No. 20-214

In the
Supreme Court of the United States

AKBAR GHANEH FARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In competitive government procurement programs, does a government contractor "defraud" the Government by practicing conservatism in the bidding process and reasonably overstating estimates for proposed cost items?
2. Does any alleged misrepresentation in obtaining a government procurement contract through set-aside program transform a contract into a "government benefit" akin to a grant or an entitlement program payment, for the purpose of loss and restitution calculation, as opposed to a classic procurement fraud, which should be treated under the general rule for loss calculation?

PARTIES TO THE PROCEEDING

Petitioner Akbar Ghaneh Fard was a defendant in the district court and an appellant in the Eleventh Circuit. The respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Akbar Ghaneh Fard, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

In ordinary competitive-based government procurement fraud cases, the would-be fraudsters lie about their eligibility, qualifications, business credential, or capabilities in their proposals. They overpromise what they can deliver so that they can have a competitive edge over competitors. They also may bid a lower price to get ahead of the competition. In these cases, after they secure a contract, they don't perform as they often have no means or intention to provide the services contracted.

But, this case is not ordinary by any mean. There are no allegations or evidence of any misrepresentations made by the Petitioner Fard in his initial proposals (either funded or not-funded) relating to his company, Advanced Materials Technology, Inc (AMTI)'s eligibility, qualifications, key personnel, facility, or commercialization capability that would have fraudulently influenced the rankings of his proposals or provide AMTI with an unfair advantage over other companies. In addition, Fard always intended to and did fully perform and deliver his work according to the terms and conditions of contracts. Fard complied with all bidding instructions and contract terms and violated no law, rule, or government procurement practice. Furthermore, contrary to a majority of other contractors, Fard fulfilled the ultimate goal of the SBIR/STTR program

by successfully completing a Phase III, which is also known as the "Commercialization Phase". The government agencies never complained about anything during periodic performance evaluation and oversight of the contracts.

The question then becomes more mysterious: if there were no misrepresentations in Fard's proposals and the government agencies received the ultimate work product or scientific research for which they had bargained, then what was the possible wire fraud that the Government charged Fard?

The answer to that question involves proposed cost budgets. As part of proposals, Fard submitted a summary budget with estimated cost items. The government theory of prosecution was that Fard's proposed cost budgets contained false information about expenses, i.e., bloated cost items, and Fard did not incur every expense he estimated in his proposals. However, it is indisputable that the proposed cost items were merely estimates. Fard, in his proposed budgets, included reasonable estimates for possible cost items, according to the instructions and recommendations of the government agencies as well as the principle of conservatism. It is beyond dispute that Fard did not attempt to be a lower bidder to increase his chance of getting awarded government contracts. All but one of the submissions made by Fard was for firm fixed price contracts, which by definition, allocate "fixed" funds to a proposal, once it is selected in a competitive process, and leave the manner of expenditure to the contractor's discretion. The Government simply criminalized a prudent, normal, and legitimate way of doing business, and Eleventh Circuit

affirmed it. There is no way that could be the law. There was simply no scheme to defraud. The Eleventh Circuit's decision to affirm the wire fraud conviction conflicts with this Court's directive that "financial accounting has as its foundation the principle of conservatism, with its corollary that 'possible errors in measurement [should] be in the direction of understatement rather than overstatement of net income and net assets". *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995).

Moreover, the district court and 11th Circuit Court erred in using the government benefits rule in calculating loss and restitution in Fard's SBIR/STTR contracts, which were clearly procurement contracts. Nevertheless, there is a 3-3 slip between the circuit courts of appeal over how to calculate loss and restitution when a defendant uses misrepresentations in obtaining funding through a set-aside program, yet delivers the services under contract. Three circuits calculate loss and restitution using the government benefits rule, regardless of the fair market value of services delivered. In comparison, three other circuits deduct from the loss and restitution calculation an offset for the fair market value of any services rendered by the Defendant.

Finally, as a methodological matter, the court below defied this Court's instruction to use principles of lenity, fair notice, and avoidance to prevent criminalizing routine business practice. To correct the far-reaching errors and settle the multiple conflicts generated by the Eleventh Circuit's decision below, this Court should grant review.

OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (Pet. App. at 1-8) along with a copy of the Eleventh Circuit's order denying the petition for rehearing *en banc* (Pet. App. at 9).

JURISDICTION

The Eleventh Circuit issued its opinion on February 4, 2020, Pet. App. at 1-8, and denied Fard's timely petition for rehearing *en banc* on March 31, 2020. Pet. App. at 9. On March 19, 2020, this Court issued an order, extending the deadline to 150 days to file writ of certiorari. Therefore, the deadline to file this petition is August 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provision (18 U.S.C. §1343) is set forth at Appendix C to this petition.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Fard's indictment and conviction stem from his involvement in government research programs – Small Business Innovative Research Program (SBIR) and the Small Business Transfer Technology Program (STTR), See 15 U.S.C. § 638, created by the United States Congress in 1982 and 1992,

respectively. These programs require eligible governmental agencies to set aside a percentage of their budgets to help domestic small businesses engage in research and development (R&D) with strong potential for technological commercialization. Fard's Brief at 3.

