No. _____

In The
Supreme Court of the United States

KAY GOW,

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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dr. Kay Gow worked as an executive for a startup company called VR Laboratories ("VR Labs") that employed, among others, a Nobel prize winning scientist and the former lieutenant governor of Florida. VR Labs applied for and received $5 million in grant funding from Lee County, Florida (the "County"). Under its grant agreement with the County, VR Labs agreed to employ at least 208 people within five years. If it failed to do so, VR Labs was contractually obligated to repay the grant money. A financial dispute between VR Labs and its general contractor caused the undercapitalized startup to fold.

After the collapse of the company, the Government brought wire fraud charges against Dr. Gow based on the County's loss of grant funds. A central feature of the Government's theory of the case was the company's failure to create 208 jobs, which, according to the Government, meant that the county did not get "what it bargained for." The Government separately charged Dr. Gow with wire fraud stemming from the losses of an investor who claimed at trial he was defrauded based on misrepresentations made by Dr. Gow's husband. However, the subscription agreement he signed directly refuted his trial testimony regarding the purported deceit, and his civil suit against the Gows proved unsuccessful. The questions presented are:

1. Can the provisions of the federal wire fraud statute, 18 U.S.C. § 1343, be interpreted to

criminalize a breach of a contract by grant recipient, where the parties contemplated a contractual remedy for the breach, and the alleged misrepresentations were aspirational statements made in a forward-looking grant application?

2. May an individual be convicted of wire fraud under 18 U.S.C. § 1343 where the victim, a sophisticated investor, executed a subscription agreement prior to his investment that directly contradicted his claim that the defendant lied to him to procure his investment?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Kay Gow was the Defendant-Appellant in the court below.

Respondent, who was the Plaintiff-Appellee in the court below, is the United States of America.

Petitioner is not a corporation. No party is a parent or publicly held company owning 10% or more of any corporation's stock.

STATEMENT OF RELATED PROCEEDINGS

- *United States v. Gow*, Case No. 2:17-cr-16-JES-NPM, U.S. District Court for the Middle District of Florida. Judgment entered May 21, 2019.
- *United States v. Gow*, Case No. No. 19-12053, U.S. Court of Appeals for the Eleventh Circuit. Opinion and Judgment entered September 16, 2021.
- *Williams v. United States*, Case No. 21-876, U.S. Supreme Court. Petition for Writ of Certiorari filed by co-defendant John G. Williams, Jr. on December 10, 2021 and denied on January 10, 2022.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Kay Gow, respectfully petitions the Court for a writ of certiorari to review the opinion issued by the United States Court of Appeals for the Eleventh Circuit affirming her criminal convictions.

DECISIONS BELOW

The United States District Court for the Middle District of Florida entered a judgment against Dr. Gow after a jury trial. App. 23.

The Eleventh Circuit issued an unpublished opinion affirming her conviction. That opinion is reproduced in the appendix. App. 1.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had jurisdiction over this federal criminal prosecution. 18 U.S.C. § 3231. The Eleventh Circuit issued its opinion on September 16, 2021. App. 1. This Court granted an application to extend the time to file a petition for writ of certiorari until January 14, 2022. This Court has jurisdiction. 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute, 18 U.S.C. § 1343, states in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

A. The Formation of HerbalScience

Around 2001, Robert Gow[1] formed a company called HerbalScience, LLC ("HerbalScience"). HerbalScience developed technology that could identify the active ingredients in plants, such as kava, turmeric and elderberry. HerbalScience employed a host of prominent scientists, including Dr. Randy Alberte, Dr. William Roschek, and a Nobel Prize winning professor from Yale University named

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[1] Kay Gow's husband, Robert Gow, was also tried and convicted as a co-defendant. Mr. Gow died after his conviction but before being sentenced, and so he was not a party to the appeal to the Eleventh Circuit. App. 2.

Dr. James Rothman. At its laboratory in Singapore, the company sought to extract bioactive chemical components so they could be utilized in consumer nutraceutical products. App. 2.

