.C. § 3553(a) is to impose a sentence that is "'sufficient, but not greater than necessary' to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment.'" *Carty*, 520 F.3d at 991 (citing 18 U.S.C. § 3553(a)

and (a)(2)). While every sentencing proceeding must "begin by determining the applicable Guidelines range," the district court is not permitted to presume that the Guidelines range is reasonable. *Id.* (citing *Rita v. United States*, 551 U.S. 338, 351 (2007)). "Nor should the Guidelines factor be given more or less weight than any other. While the Guidelines are to be respectfully considered, they are one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence." *Id.* (citing *Kimbrough v. United States*, 552 U.S. 85, 101 (2007), and *Gall v. United States*, 552 U.S. 38, 50 (2007)).

A. The nature and circumstances of the offense

In sentencing Ms. Will-Darnall, § 3553 directs the Court to consider "the nature and circumstances of the offense," and the need to impose a "just punishment." 18 U.S.C. § 3553(a)(1). Ms. Will-Darnall does not seek to minimize her conduct. She fully recognizes the seriousness of her actions. The offense was non-violent, and no individuals were personally or financially harmed. The United States Treasury bore the only financial loss. The offense thankfully does not involve victims who lost their savings, livelihoods, or personal property. Ms. Will-Darnall was, at one time, a legitimate and successful businesswoman who, with her business partner, built Rosswood into a legitimate, thriving company. By the time she applied for the PPP loans, however, her life was unraveling. She was overwhelmed by mounting debts arising from her divorce, significant legal fees due to litigation, and the collapse of her company after losing its sole client. Rosswood's decline was not the result of mismanagement but rather a consequence of circumstances beyond her control. In late 2019, Ms. Will-Darnall attempted to rebrand her company after her business partner decided to leave. She could not have foreseen that, only a few months later, the COVID-19 pandemic and shelter-in-place orders would shut down all non-essential business activity. Like countless businesses across the country, Rosswood was negatively impacted by the COVID-19 pandemic, which Congress specifically sought to address through the PPP and related relief programs. While Rosswood had already lost its key client, the pandemic effectively ensured its demise. In that sense, Rosswood was the type of business Congress intended to assist, even though Ms. Will-Darnall unlawfully attempted to keep it afloat by submitting false documents and improperly using those funds to pay personal debts. The COVID-19 pandemic and shelter-in-place orders created an unprecedented environment

and context during which she committed the offense. The relaxed rules and urgent atmosphere lowered barriers and contributed to poor judgment by many who otherwise had no criminal history. It is extraordinary that, as to Count 1, Ms. Will-Darnall received nearly $ 1 million in less than 24 hours. For Ms. Will-Darnall, this was compounded by her alcohol consumption and the constant drumbeat of companies soliciting individuals to apply for PPP loans, which became a cottage industry for a time.

Although some of the PPP proceeds were used for personal expenses, the overwhelming majority of the funds went toward paying off debts, reflecting her financial desperation rather than a desire for personal enrichment. Importantly, her conduct was readily detected. The transparent nature of the offense is itself a mitigating factor. She applied for the loans in her own name, and the funds were deposited directly into accounts she controlled. She did not employ elaborate means of concealment. The obvious nature of her conduct explains why the government proceeded by target letter rather than indictment; a further mitigating consideration with respect to her acceptance of responsibility. *See, e.g., United States v. Brown*, 985 F.2d 478 (9th Cir. 1993) (sentencing court may depart downward for extraordinary acceptance of responsibility, *see* § 5K2.0; § 3E1.1). The defense also notes that there is evidence of multiple liens on Ms. Will-Darnall's properties, which the government incorrectly suggests are related to the offense. They are not. The liens predate the PPP loans, have no connection to the charged conduct, and were not an attempt to frustrate the government's efforts to seek restitution.

Ms. Will-Darnall has also saved the government considerable expense by waiving indictment, proceeding by information, and resolving her case quickly. She has demonstrated genuine remorse and a sincere desire to make restitution. At bottom, Ms. Will-Darnall's conduct was serious and deserving of punishment. But it was not violent, did not victimize individuals, and arose from financial desperation during a period of extraordinary crisis for her. The Court should consider these mitigating circumstances in fashioning her sentence.

B. Ms. Will-Darnall's personal history and characteristics

Ms. Will-Darnall's personal history and characteristics are factors for the Court to consider in fashioning a fair and just sentence. *See* 18 U.S.C. § 3553(a)(1). Several considerations are relevant.