1. **Purpose of SBIR/STTR Programs**

The original charter of the SBIR program was to address four goals:

- Stimulate technological innovation
- Use small business to meet Federal R/R&D needs
- Foster and encourage participation by the socially and economically disadvantaged small businesses and those that are 51 percent owned and controlled by women, in technological innovation
- Increase private-sector commercialization of innovations derived from Federal R/R&D, thereby increasing competition, productivity, and economic growth

There are three phases in SBIR and STTR program:

- Phase I is the concept phase. It lasts six to twelve months and supports exploration of the technical merit or feasibility of an idea or technology.
- Phase II awards may last for up to two years and expand upon the Phase I results. During this time, the R&D work is performed.

- Phase III is the period during which Phase II innovation moves from the laboratory into the marketplace. No SBIR funds support this phase. The small business must find funding in the private sector or secure it from other non-SBIR Federal Agency funds that can fund continued development.

(SBIR/STTR On-line Tutorials, Course 1 Program Basics, Tutorial 1, What is the purpose of the SBIR & STTR Programs?, available at the government website at https://www.sbir.gov/tutorials/program-basics/tutorial-1, last visited August 17, 2020)

Fard successfully completed a Phase III (commercialization phase) project, and, therefore, was able to fulfil the purpose of SBIR/STTR programs.

2. Eligibility Requirements

Per 15 U.S.C. § 638 and § 662(5), to be eligible for SBIR/STTR awards, awardees must qualify as small business concerns (SBC). An SBC is one that, at the time of award of Phase I and Phase II funding agreements, meets the following criteria:

(1) is organized for profit, with a place of business located in the United States;

(2) is in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative;

(3) is at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States; and

(4) has, including its affiliates, not more than 500 employees. Gov't Ex. 6.1 at 13[1].

In addition, the primary employment of the principal investigator (PI) must be with the small business concern, and the research must be performed domestically. *Id. at 9.*

Advanced Materials Technology, Inc (AMTI) met all the above requirements and, therefore, Fard was undoubtedly an intended recipient of all his SBIR/STTR contracts.

3. SBIR/STTR Proposal Format Requirements

Each proposal submitted contained the following items:

(1) Certification Cover Sheet (Form A), electronically endorsed;

(2) Proposal Summary (Form B),

(3) Budget Summary (Form C),

(4) Cooperative R/R&D Agreement between the SBC and RI (research institution) (STTR only),

(5) Technical Content: 11 parts including work plan (statement of work),

(6) Briefing Chart. Gov't Ex. 6.1 at 16.

[1] Gov't Ex. refers to the Government's Exhibit.

4. Guidelines for Preparing SBIR Budget Summary

All budget items in the budget summary were merely estimates. In fact, in the guidelines for preparing SBIR budget summary, the word estimate or some variant thereof is repeated 12 times. Gov't Ex. 6.1 at 59-60.

5. Evaluation Criteria of Proposals

The relevant government agencies publish a catalogue (Program Solicitations) of research and development program for which they are seeking proposals to be funded by/through SBIR/STTR programs. Various entities submit thousands of proposals. All Phase I and II proposals are evaluated and judged on a competitive basis. Proposals are initially screened to determine responsiveness. Then, the agencies would do a thorough amount of due diligence before awarding contracts. Proposals passing the initial screening are then technically evaluated by the agencies personnel to determine the most promising technical and scientific approaches. Various government agencies utilize similar evaluation criteria. Gov't Ex. 6.1 at 29-30.

Each proposal is judged and scored on its own merits using the factors described below:

- Factor 1: Scientific/Technical Merit and Feasibility
- Factor 2: Experience, Qualifications, and Facilities
- Factor 3: Effectiveness of the Proposed Work Plan
- Factor 4. Commercial Potential and Feasibility

Commercialization encompasses the infusion of innovative technology into products and services for NASA (National Aeronautics and Space Administration) mission programs, other government agencies and non-government markets. *Id.*

6. Selection Process

Factors 1, 2, and 3 are scored numerically with Factor 1 worth 50 percent and Factors 2 and 3 each worth 25 percent. The sum of the scores for Factors 1, 2, and 3 will comprise the Technical Merit score. For NASA's Phase II, Proposals receiving numerical scores of 85 percent or higher are evaluated and rated for their commercial potential by applying adjectival ratings (Excellent, Very Good, Average, Below Average, and Poor). Gov't Ex. 6.1 at 32.

Recommendations for award are forwarded to the Program Management Office for analysis and presented to the Source Selection Official and Mission Directorate Representatives. Final selection decisions consider the recommendations, overall NASA priorities, program balance and available funding, as well as any other evaluations or assessments. The Source Selection Official has the final authority for choosing the specific proposals for contract negotiation. Each proposal selected for negotiation is evaluated for cost/price reasonableness, past performance and awards are made to those contractors determined to be responsible. *Id.*

It is very important to notice that the exact budget was not a factor in the government's evaluation process or eligibility criteria. The goal of submitting a budget summary (Form C) is to enable NASA to determine whether the proposed budget is fair and reasonable. In fact, Government Exhibit 6.1 clearly states that NASA plans to select for award those proposals offering the best value to the government and the SBIR/STTR program. "NASA will give primary consideration to the scientific and technical merit and feasibility of the proposal and its benefit to NASA". *Id.* at 29.