To augment the funding for its Singapore operations, HerbalScience turned to two groups of investors: Aisling Capital from New York and Weston Presidio from Boston. Mark Bono, the head of Weston Presidio, had an MBA from Harvard, while Tony Sun, the head of Aisling Capital, was a medical doctor, who had substantial experience in finance. After conducting extensive due diligence on HerbalScience, Aisling Capital and Weston Presidio decided to invest $14 million apiece. Ultimately, though, HerbalScience would not produce the returns expected of it, and due to unforeseen financial difficulties, the company reached the verge of bankruptcy. App. 3

B. The Formation of VR Labs

HerbalScience began to explore different uses for the technology so that it might secure new customers. One potential customer was VR Labs. Mr. Gow formed VR Labs in 2010, and the company hired Reg Steele as a consultant for $180,000 per year. Steele was a former GNC executive, who helped that company develop an international presence that grew to almost 2,000 stores abroad. Steele ultimately became the Chairman of the Board for VR Labs, which entered into a licensing agreement with HerbalScience to use its extracts in

drinks that would be sold to consumers in the United States. App. 3, 6.

VR Labs also hired Jeff Kottkamp, an attorney who served as a member of the Florida House of Representatives and later as the Lieutenant Governor of Florida. After he left his post as Lieutenant Governor, Kottkamp agreed to represent VR Labs and assist the company in its efforts to secure public and private funding. Kottkamp's agreement entailed his receipt of 5% interest in the stock of the company. App. 3.

C. The FIRST Grant

Kottkamp lobbied on behalf of VR Labs to obtain a grant associated with the Economic Development Office of Lee County, Florida, an organization designed to energize business growth and attract new business to the area. VR Labs initially applied for funding through Recovery Zone Facility bonds, which were tax exempt bonds issued to raise funds to aid qualified businesses in designated recovery zones. In its application, VR Labs proposed the construction of a facility would contain two buildings, a 125,000 square-foot production facility and a 30,000 square-foot headquarters facility. These buildings would be large enough to house both HerbalScience's extraction of chemicals from plants and VR Labs' manufacturing of products with those chemicals. App. 3.

The estimated cost of the proposed project would be $40 million. According to the application, that money would go towards covering the cost of design, construction, and some equipment for the new facilities. The remaining equipment and furnishing costs would be paid by the company's cash flow as demonstrated by financial projections attached to the application. VR Labs was not able to complete the financing by the end of 2010, which was the deadline to apply for the bonds. After the expiration of the deadline for Recovery Zone Facility bonds, VR Labs proceeded with their "fallback" plan, which was to build a pilot plant to begin production in Lee County. App. 3.

The company applied for funds through the Lee County Financial Incentive for Recruiting Strategic Targets ("FIRST") program. Dr. Kay Gow was listed as the contact person for the company on the application. One question on the application asked what best described the operations of VR Labs, and the company checked a box for "multinational business enterprise." The Director of the Economic Development Office of Lee County, James Moore, knew that VR Labs was not an international company at time of it submitted the application. In fact, Moore knew that VR Labs was a startup that did not have any established track record. Moore was also aware that startups generally have a higher risk associated with them than going concerns that have been established for some time. The application also stated that VR Labs hoped to create 208 jobs in

Lee County. Because it was a start-up, though, VR Labs never provided Lee County with any financial statements or bank references. App. 3.

Moore was excited about the prospect of having HerbalScience and VR Labs operating in Lee County, but he asked Mr. Gow for additional financial information concerning the companies. Mr. Gow, citing confidentiality concerns, declined to provide it, so Moore personally took no formal position on the application. Still, the Economic Development Office recommended that the County approve the application, and the Board of County Commissioners voted to approve the application. App. 3-4.

Funds were to be limited to "qualified capital improvements," which were defined as "investments made by or on behalf of Company for purchasing manufacturing and research and development equipment for project facility, constructing improvements to real property on project site as would be included in the basis of such property for tax purposes, and acquiring or leasing furniture, fixtures, and equipment for the project facility." Salaries and personal business expenses were not qualified capital improvements. App. 4.

Under its agreement with the County, VR Labs agreed that intended to employ at least 208 people at its facility by December 31, 2016. If the company did not create those jobs, the County had the ability to terminate the contract, though VR Labs

could request an extension of the job creation schedule by one year. According to the incentive agreement, VR Labs was responsible for repaying the money within forty-five days if the promised jobs were not created. *See* App. 4.

Ordinarily, the County required FIRST grant recipients to spend their own funds, which the County would reimburse, after confirming that the funds constituted "qualified capital investment" expenditures. However, VR Labs negotiated a different arrangement with the County that would allow grant funds to be spent "by or *on behalf of*" VR Labs. This, in turn, allowed VR Labs to reach an agreement with its general contractor under which the contractor would make the initial payment of a qualified expenditure to a subcontractor through a line of credit. Then, after the contractor obtained the subcontractor's release of lien and submitted receipts, VR Labs would seek reimbursement. The County knew of and approved this arrangement. *See* App. 6.