First, despite her middle-class upbringing, Ms. Will-Darnall endured a traumatic childhood. She and her mother were physically abused by her alcoholic father. The Ninth Circuit has recognized that a district court may appropriately considered a defendant's personal characteristics and the circumstances of his life, including his background of abuse, addiction, and mental illness to grant a variance. *United States v. Ruff*, 535 F.3d 999 (9th Cir. 2008)(defendant resentenced to one day, from 12 months and 1 day) "Where a defendant's crime is attributable to a disadvantaged background or emotional or mental problems, the defendant is less culpable than one without the excuse." *Landrigan v. Schriro*, 441 F.3d 638, 648 (9th Cir. 2006); *see also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (defendant's background is relevant because of the belief "long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional or mental problems may be less culpable"). A defendant's lack of guidance as a youth or disadvantaged background may properly be considered mitigating. *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991) (overruled on other grounds) (downward departure justified given the defendant's "youthful lack of guidance); *see also United States v. Adelson*, 441 F.Supp 2d 506 (S.D.N.Y)(The court imposed a non-Guidelines sentence of 42 months where Guideline range was life imprisonment, in part, due to the defendant's personal history). Her father's alcoholism and abuse marked Ms. Will-Darnall's upbringing. As an only child, she bore the brunt of his anger without a sibling to turn to for support. That family history of alcoholism carried forward into her own life. She began drinking at thirteen and developed problematic use in her twenties. At the time of the instant offense, while sheltering in place during the pandemic, she was drinking daily, and her drinking increased over time. Although her alcohol use does not excuse her conduct, it plainly lowered her inhibitions and clouded her judgment. At bottom, she was not in her right mind. Ms. Will-Darnall's friends and family speak of her with deep admiration and respect, offering heartfelt accounts that underscore her character and support a sentence below the advisory range. *See* Defense Exb. A, Mitigation Reports.

Second, Ms. Will-Darnall has a documented history of mental health struggles. The Court may grant a variance based on a defendant's "mental and emotional condition." *United States v. Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2007); *see also United States v. Cantu*, 12 F.3d 1506, 1512 (9th Cir.

1993). Ms. Will-Darnall was diagnosed with anxiety and depression in 2018 or 2019 and has been prescribed medication. These conditions, combined with mounting financial pressures and alcohol use, clearly further impaired her judgment at the time of the offense. She is thankfully engaged in mental health counseling to address some of the root factors that contributed to her poor decision making. *See* Def. Exb. B.

Third, her physical health is a relevant consideration. During the pendency of this case, she survived a life-threatening sepsis infection. She continues to experience ongoing pain and requires medication and monitoring to manage the condition.

Finally, family hardship warrants consideration. Ms. Will-Darnall is the single mother of an eleven-year-old son and, by all accounts, a loving and attentive parent. She also helps care for her elderly mother, who is experiencing cognitive decline. A lengthy term of incarceration would impose severe hardship on both her child and her mother. The Ninth Circuit has acknowledged that family circumstances may be properly considered at sentencing. *See, e.g., United States v. Muñoz-Nava,* 524 F.3d 1137 (10th Cir. 2008)(Affirming variance to 12 months and 1 day plus one year of home confinement where defendant, a single parent, was sole caregiver for his 8-year-old son and elderly, medically ill parents); *United States v. Leon*, 341 F.3d 928 (9th Cir. 2003)(affirmed a downward departure under § 3553(a) based on the defendant's role as an indispensable caregiver, finding it constituted extraordinary family circumstances); *United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2005)(*overruled on other ground*) ("The difficulty of providing appropriate care for a child of a single parent may, when balanced against factors such as the nature of the offense, § 3553(a)(1), deterrence to criminal conduct, § 3553(a)(2)(B), and protection of the public, § 3553(a)(2)(C), warrant a sentence outside the Guidelines.").Taken together, Ms. Will-Darnall's disadvantaged background, struggles with alcohol and mental health issues, serious health issues, and significant family responsibilities are factors that support a mitigated sentence.

C. A longer sentence is unnecessary to deter Ms. Will-Darnall and promote respect for the law

To arrive at an appropriate sentence, the Court must consider what is necessary to deter Ms. Will-Darnall and to promote respect for the law. *See* 18 U.S.C. § 3553. As the Supreme Court has

cautioned, "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall v. United States*, 552 U.S. 38, 54 (2007) (quotation omitted). Ms. Will-Darnall committed a serious crime, and she does not minimize her responsibility. She accepts that a term of imprisonment is warranted. But a sentence of 24 months, as recommended by Probation, or an even longer term, as sought by the government, is greater than necessary to achieve deterrence or respect for the law.