Moreover, Fard's alleged misrepresentations in the proposed budgets could not result in inducement. It is the usual custom and practice in this industry to request maximum funding from the Government. Had Fard wanted to "induce" the Government to award him a contract, it would have been more beneficial for him to have requested a lesser amount of funding, as doing so would have increased the chances of being awarded the contract. See Government's Exhibit 6.1, at 32 (Where technical evaluations are essentially equal in potential, cost to the Government and offeror's past performance may be considered in determining successful offerors.)

Fard through his corporation submitted about 31 proposals. These proposals were submitted to the National Aeronautics and Space Administration (NASA), the Missile Defense Agency (MDA), and the United States Navy (USN) among some other agencies. Fard's company was awarded 11 contacts (seven

Phase I, three Phase II, and one Phase III) from 2003 until 2013. See PSR[2] at 12. It is without dispute that he delivered the property and/or services to NASA, MDA, and USN. The property and/or service were a direct benefit to the United Sates government.

B. Indictment and Trial

On March 22, 2017, Fard was indicted on six counts of wire fraud in violation of 18 U.S.C. § 1343. Doc. 1.[3]

The evidence showed that on June 30, 2003, Fard incorporated Advanced Materials Technology, Inc. (AMTI) in Florida. Fard was the president and owner of AMTI, and the company submitted contract proposals and other documents to NASA, MDA, and USN among some other agencies to procure funding for research projects. Fard's Brief at 3-4.

Fard had, in total, eleven contracts with NASA, MDA and USN. All but one of the contracts was for firm-fixed price contracts. In a fixed price contract, as part of the proposal, the proponent estimates what costs will be. If those estimates are inaccurate, the proponent bears the risk of cost overruns. The proponent of the project is obliged to deliver the promised research product, regardless of the actual costs incurred. Fard had one cost plus fee project with USN. In a cost-plus fee project, the Government pays all costs associated with the research project and guarantees the recipient a certain profit. *Id. at 4.*

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[2] "PSR" refers to the presentence investigation report.

[3] "Doc." refers to the numbered entry onto the district court's docket in this case.

It was undisputed that Fard always delivered what he promised, as evinced by the fact that he was repeatedly awarded contracts. *Id.*

The Government's theory of prosecution was that Fard defrauded the Government because his proposed estimates were false and he did not incur every expense he projected in his proposals. *Id. at 5.*

The Government presented 18 witnesses in its case-in-chief and no rebuttal witnesses. The Government's key witness was special agent Phil Mazzella, who was one of the case agents and was employed by the NASA Office of Inspector General. Doc. 134 at 45.

Mazzella testified, without any support, to the legal conclusion that AMTI was bound by the proposal submitted. *Id.* at 62. He generally testified that Fard's spending was materially inconsistent with what was agreed upon in the contracts. Doc. 135 at 42. Mazzella testified that AMTI had made approximately sixteen different proposals to NASA, MDA and USN, each time proposing a research associate, *Id.* at 46, and that Mazzella could not confirm that AMTI ever utilized a research associate. *Id.* at 45.

Mazzella also testified that every proposal submitted by AMTI under the SBIR/STTR program had a seven percent profit cap proposed by Fard. Mazzella also testified that of the 2.1 million dollars AMTI collected from those programs it kept in some fashion approximately 1.5 million dollars, which was approximately 70%. *Id.* at 46. This testimony was misleading and reckless.

First, apart from any profit AMTI would get from the SBIR/STTR project, Fard was always the principal investigator (PI) who drew a salary. In every proposal, Fard was personally going to get the lion's share of the funds distributed because as the principal investigator and the sole owner of AMTI, he stood to benefit from the profits the company received as well as his salary as the principal investigator. Second, there was no allegation that Fard did not fully deliver the promised research product to any government entity on any of the projects for which his proposal was accepted from many competitive bidders.

Romaguera, Doc. 136 at 133, and Binder, Doc. 136 at 207, Government's witnesses, reiterated the same statements regarding the definitization of estimated costs in a proposal once the contract was finalized and the cap on profits. On cross-examination, Binder could not identify any references to either definitization or profit caps in the final contract between Fard and NASA. Doc. 136 at 216-219.

Fard made his motion for a judgment of acquittal, which was denied without any explanation. Doc. 138 at 23. After five days of trial, on Feb. 9, 2018, a jury returned guilty verdicts against Fard on all six counts. *Id.* at 139-140.