D. VR Labs Contracts with Williams Bottling

VR Labs chose Williams Specialty Bottling Equipment ("Williams Bottling") to procure and manage the bottling equipment that VR Labs would need to package the company's products. Williams Bottling was a company formed by a HerbalScience investor, co-defendant John Williams. Williams was licensed as an engineer and an electrician, but he

had no prior experience with bottling lines or manufacturing bottles. App. 4

Still, VR Labs wanted to equip its bottling line with proprietary software that would increase efficiency, and Dr. Gow testified that the company trusted Williams to protect this trade secret, which had the potential to hold great value. According to John Saltamartine, who VR Labs hired to operate the bottling line, the software could improve efficiency and provide a substantial return based on the increased efficiency. Minor inefficiencies on a bottling line can cost a large amount of money. Saltamartine testified that the proprietary software could generate savings of over $2 million in the first year alone. *See* App. 15.

Saltamartine worked closely with Williams' son, John Mosby Williams ("Mosby Williams"), who was tasked with developing the software. Saltamartine saw screenshots of the software but did not believe that the software was functional at that time. In any event, the software could not be tested until the bottling line was completely assembled. Mr. Gow told Kottkamp that he was confident that Mosby Williams had the ability to complete the software because of the work he had done previously at HerbalScience. Kottkamp testified at trial that the company viewed the software as crucial to its success. He also averred that he knew an individual who ran another company that had paid $1 million for customized software.

E. Payments to Williams Bottling

In 2011, Williams met with A-Packaging Systems, Incorporated ("APACKS"), a company from Indiana that designed and constructed customized machinery for bottling lines, to discuss the construction of the bottling line for VR Labs. Williams acquired a detailed quote from APACKS for the machinery required for the bottling line, as well as for its installation at the VR Labs facility. App. 5-6.

Williams took that quote, marked up the price, and used the contents to prepare his invoice to VR Labs. In addition to the items that APACKS would provide, the invoice contained a line item that required Williams Specialty Bottling to develop, install and test a proprietary software package to enhance system performance and provide proprietary information requirements. Also included were other services to be provided by Williams Bottling, including: (1) mechanical engineering services; (2) project management and systems integration; and (3) preventative maintenance and repair for two years from the date of the installation. The cost for developing this "turnkey proprietary bottling line" and associated engineering services was approximately $1.7 million. App. 5, 21.

Lee County knew from the outset that Williams Bottling was providing the bottling line, and if anyone at the economic development office took issue with the amount of any of the line items on

his invoices, they could have denied the reimbursement request, as the County had on other occasions. Instead of doing so, the County approved all of requests for reimbursements from Williams Bottling. App. 5.

Around this same time, Williams personally signed a subscription agreement, stating that he would invest $1.3 million in VR Labs in exchange for a 1.3% percent interest in the company. Nothing in the grant agreement prohibited VR Labs from employing an investor, like Williams, as a subcontractor. After the County approved of the payment to Williams Bottling, the company moved a portion of the funds received (approximately $700,000) to a new personal savings account. Williams then transferred $250,000 from his savings account back to Williams Bottling, and Williams transferred $320,000 to VR Labs as an investment under his subscription agreement. The same day that it received the payment, VR Labs paid HerbalScience a $33,333 "license fee" that was due. App. 5-6.

Ultimately, Lee County reimbursed VR Labs $4,694,548.04. Of that amount, $2,383,154.90 went to reimburse payments VR Labs made to Williams Bottling using the line of credit that the general contractor obtained. And, in turn, Williams Bottling transferred $1,430,000 of the county grant money back to VR Labs pursuant to his subscription agreement. Much of the money from his investment went to salaries, expenses and other costs that did

not meet the criteria for "qualified capital investments" under the grant agreement. App. at 6-7.

F. VR Labs and its Fundraising Efforts

As a startup with limited capital, VR Labs was actively seeking additional funding. The company partnered with an investment specialist named John Barrymore, who set up meetings to discuss opportunities in the mergers and acquisition space for natural product companies. These discussions also included Tom Hall, who worked in San Francisco, and Frank Sajovic, who lived in Connecticut. Hall and Savojic were working in marketing and sales.

According to an email introduced at trial, Mr. Gow wrote: "It looks like we will need to raise only $2.5 million, which will be used as follows: $500,000 for equipment for the production plant needed for the facilitation of two-ounce production – more bottles put through the system will require the extension of several pieces of bottling line equipment."