The Court should instead recognize that this offense is an aberration from her otherwise law-abiding life. *See* U.S.S.G. § 5K2.20; and (8) (providing for a downward departure where the offense constitutes a single act of aberrant behavior, outside the defendant's otherwise law-abiding life). Ms. Will-Darnall has no prior criminal convictions. Her conduct in this case is clearly an aberration from her otherwise law-abiding life as a loving and supportive mother. *See* Defense Exb. C, letters of support and mitigation photos. There is no evidence that she poses any ongoing risk to the community, and her likelihood of recidivism is extremely low. Accordingly, extended incapacitation is unnecessary to protect the public. For someone with no history of criminal conduct, even a short custodial term represents an extraordinary punishment. Home detention or a sentence of 12 months and one day, followed by three years of supervision, and a monetary judgment exceeding $1.4 million is significant. Such a sentence ensures that she will be either incarcerated or under federal control until at least 2029. During that time, her liberty will be restricted, and the financial penalty will extend well beyond her period of supervision. The collateral consequences are also serious. She will lose her teaching credential and her real estate license, stripping her of her livelihood and decreasing her future earning capacity. She has endured reputational damage in a community where she was once an active and respected member. The consequences of this offense will follow Ms. Will-Darnall for the rest of her life. As an only child, she will one day inherit her aging mother's home, which represents the only meaningful asset likely to come into her possession in the future. When that occurs, the government will be entitled to pursue those proceeds to satisfy restitution and or the money judgment. In short, this is not a case where the defendant will avoid accountability or where repayment is speculative. She stands to incur a meaningful and lasting penalty for her conduct.

The structure of this case ensures the government will ultimately be made whole, even if not immediately. These are lasting penalties that can't be undone, and they weigh heavily in determining how much additional punishment is "sufficient, but not greater than necessary." In short, while a custodial term is warranted, the government's recommendation overstates what is needed. A sentence of extended home confinement or alternatively 12 months and one day reflects the seriousness of the offense, imposes meaningful punishment, deters future misconduct, and promotes respect for the law.

IV. Ms. Will-Darnall is a zero-point offender, and a departure or variance is warranted.

In 2023, the Sentencing Commission amended the Guidelines to add U.S.S.G. § 4C1.1, Adjustment for Certain Zero-Point Offenders. *See* U.S.S.G. App. C, amend. 821 (November 1, 2023). Section 4C1.1 directs the sentencing court to decrease the adjusted offense level by two levels if the defendant has zero criminal history points and the offense does not involve any of the ten specified aggravating factors. *Id*. The Commission adopted § 4C1.1 based on empirical evidence showing that offenders with zero criminal history points "have considerably lower recidivism rates" than other offenders. *Id*. Here, Ms. Will-Darnall's eligibility for § 4C1.1 is uncontested. The Probation Office agrees that Ms. Will-Darnall qualifies for the § 4C1.1 reduction, and the government does not object to Probation's determination that she meets all criteria under the 2024 Sentencing Guidelines Manual. However, an ex post facto issue exists because the 2021 Guidelines are more favorable to Ms. Will-Darnall. The 2021 version of § 2B1.1 predates the 2023 revision concerning the definition of "loss," a revision that forecloses any argument that *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), prohibits reliance on intended loss. Applying the 2021 version of the Guidelines avoids retroactive disadvantage and preserves Ms. Will-Darnall's right to argue that intended loss, found only in the commentary, should not be used to determine her advisory Guidelines range. Amendment 821, which created § 4C1.1, became effective on November 1, 2023, after the 2021 Guidelines, but before the 2024 Guidelines went into effect on November 1, 2024. The Commission made Amendment 821 retroactive as of February 1, 2024. ***See*** U.S.S.G. § 1B1.10(d). As a result, courts across the country, including this one, have granted numerous sentence reductions under the amendment. Additionally, undersigned counsel is aware of cases in this District in which judges granted variances based on Amendment 821 after its effective date but before the 2024 Guidelines became effective. *Hamilton v. United States*,

670 F.3d 761 (9th Cir. 1995), is instructive and provides a strong analogy to the facts here. There, the Ninth Circuit held that the defendant was entitled to the benefit of both the more favorable Guidelines at the time of his offense due to an ex post facto issue and a retroactive amendment that had become applicable after the prior sentencing. By the same token here, although § 4C1.1 was not yet part of the 2021 Guidelines Manual, its enactment reflects the Commission's most current, evidence-based judgment that first-time, non-violent offenders like Ms. Will-Darnall warrant more lenient treatment. Consistent with that judgment, and in furtherance of the goals outlined in § 3553(a), particularly the need to avoid unwarranted disparities, and impose a sentence that is sufficient but not greater than necessary, a two-level variance is both appropriate and warranted here. In short, Ms. Will-Darnall is precisely the type of defendant for whom Congress, in adopting § 4C1.1 intended this provision to apply: law-abiding until this offense, non-violent, and statistically unlikely to reoffend. The Court should retroactively apply the zero offender provision or vary accordingly. However, if the Court declines to adopt the defense position under § 2B1.1 and *Kisor v. Wilkie* and does not grant a variance based on zero-point offender status, the defense respectfully requests that the Court proceed under the 2024 Guidelines.

CONCLUSION

For the foregoing reasons, Ms. Will-Darnall respectfully requests that the Court sentence her to home confinement to permit her to continue to care for her elderly mother and minor child, or in the alternative, impose a sentence of no more than 12 months and 1 day.

Dated: August 25, 2025

Respectfully submitted,

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/S
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