C. Sentencing

At sentencing, Fard objected to the loss amount, forfeiture and restitution calculations. Doc. 153. His position was that given that the relevant agencies received exactly what they bargained for, the loss amount should be zero, even if

there had been some fraud in the inducement to enter the contract. *Id.* at 4. For the same reasons, Fard objected to the forfeiture award and the restitution imposed. The district court overruled his objections and varied from his guideline sentence to impose 36 months' imprisonment. Doc. 163. The court also ordered Fard to pay restitution totalling $1,472,082, and entered an order of forfeiture against him in the same amount. Doc. 184 at 48; Doc. 163.

D. The Eleventh Circuit's Decision

On appeal, Fard raised two issues: (1) whether the evidence was sufficient to convict Fard of the charges in his indictment, and (2) whether the district court erred in calculating the loss amount in determining Fard applicable guideline sentence, as well as the forfeiture award and the restitution order. Fard's Brief at 2.

Fard argued that there were no misrepresentations in his proposals as the proposed estimates to the relevant agencies were merely estimates. *Id.* at 44. Alternatively, Fard argued that even if he made knowing misrepresentations in his contract proposals, which was belied by the facts adduced at trial, at most he committed fraud in the inducement, as the Government received exactly what it bargained for. And that is not wire fraud according to well-established circuit precedent. *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016).

Finally, Fard argued that the United States experienced no loss as a result of that fraud. Fard delivered everything required of him under the SBIR or

STTR contracts that were the subject of this case. This was self-evident. He was repeatedly given more contracts, and he would only have been continuously awarded contracts if he had satisfactorily completed the requirements of previously awarded contracts. *Id. at 45.*

On February 4, 2020, the panel of 11th Circuit Court judges issued a *per curiam* decision affirming the decision of the district court without holding any oral argument. Pet. App. at 1-8.

Accepting the Government baseless and bizarre theory that the estimates were binding, the panel wrongfully concluded that "From the combination of Fard's obligations and actual spending, the Government presented sufficient evidence to show that Fard had made material misrepresentations to the agencies." Pet. App. at 4.

Also, the panel strangely asserted that Fard's alleged misrepresentation undermined the purpose of the programs to stimulate innovation and economic growth, *Id.*, while the jury heard zero evidence in this regard.

In reality, see *supra* Statement A.1 , the purpose of SBIR/STTR programs is not only to stimulate innovation and economic growth but also is the commercialization. Indeed, commercialization is the ultimate goal of the programs. Doc. 135 at 92. See also United States v. Aldissi, 758 F. App'x 694, 697 (11th Cir. 2018) ("In fact, commercialization is the main goal"). Fard achieved the commercialization goal by getting and successfully completing a

Phase III project. Doc 135 at 139 and PSR at 12. Indeed, Phase III contracts are optional endeavors for commercialization, and most Phase II contracts do not turn into Phase III contracts. PSR at 6. Also see National Academies of Sciences, Engineering, and Medicine, STTR: An Assessment of the Small Business Technology Transfer Program, https://www.ncbi.nlm.nih.gov/books/NBK338714/ ("the conversion rate to Phase III was 4 percent") (last visited August 17, 2020).

There exists absolutely nothing to support that the alleged misrepresentations in the proposed estimated cost items would undermine the purpose of the programs. There is a good reason for that. It simply does not make any sense. The innovation and commercialization come from the work and innovative ideas of Fard as principal investigator and not from unnamed research associate with unknown qualifications who does not even need to have a bachelor's degree. Doc. 135 at 163. Therefore, hiring a research associate and/or purchasing chemicals/supplies cannot undermine the purpose of the SBIR/STTR programs. In other words, the research performed by highly qualified principal investigator (Fard) is more valuable or more likely to yield promising technology than that performed by unnamed research associate with unknown education and work background.

The Government got full benefits of its bargain: satisfactory research work and getting into commercialization phase of the technology developed under the SBIR program. Fard did not undermine the purpose of the program; rather he fulfilled the purpose of the program. There was simply no discrepancy between

benefits reasonably anticipated ... and the actual benefits which [Fard] delivered. *Takhalov*, 827 F.3d at 1314.

REASONS FOR GRANTING CERTIORARI

I. The Decision Below On Fraudulent Inducement Is Wrong And Conflicts With This Court's Precedents

The wire fraud charges in this case were based on fraudulent inducement in the government contracts. "His [Fard's] SBIR/STTR award proposals budgeted thousands of dollars for personnel, laboratory materials, and, on one occasion, expensive equipment, when he did not incur these expenses. And, if NASA and DoD had known that Fard's award proposals contained false expenses, they would not have awarded AMTI research contracts". See Government answer brief at 21.

However, the alleged lies in the proposed budgets were estimates. The Government was never able to put forth any evidence that the estimates in Fard's proposals to the relevant agencies were anything more than estimates. Except for the one US Navy contract, each of the contracts at issue in the case were firm-fixed-price contracts. As the Eleventh Circuit Court has noted:

> The [relevant] contracts were fixed price contracts, meaning that the government and lowest acceptable bidder agree that the low bidder will perform the contracted work for a stated price. Under such contracts, if the final total costs of the agreed upon services exceed the contracted price, the contractor takes the loss, conversely, ***he can profit if the costs are lower than the contract price.*** Because of the fixed price nature of the contract the contractor does not have to demonstrate his actual costs to the

> government, and the government consequently imposes no recordkeeping requirements under the contract.