The additional funds would also be used as follows: "$1 million for animal and pilot human clinical studies for our nine medical food products, and for MRSA and H3N2 flu virus, our two botanical medicine products. These studies will be fast in duration, since we already know MOA. . . and have extensive in vitro data. Getting the majority of these accomplished before the Helssin/Thorne joint venture

portal opens in March will be important for our products to be included."

The reference to Helssin/Thorne alluded to a meeting with Thorne, a company that was already selling products in the pharmaceutical and natural products/vitamins arena. VR Labs had meetings with Thorne, as well as with Helssin, another company already operating in that same space. The idea was to either merge with those companies or at least work together with them on products.

Mr. Gow proposed that the capital come from "friends and family" instead of "venture capital sources." Mr. Gow suggested that Steele and Kottkamp work with one of the scientists to raise the funds. The goal was to raise the funds by January of 2012. Mr. Gow wrote that "$2.5 million is not a lot of money for the startup of a business like VR Labs. The risk capital, the capital needed to assemble the right team, facilities, commerce, plant and equipment, plus getting the business in motion, has already been invested, and invested a valuation of $100 million."

Mr. Gow privately told Kottkamp that he estimated that VR Labs could be worth a billion dollars, though he never provided any financial data to support that valuation. Kottkamp believed that the figures were substantiated by "a variety of sources," including the "value of certain botanicals" that might provide an "answer to MRSA." Kottkamp remained "very excited and enthusiastic," and he

convinced some close friends to invest in VR Labs. App. 17.

G. The Dispute between the General Contractor and VR Labs

During the construction of the bottling facility, a rift developed between VR Labs and its general contractor related to payments under the contract. The dispute came to a head when the contractor filed construction liens on the property in July of 2012. The liens were devastating to VR Labs, not just because they effectively prevented anyone from the company from entering the land, but also because the general contractor was representing to members of the community that he was owed hundreds of thousands of dollars, even though, according to VR Labs, he had not complied with the contract and was not owed that money. His allegations wound up in the media and resulted tremendous reputational damage. *See* App. at 7.

H. VR Labs Hires Robert Haynes

In January of 2012, an individual name Robert Haynes sent Kottkamp a letter inquiring about the possibility of working for VR Labs. Haynes received his MBA from Vanderbilt University, spent thirteen years working in pharmaceutical product development at Eli Lilly and Company, and thereafter worked in a similar capacity with Human Genome Sciences, a "genomic-based biotechnology company" that worked on decoding the human

genome to discover "new pathways for new pharmaceuticals."

Later that month, Haynes visited VR Labs. He met Dr. Roschek, Robert Gow, and Kottkamp and toured the VR Labs facility. Dr. Roschek presented an overview of the technology during that visit. Between January and September of 2012, Haynes had multiple conversations with VR Labs executives and repeatedly expressed his interest in working for the company.

During a meeting in September of 2012, Mr. Gow told Haynes that the timing might be good for him to come work for VR Labs. Mr. Gow mentioned a new nutraceutical product line in development and discussed the potential value of the merger between VR Labs and Thorne, the value of which he estimated to be between $370 million and $375 million. VR Labs offered Haynes a job during the meeting, but he did not accept it immediately. Instead, Haynes did "due diligence" on Thorne, on Dr. Rothman, who he testified was "pretty renowned," and on Kottkamp, the former Lieutenant Governor of Florida.

Haynes also had extensive meetings with VR Labs executives over several days. He toured the laboratory, met with the scientists, and discussed operations with Saltamartine. Haynes admitted that, after conducting this due diligence, he came away from the multi-day tour impressed with VR Labs.

Mr. Haynes reached an agreement to work for VR Labs as a Senior Vice President in September of 2012. His salary would be $240,000 per year and he would receive stock options equal to 2% of the company that would vest at some time in the future. Per the contract, Mr. Haynes also agreed to purchase shares in VR Labs in the amount of $500,000 at a valuation of $50,000,000, or one percent of the company. App. 9.

In the subscription agreement, VR Labs disclosed risk factors that might impact Haynes' investment, including the risks associated with operating in such a highly competitive market, and the risk that other competitors might have better capitalization, substantially more resources, and established relationships with prospective purchasers. The subscription agreement states that those risk factors could limit the company's sales and market penetration and make it difficult to achieve profitability. It also listed the shares, shareholders, and the amount of capital the shareholders had contributed. App. 19.