United States v. White, 765 F.2d 1469, 1472 (11th Cir. 1985) (emphasis supplied).

This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden on the contracting parties. 48 C.F.R. § 16.202-1 (2019).

Clearly, in a fixed price contract, it behooves contractor to account for any contingencies, since he is responsible for delivering the promised item no matter the costs. It is impossible to know what would be exact actual cost in research and development projects. Even Government's witness McQuade testified about the difficulty of estimating a budget: R and D, it's very difficult to sometimes estimate how much it's going to cost because you have significant technical issues. Doc. 136 at 17.

Any overstatements of estimated proposed costs contained in all Fard's proposed budgets were compliant with the usual and customary industry standards. At trial, Government's witness Sunol admitted that if he were the one performing the work, he would implement a "20, 30 percent contingency" to his proposed estimates in budgets. Doc. 136 at 96-97. By contrast, in all Fard's four cost proposals, the proposed amount for research associate averaged out to

5.7% of the overall contract price. The average total proposed costs for materials/glassware/small tool/miscellaneous and leasing equipment were 3.3% and 0.6%, respectively. Thus, the proposed budget for all items in four proposals, that were the subject of the indictment, was just 9.6% of the total proposed costs. It is indisputable that Fard's proposed cost items were reasonable and well below what even the government witness suggested. See the table below for details.

			Proposed Cost Item		
Gov't Exhibit	**Count Number**	**Total Proposed Cost**	**Research Associate**	**Materials Glassware Small Tool Miscellaneous**	**Leasing Equipment**
Ex 3.2B	1 and 5	$599,997	$43,200	$36,480	$11,472
Ex 10.8	2	$749,999	$29,880	$2,342	-
Ex 4.2B	3 and 6	$599,999	$38,000	$27,374	-
Ex 6.2A	4	$99,999	$6,300	$787	-
Total		$2,049,994	$117,380	$66,983	$11,472
% of Total Proposed Cost			**5.7%**	**3.3%**	**0.6%**

There was no evidence that the estimates were fraudulent at the time of submitting proposals. Only after the fact, were the estimates called into question. There is an excellent example of the folly of the Government's theory of fraud in Fard's case. The Government's answer brief raises the fact that as part of his estimates, Fard had budgeted for the lease of a pycnometer, an expensive piece of laboratory equipment. *Id.* at 25. The Government, in its answer brief, asserts that this equipment was provided by the subcontractor. *Id.* While technically true, it is also true that when Fard was preparing his proposal that included the pycnometer, his subcontractor did not have a pycnometer, and he had no way of knowing that his subcontractor would acquire one in the future when it was needed for the project. Doc. 136 at 88. That anyone could ever provide estimates with such uncanny accuracy about the expenses of research and development projects which are so sufficiently complex and sophisticated that they are the subject of NASA and USN proposals is complete folly. Nevertheless, that is precisely what Fard's convictions hang on.

The bottom line is that Fard attempted to include all possible cost items in his proposed budgets in a reasonable fashion. In other words, Fard simply practiced the principle of conservatism, which is in line with this Court's position in *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995): "Financial accounting is not a science. It addresses many questions as to which the answers are uncertain and is a "process [that] involves continuous judgments and estimates." *Id.*, ch. 5, at 7–8. In guiding these judgments and estimates,

"financial accounting has as its foundation the principle of conservatism, with its corollary that 'possible errors in measurement [should] be in the direction of understatement rather than overstatement of net income and net assets.'" *Thor Power Tool Co. v. Commissioner*, 439 U. S. 522, 542 (1979) (citation omitted)."

The government SBIR web site in a tutorial on Accounting and Finance provides the following instruction on how to prepare the budget for SBIR proposals:

> FAR 31.205-7 addresses the concept of a "contingency" to cover unexpected costs. It is allowed, but with limitations. It generally is not allowed in situations in which you have a cost reimbursement award (typical of a Phase II award), because such contracts/grants allow you to bill the actual cost of doing the work, including unexpected ones. And in Phase I, even though most awards are fixed price, we would say contingency is almost always an ineligible cost and therefore should not be included in your cost proposal. Therefore, make sure you have not underestimated the costs of doing the technically risky Phase I R&D.

SBIR/STTR On-line Tutorials, Course 8, Accounting and Finance, Tutorial 4, available at https://www.sbir.gov/tutorials/accounting-finance/tutorial-4# (last visited August 17, 2020)

Clearly, the government SBIR web site warns SBIR applicants against underestimating the costs of technically risky R&D work, which is in line with this Court directive in *Shalala*.

The Eleventh Circuit decision to affirm wire fraud conviction squarely conflicts with this Court's directive that any errors in cost estimates should be in the direction of overstating rather than understating the estimated costs,

following the principle of conservatism in financial accounting. Therefore, this Court's intervention is plainly warranted.

Having no evidence that Fard's estimated budgets were fraudulent at the time of submissions, the Government claimed that the estimated cost items in proposed budgets became "binding" once the parties signed the contracts

The notion that those estimates were somehow definitized and binding once the contract was consummated is belied by the lack of any record evidence and common sense. Taken to its logical conclusion, the deviation of one penny from the estimate could form the basis for a wire fraud prosecution.

The contracts at issue here were of a written nature and there were no oral modifications alleged. Not one line, clause or statement from the contracts (See Gov't Exs 3.3A, 4.3A, 6.3A, 7.3A, 8.3A, 10.10) is quoted by any witness at trial or in the Government's answer brief to support the notion that the proposed costs in Fard's submission were binding to the penny. That is because there is no line, clause or statement in any of those contracts supporting that notion. And that is for a perfect reason: It simply makes no sense and serves no purposes. The pycnometer is an excellent example of how nonsensical this theory was. As mentioned before, Fard proposed to lease the pycnometer in one of his proposals. However, as this equipment became available to Fard during the performance period of the contract, he did not spend the money on that because it was unnecessary. However, according to the government theory, Fard

was obligated to spend the money on the pycnometer regardless of whether or not it was needed!

The government theory that the estimated cost items including proposed profit are biding in fixed price contracts is clearly false as the Government SBIR web site explains:

> "A firm fixed price or FFP award requires a recipient to perform the work necessary to produce the deliverables specified in the contract/grant for an established dollar amount. FFP awards therefore incentivize the contractor to control costs and impose minimum administrative burden on the contracting parties"

SBIR/STTR On-line Tutorials, Course 8, Accounting and Finance, Tutorial 2, available at https://www.sbir.gov/tutorials/accounting-finance/tutorial-2 (last visited August 17, 2020)

In fixed price contracts Fard entered into with the relevant agencies, he delivered exactly what the Government bargained for. As such, the terms of the contracts (including costs and profits) once negotiated and accepted by the parties lose their "individual" line-item relevance. How Fard spent the funds, which in essence was his salary, was his prerogative. Fard's proposal to deliver a certain product or service, once accepted, established the value to both parties.

Moreover, all of Fard's contracts (Gov't Exs. 3.3A, 4.3A, 6.3A, 7.3A, 8.3A) contained a "Key Personnel and Facilities" clause (1852.23571) which expressly stated that the research associate was not among key personnel and, as such, Fard was allowed to remove any research associate without obtaining permission

from the Government. It is clear from the language set forth in that clause alone that the proposed estimated budget for research associates did not impact the government decision making process to award the contracts. This is very explicit language clearly saying that despite providing estimated costs for a research associate in its proposed budget, Fard could ultimately decide not to use the research associate or remove the research associate without obtaining government approval. The Eleven Circuit's assertion that estimates were binding and material misrepresentation cannot be correct.

The government theory was not real, and did not exist. It was totally irrational, but that was precisely what the Government needed to win by allowing its witnesses to present false testimony. A prosecutor's duty is not that the government "shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones," *Id.*

The common law prohibits courts from "impos[ing] obligations on the parties that are not mandated by the unambiguous terms of the agreement itself." *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2nd Cir. 1999) (Sotomayor, J.).

There were no misrepresentations in Fard's proposals and no scheme to defraud in this case.

The implications of this case are shocking—and dangerous. Nothing is easier than accusing a small-business government contractor of making misrepresentations in his initial cost estimates. Such an allegation is enough, under the decision below, not just to drop him as a contractor, terminate his contracts, or sue him for breach of contract, but to indict him for fraud.

But the problem is actually far worse. All that is needed to obtain an indictment is an allegation that the estimated costs are false because they are different from actual costs.

In an ideal world, the proposed estimated costs would be the same as the actual costs. But our world is decidedly not ideal, and in the world of contracts, particularly research and development contracts, the ideal world does not exist. Small business contractors thus always have their interests in mind to ensure that they are not going to lose money. We all understand as much—except, apparently, the Eleventh Circuit. Trying to criminalize overstating estimated through federal criminal law, that Court has now authorized prosecutors to pursue, and empowered juries to imprison, any government contractor who practices conservatism by putting all possible cost items in his proposed budget. This Court cannot stand by.

Moreover, this Court has interpreted the fraud statutes in light of the "rule of lenity" and in such a way that provides citizens "fair notice of what sort of conduct may give rise to punishment." *McNally v. United States*, 483 U.S. 350 (1987). The decision below violates these principles, criminalizing a common

business practice while denying fair notice of the legal principles, applied in the prosecutions, and that alone directly contradicts this Court's cases.

The notion that federal courts should expand the wire fraud statute to capture all conduct they regard improper is contrary to multiple root principles of federal law. The Eleventh Circuit Court's holding in this case is clearly incompatible with the rule of lenity, which instructs that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971).