By signing the subscriber agreement, Haynes, the subscriber, attested to the following:

> Subscriber represents that it has had an opportunity to ask questions and receive answers from the company regarding the terms of the operating agreement and the business properties, prospects and financial condition of the

> company, and that subscriber is satisfied with the opportunity and has had all of the subscriber's questions answered to subscriber's satisfaction.
>
> Without limiting the generality of the foregoing, subscriber represents, A, that it has had an opportunity to ask questions about the company's business plan; and, B, that subscriber understands the company is a pre-revenue enterprise which has not yet had significant revenue.

Haynes also certified that he was an "accredited investor," which meant he had a net worth in excess of $1 million and an individual income of more than $200,000 or a joint income with his spouse of over $300,000. The contract also disclosed the risk that Haynes could suffer the complete loss of his investment because VR Labs was a new company in a highly competitive marketplace. App. 19.

Haynes asked to see a financial statement before signing a contract, but Mr. Gow told him the financial information was confidential and could not be disclosed due to the potential merger with Thorne. Nevertheless, Haynes decided to sign a service and subscription agreement, and paid the investment of $500,000 in two installments by the fall of 2012. App. 9.

One of Haynes' first assignments was to "pull together opportunity assessments in a few therapeutic areas" in advance of the Thorne merger. This required him to forecast the potential value of VR Labs products. One of the products was a treatment for MRSA, which Dr. Roschek was developing. Another product was designed to treat Alzheimer's that was in an early stage of development. Haynes was active in promoting the Thorne merger and sat in on one of the meetings with Morgan Stanley, the investment bank that was financing the deal.

Thorne was not the only pharmaceutical company interested in VR Labs; Helssin had inquired about the product designed to treat MRSA, and the pharmaceutical company entertained a pitch prepared by Dr. Roschek on it. In advance of the meeting, Haynes prepared the marketing document entitled, "Preliminary Licensing Opportunity for Treatment of MRSA." Haynes also prepared a similar document related to the Alzheimer's treatment. Haynes believed in the potential for the VR Labs products and was operating in good faith when he advocated for a merger to executives of both companies.

Neither merger came to pass, however, and Haynes soon learned that VR Labs' dispute with its general contractor had deteriorated to such an extent that it put his investment at risk. The Gows asked Haynes to invest more money, but Haynes told them

he had no more to invest. Facing dire financial straits, VR Labs asked Haynes in March of 2013 to reduce his salary, but he declined that request as well. Haynes then discontinued his work at VR Labs that same month.

After the collapse of VR Labs, Haynes sued Mr. Gow and VR Labs civilly. He admitted at trial that his suit was not successful. Haynes also agreed that he read the risk factors in the subscription agreement but still invested because there are "always risks with every venture."

Haynes testified that Mr. Gow told him that his investment was designed to protect licensing and intellectual property and that others in senior management had invested, including Kottkamp, who he was told had invested $1million. However, in the subscription agreement introduced into evidence, VR Labs listed the individuals who had invested in the company, and Kottkamp's name did not appear. Haynes also clarified on re-direct that he did not believe his investment funds were designated to be spent on any particular purpose. *See* App. 8-9

I. Tammy Hall and the Indictment

One of the Lee County Commissioners, Tammy Hall, was close friends with the general contractor and another sub-contractor who handled the HVAC during the construction project. She began working for the sub-contractor after she left the County Commission. According to Mr. Moore, Commissioner

Hall wanted the full weight of the County brought to bear on VR Labs to make sure that her friends got paid. As it happened, Hall was also a confidential informant for the FBI at that time and served as the "catalyst" in initiating the federal prosecution.

In the ensuing indictment, the Government charged the Gows and Williams with conspiracy to commit wire fraud in Count One. It charged them with four counts of wire fraud, two of which related to payments Williams made pursuant to the subscription agreement, while two other counts against the Gows arose from the two investments Haynes made under his subscription agreement. App. 8.

J. The Trial

The case proceeded to trial in February of 2019. In its opening statement, the Government explained its theory of the case: The Gows hired Williams to produce a bottling line to manufacture drinks with herbal supplements in them, even though he had no experience in producing bottling lines, and in 2011 and 2012, Williams sent five invoices to a Gow-owned company for payment, but in each instance, he returned a substantial sum back to the Gows through his investment in VR Labs.

According to the Government, the Gows' company, VR Labs, had received a $5 million grant to build the bottling line from Lee County, Florida. That money, though, could only be used for hard

costs, such as manufacturing, construction, and paying for the bottling line itself. The Government maintained that Williams inflated his invoices to get around those restrictions and allow for grant money to flow back to VR Labs to pay for salaries and other soft costs. With regard to the misrepresentations underlying the wire fraud, the Government averred that the grant application that Dr. Gow submitted to Lee County included falsehoods.