It is critical for this Court to correct the Eleventh Circuit Court's profoundly flawed interpretation of the elements of wire fraud statute. The federal Government's keenness to treat a routine business practice as a federal criminal matter illustrates the "over-criminalization and excessive punishment" that have plagued the criminal justice system. *Yates v. United States*, 135 S. Ct. 1074, 1100-01 (2015) (Kagan, J., dissenting). This Court's intervention is plainly needed.

II. In Fraudulent Inducement In Procurement Cases, There Exists A Mature Circuit Slip About How To Calculate Loss And Restitution

This Court should consider the 3-3 circuit split over the calculation of loss and restitution in the fraudulent inducement in procurement cases. The holding

below misconstrued the loss calculation and restitution guidelines and had significant implications for Fard's forfeiture and restitution orders.

The question is whether to apply the general rule for loss calculation that permits offsets, U.S.S.G. §2B1.1, cmt. (n.3(E)(i)) (loss "shall be reduced by money and property returned, as well as the fair market value of services rendered ... to the victim before the offense was detected"), or the special government benefits rule that does not allow offsets, U.S.S.G. § 2B1.1, cmt. (n.3(F)(ii)) (loss is not "less than the value of the benefits obtained by unintended recipients or diverted to unintended uses").

It is without dispute that loss amount calculation and the forfeiture and restitution orders are germane to each other. *See United States v. Ali*, 619 F.3d 713, 720 (7th Cir. 2010) (where the loss calculation, forfeiture order, and restitution award are the same, the analysis of the district court's holdings should be similar).

The district court decided and the 11th Circuit panel affirmed that *Maxwell* governed the issues discussed in sentencing and SBIR/STTR program contracts awarded to Fard's corporation were akin to "government benefits" type contract. See *United States v. Maxwell,* 579 F. 3d 1282 (11th Cir. 2009). As such, the district court relied upon United States Sentencing Guideline (U.S.S.G.) § 2B1.1, cmt. (n.3(F)(ii)) to determine the loss amount. Based upon that determination, the district court entered its forfeiture and restitution orders.

Without a shadow of doubt, SBIR/STTR contracts in this case are procurement contracts (fee-for-service business deal). See *Sperient Corp. v. United States*, 113 Fed. Cl. 1, 7 (2013). In fact, the price negotiation memo of each SBIR/STTR contract that Fard entered into states so on the very first page: "This procurement is for Research and Development with separate research areas under which Small Business Concerns (SBCs) are invited to submit proposals: the Small Business Innovation Research (SBIR) program and the Small Business Technology Transfer (STTR) program". Gov't Ex. 6.3B.

Moreover, the government SBIR web page unequivocally points out that NASA and DOD SBIR contracts are procurement contracts–an agreement between a buyer and seller to provide goods or services in return for compensation. It provides distinctions between procurement contracts, often simply called contracts, and grants, and cooperative agreements. It further states: "By contrast contracts are more demanding. A contracting agency is looking to procure a good or service that will be of direct benefit to the Government. See SBIR/STTR On-line Tutorials, Course 1 Program Basics, Tutorial 6, Contracts vs. Grants, available at https://www.sbir.gov/tutorials/program-basics/tutorial-6# (last visited August 17, 2020).

The lower court decision, Pet. App. at 1-8, to affirm that SBIR/STTR contracts constitute government benefits is simply inconceivable.

In affirming the district court, the panel relied almost exclusively on *Maxwell*. The *Maxwell* case is utterly irrelevant to Fard's case. The defendant in *Maxwell* allegedly participated in a fraudulent scheme to obtain construction contracts set aside for socially and economically disadvantaged companies at the Miami International Airport. The contracts involved in *Maxwell* were of a type of Community Small Business Enterprises (CSBE) and Disadvantaged Business Enterprises (DBE) programs, for which the Defendant's company did not qualify as either of those enterprises. In other words, the Defendant in *Maxwell* was an unintended recipient of contracts.

Contrary to *Maxwell*, Fard and his company fully qualified for the contracts that he applied for and received and, therefore, were intended recipients of the contracts. See *supra* Statement A.2. Hence, *Maxwell* is inapplicable here.

In *United States v. Near*, 708 Fed. Appx. 590 (11th Cir. 2017), a strikingly similar case to this case, the Eleventh Circuit Court reconciled its holding with that in *Maxwell*, by distinguishing that case as follows:

> The government is correct that *Maxwell* declined to offset losses under the Government Benefits Rule, but *Maxwell* involved funds received by an unintended recipient. *Maxwell*, at 1282. It makes sense that such losses could not be offset by the value of services provided because those services should never have been provided by that recipient in the first place.

The SBIR/STTR programs at issue in this case are not DBE programs. As per the Federal Grant and Co-operative Agreement Act, government agencies

(NASA, MDA, USN) must use procurement contracts when the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States government. See 31 U.S.C. § 6303 (1).

Interestingly, the 11th Circuit Court of Appeals affirmed that the district court finding whether Fard was an unintended recipient was not explicit. Pet. App. at 6. Also, the panel mentioned that the Government distinguished awarding funds to AMTI (Fard's company), not Fard. This argument is specious because Fard's business was Fard. Fard was the sole owner and shareholder of Advanced Materials Technology (AMTI), and hence the alter ago of his company.

Furthermore, the 11th Circuit Court erred in concluding that Fard used the awards for unintended purposes. Pet. App. at 6.

The evidence presented at trial contradicts the Government's allegation that Fard fraudulently diverted 70% of the government funds for his personal use. First, Fard made it clear in all of his proposals that he would be providing and charging for services provided by him in his dual capacity as the principal investigator and president of AMTI. All of AMTI's Phase 1 proposals to NASA as well as the Phase II invoices submitted for the Navy project represented that approximately 70% of the funds would be for Fard's direct labor, overhead, and profit. Moreover, the trial testimony of Government witness Romanguera demonstrated that once the Government approved and accepted the work performed under these contracts, the funds received by Fard as payment could

be spent at his discretion. Doc. 136 at 149-150. Based on this evidence, there can be no finding that the funds received by Fard were diverted to unintended uses so as to warrant the application of the Government Benefits Rule.

Furthermore, Fard certified in all his proposals that the principal investigator was primarily employed by AMTI. This simply meant that Fard was required to pay for himself as principal investigator. As the principal investigator of the contracts approved by the relevant agencies, his salary (both direct and overhead, which was a major part of G&A) was the most significant cost item budgeted in the proposals.

In summary, the Eleventh Circuit Court of Appeals erred in affirming that (1) *Maxwell* is applicable, (2) SBIR/STTR contracts in this case are government benefits programs, and (3) Fard diverted 70% of funding to unintended uses.

Regardless of erroneous decisions of the 11th Circuit Court of Appeals in this case, in fraudulent inducement in procurement contract cases, a 3-3 circuit split has erupted over the question of whether the loss should be reduced by the fair market value of services rendered.

The Third, Fifth and Ninth Circuits decided that loss in contract fraud cases must be reduced by the fair market value of services rendered by the Defendant:

- *United States v. Nagle*, 803 F.3d 167, 181-183 (3rd Cir. 2015) (holding that the amount of loss under § 2B1.1 should be calculated by taking the face

value of the contracts and subtracting the fair market value of the services rendered under those contracts. "This includes. . .the fair market value of the materials supplied, the fair market cost of the labor necessary to assemble the materials, and the fair market value of transporting and storing the materials.")

- *United States v. Harris*, 821 F.3d 589, 605 (5th Cir. 2016) (District court's error in treating entire face value of contracts as loss, rather than determining loss as total contract price less the fair market value of services rendered, was procedural error in sentencing defendant following convictions for wire fraud in connection with a scheme to obtain government procurement contracts set aside by the SBA for minority-owned small businesses); *United States. v. Sublett*, 124 F.3d 693, 694–695 (5th Cir. 1997) (Court vacated the sentence of a mail fraud defendant who had fraudulently obtained counseling services contracts from the IRS by misrepresenting his academic and professional credentials. The Court held that because the Defendant had provided properly credentialed counselors to perform portions of the contracted-for services, the district court erred in treating the entire value of the contracts as loss and, instead, directed it to deduct the value of the legitimate services actually provided.); *accord United States v. Jones*, 475 F.3d 701, 706 (5th Cir. 2007) ("In the context of a contract, the court must credit the defendant for the value of the performed services.").

- *United States. v. Martin*, 796 F.3d 1101, 1108, 1110–11 (5th Cir. 2015) (In calculating sentencing loss attributable to Defendant convicted of defrauding the DBE and SBA programs, when Defendant was not qualified to participate in such programs, the sentencing court could not use the entire amount of government contracts awarded to Defendant, where Defendant successfully performed under the contracts and provided valuable construction services to the Government).

On the other, the Fourth, Seventh, and Eleventh Circuits do not allow offsets for services rendered. See *United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300, 317-18 (4th Cir. 2000); *United States v. Leahy*, 464 F.3d 773, 789-90 (7th Cir. 2006); *United States v. Maxwell*, 579 F.3d 1282, 1305-07 (11th Cir. 2009).

Although this case presents the same "government benefits" issue that was recently presented in *Aldissi et ux. v. United States*, No. 19-5805 (S. Ct.), it arrives here in a factually more substantial and cleaner vehicle.

Because the Eleventh Circuit applied its prior panel precedent in *Maxwell*, which was for unintended recipients, the panel necessarily reached the wrong results concerning to Fard' loss and restitution amount arguments. This Court should grant certiorari to consider the viability of the "government benefits" rule in procurement contracts for set aside programs once and for all.

Applying the government benefits rule in fraudulent inducement cases causes unfair sentencing and unjust restitution amount for cases when the Government receives products/services and the Defendant fully performs. It would provide the Government with the opportunity to keep the benefits of perfect performance while demanding restitution of the entire amount of the funding received by the Defendant. That cannot be the law. This case presents an ideal vehicle to consider just that.

To protect the integrity of this Court's decisions, resolve the circuit split, and stop this criminalization of normal business operation, this Court must grant review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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Respectfully submitted,

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