Finally, the Government maintained that, after the depletion of the grant money, VR Labs solicited an investment of $500,000 from another individual, Robert Haynes. The Government asserted that Haynes was also defrauded based on falsehoods told to him to obtain his investment. According to the Government, those falsehoods included (1) the statement that Kottkamp was an investor; (2) the company was in "good financial condition"; and (3) VR Labs was in the process of merging with another company.

Dr. Gow, for her part, argued that she had no intent to defraud anyone because she wanted the business to succeed. She emphasized that her nutraceutical company, HerbalScience, employed Dr. James Rothman, a faculty member of Yale University who won the Nobel Prize for medicine, as well as many other reputable scientists and Jeff Kottkamp, the former Lieutenant Governor of Florida.

The Gows also stressed that VR Labs was a startup company that contracted to build a pilot

plant, which, the founders hoped, would be the first of many. Lee County knew that it was a startup that had no capital, no profit and loss statements.

With regard to Williams, the Gows observed that he had a contract, a subscription agreement, that allowed him to buy into the company, and in return he invested those funds with VR Labs. In sum, the Gows took the position that there was no wire fraud because they never had the intent to defraud anyone.

After the Government rested its case, Dr. Gow moved for judgment of acquittal. She maintained that there was no evidence introduced that suggested that she ever intended to cause a loss to anyone or to injure anyone or to steal from anyone. On the contrary, the evidence demonstrated that Dr. Gow wanted the project to succeed so that everyone could recoup their investment. Williams, for his part, argued that there was no proof of any lie or deception.

In response, the Government maintained that the "big lie" was that the County awarded money to be used to pay for qualified capital improvements, and that the money should not have gone to soft costs. The Government explained its theory of the case as follows:

> The Gows and Williams agreed to divert this grant money and to use a portion of it for purposes that were not

> permissible under the terms of the grant, and spent it rather for other purposes, in part to keep VR and [HerbalScience] alive - - and to maintain the appearance that they were still alive so that they could ultimately achieve a merger or a sale of the company and get their big payday. That's what everybody was counting on. But their objective of selling or merging so they can all get paid is not a license to lie to the county to get that money to keep it afloat until they reach their personal goal.

The Government also framed its argument about the counts related to Lee County in terms of contract law:

> And the county did not receive what it bargained for. It didn't receive a deal where the people who got the grant money spent it for permissible purposes. And in the end, of course, they never got what they bargained for at all, because they never got the pilot plant, they never got the jobs that were promised pursuant to the agreement, they didn't get the benefit of their bargain.

Thus, in the view of the Government, since Lee County did not get "what it bargained for" the

defendants committed fraud. The district court denied Dr. Gow's motion for judgment of acquittal.

After the defense rested. Dr. Gow renewed her motion for judgment of acquittal. She argued that there was no evidence presented of any intent to cause a loss or an injury to the victim. Without the intent to cause a loss or injury, she continued, all the counts in the indictment were unsustainable. The district court denied the motion. App. 2.

During closing arguments, Government discussed the wire fraud counts and stated that the victims were Lee County and Robert Haynes. With regard Lee County, the Government claimed that certain statements on the VR Labs application for FIRST grant money were fraudulent, including: (1) VR was a multinational business enterprise; (2) VR Labs was going to bring 200 plus highly skilled jobs to the county; and (3) VR Labs leading formulator and manufacturer of nutraceuticals. It also claimed that submitting an application with no financial statements and no bank references was fraudulent. *See* App. 12.

According to the Government, the Gows also falsely represented that the money would be used for qualified capital investments, but instead diverted payments through Williams Specialty Bottling to VR Labs, which it claimed was an illegal diversion of grant funds. The Government emphasized that Williams agreed to provide the bottling line even though he had no experience with bottling lines prior

to that time. In addition, the Government claimed that the margins that Williams charged above and beyond its contract with APACKS were illegitimate. App. 13.

With regard to counts related to Haynes, the Government relied on two statements that it claimed were fraudulent: (1) Mr. Gow told him that Kottkamp invested in VR Labs; and (2) "that this money was going to go for licensing and protecting the technology, and things of that nature; not for day-to-day operating expenses."

The jury returned a general verdict of guilty against Dr. Gow on all counts in the indictment. App. 9.

K. Dr. Gow's Appeal

On appeal, Dr. Gow argued that her convictions for wire fraud failed as a matter of law. With respect to the charges related to the County, she observed that the Government urged the jury in closing arguments to convict her based on a legally inadequate theory; *i.e.*, VR Labs promised to create some 200 jobs, and because it failed to do so, she could be convicted of defrauding Lee County. App. 14-15.

She admitted that Lee County never received the employment that VR Labs had an obligation to generate. However, she observed that the parties specifically devised a remedy for such a breach: VR Labs would have to pay Lee County its money back

within 45 days. According to Dr. Gow, breaching a contract, even intentionally doing so, is not a federal crime, and so the company's failure to perform under the contract was an invalid basis to establish her intent to defraud the County. *See* App. 15.

Dr. Gow also argued that the purported falsehoods in the FIRST grant application that the Government highlighted before the jury could not provide the basis for a wire fraud conviction. She pointed out that VR Labs fully intended to become a multinational company that was an international leader in nutraceutical drinks and that the statements in the application for the FIRST grant were nothing more than aspirational statements akin to "puffery." App. 15.

She argued that, because the jury returned general verdict of guilty, her convictions related to the grant agreement must be set aside under *Griffin v. United States*, 502 U.S. 46, 56 (1991), because it was "impossible to tell" whether it may have been based solely upon an unconstitutional or "legally inadequate" ground.

Dr. Gow also challenged the validity of the wire fraud convictions related to the Haynes investment. She noted that the purported falsehoods identified by the Government and testified to by Haynes were all expressly refuted by the language of the subscription agreement.

Specifically, Haynes claimed at trial that Robert Gow influenced him by mentioning that Kottkamp had invested money in the company. But the subscription agreement accurately listed the shares, shareholders, and the amount of capital the shareholders had contributed—and Kottkamp's name did not appear. App. 19.

Dr. Gow also argued that the subscription agreement directly contradicted Hayne's claim that he was misled because he was not permitted to see the financial statements prior to his investment. To wit, Haynes attested in the subscription agreement that he had an "opportunity to ask questions and receive answers from the company regarding the terms of the operating agreement and the business properties, prospects and financial condition of the company" and was "satisfied with the opportunity and has had all of the subscriber's questions answered to subscriber's satisfaction." App. 19.

He also agreed that he "had an opportunity to ask questions about the company's business plan" and understood that the company was a "pre-revenue enterprise which has not yet had significant revenue." In other words, she argued, Haynes "could not have possibly been misled," because his own contractual attestations refuted his trial testimony about the purported falsehoods Mr. Gow told him. App. 19.

The Eleventh Circuit rejected both arguments. Notably, it disagreed with Dr. Gow's argument that a

breach of contract cannot form the basis for a wire fraud conviction: "Thus, she contends that the government's case against her rested on a breach of contract theory, which cannot support a conviction for federal wire fraud. We disagree." App. 14. It reasoned that, "a reasonable jury could have concluded that Kay Gow promised to create jobs to secure the grant award while knowing—or being recklessly indifferent to the possibility—that VR Labs would not be able to fulfill that promise." App. 15. Thus, in the view of the Eleventh Circuit, the breach of the grant agreement's provision regarding the promise to generate future employment was a valid basis for the wire fraud conviction related to the County.

With regard to the Haynes investment, the Eleventh Circuit concluded that a jury could have found that "Robert Gow (and Kay Gow as a co-conspirator) materially misrepresented VR Labs's financial condition and prospects with the intent to entice Haynes to invest $500,000." App. 18. The appellate court rejected her reliance on the subscription agreement that expressly informed Haynes that it was a "pre-revenue enterprise which has not yet had significant revenue" and advised him that the firms undercapitalization posed a risk to his investment.

According to the Eleventh Circuit, the "boilerplate language about the risks of investment" could not "displace specific misrepresentations about

VR Lab's financial condition." App. 19. The Eleventh Circuit also declined to credit the disclosure in the subscription agreement about the identity of the investors, the extent of their investment, and the lack of existing revenue streams. App. 19. In the view of the Eleventh Circuit, that argument "misses the point" because punishment "under the wire fraud statute is not limited to successful schemes." App. 19-20 (quoting *United States v. Ross*, 131 F.3d 970, 986 (11th Cir. 1997)). All the Government needed to show, it reasoned, was "that the accused intended to defraud his victims and that his or her communications were reasonably calculated to deceive persons of ordinary prudence and comprehension." *Id.*

For the reasons that follow, this Court should grant the writ and reverse the ruling of the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

The decision below warrants this Court's review for two independent reasons. *First*, the Court should clarify the scope of the wire fraud statute in the context of complex business transactions. Multiple federal courts of appeal have held that a breach of contract, even an intentional breach, is not a crime. Yet the Eleventh Circuit reached a contrary conclusion and found that VR Labs's failure to create the future employment it promised in a grant agreement subjected Dr. Gow to criminal liability. That decision, if followed by other courts, could have

a chilling effect on legitimate business transactions across the country. It would also raise grave due process and federalism concerns.

Second, the Court should dispel the uncertainty as to whether federal courts can, in imposing liability for wire fraud, disregard the plain language of an investment agreement that negates an investor's claim that he or she was misled. Some circuits, like the Seventh Circuit, have held that unambiguous written provisions control over oral statements to the contrary and bar fraud claims premised on the latter. *See Carr v. CIGNA Secs., Inc.*, 95 F.3d 544, 547 (7th Cir. 1996); *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 571 (7th Cir. 1991) ("Documents that unambiguously cover a point control over remembered (or misremembered, or invented) oral statements.").

Other courts, like the Eleventh Circuit in this case, have declined to impose those same limitations in the context of criminal prosecutions for wire fraud, even though the statements would not be actionable civilly. As Dr. Gow argued below, this ruling creates a startling anomaly: an individual can be found guilty *beyond a reasonable doubt* in a criminal prosecution for wire fraud, even though that same individual would be absolved of civil liability for fraud, which only requires proof by *a preponderance of the evidence*. That cannot be the law.

I. Review is Necessary to Clarify whether an Ordinary Breach of Contract can Support a Wire Fraud Conviction.

As Justice Scalia once observed, the mail and wire fraud statutes have "been invoked to impose criminal penalties upon a staggeringly broad swath of behavior," creating uncertainty in business negotiations and challenges to due process and federalism. *Sorich v. United States*, 129 S.Ct. 1308, 1308-11 (2009) (Scalia, J., dissenting from denial of certiorari). In that same opinion, Justice Scalia lamented the lack of a viable limiting principle that "separates the criminal breaches, conflicts and misstatements from the obnoxious but lawful ones." *Id.*

Most federal courts of appeal have recognized that an ordinary breach of contract does not amount to wire or mail fraud. *See*, *e.g.*, *United States v. D'Amato*, 39 F.3d 1249, 1261 n.8 (2d Cir. 1994) ("A breach of contract does not amount to mail fraud"); *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 388 F.3d 990, 1002 (7th Cir. 2004) ("Fraud requires much more than simply not following through on contractual or other promises."); *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990) ("Nor does a breach of contract in itself constitute a scheme to defraud.").

In this case, though, the Eleventh Circuit disagreed with those well-reasoned decisions. Instead, it held that Dr. Gow could be found guilty of wire fraud, based solely on the fact that a jury could find she "promised to create jobs to secure the grant award while knowing—or being recklessly indifferent to the possibility—that VR Labs would not be able to fulfill that promise." That is too low a bar to impose criminal liability for wire fraud.

It is not illegal to breach a contract, even intentionally. *See* John E. Murray, Jr., Murray on Contracts, § 117, at 672 (3d ed. 1990) ("It is conceivable . . . for a legal system to compel the enforcement of promises through its criminal law or at least to allow recoveries to injured promisees which go beyond mere compensation. But the Anglo-American legal system has not chosen this route.").

Indeed, the very notion of an "efficient breach" is predicated on the theory that a party is free to intentionally breach a contract "for no other reason than that it benefits them financially." *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th Cir. 2008). Punitive damages are generally unavailable for an intentional or even a "malicious" breach of a contract. *See Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 66 (2d Cir. 1985).

In the view of the Eleventh Circuit, though, a jury could find someone's intentional breach of a

contract grounds for holding that individual *criminally liable* for wire fraud, even though that same breach of contract could not support the imposition of punitive damages. Adopting this view would raise intractable fair notice problems.

As Justice Holmes observed, the law requires "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). How is anyone supposed to know that an ordinary breach of contract could transmogrify into a wire fraud prosecution, when that same breach of contract would not be sufficient to trigger punitive damages?

Setting aside the fair notice problems, Dr. Gow's convictions also raise the specter of arbitrary enforcement. Due process requires that a "penal statute define the criminal offense . . . in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Under the "standardless sweep" of the Eleventh Circuit's reading of the wire fraud statute, *id.*, a prosecutor would have unbridled discretion to decide which breach of contract is worthy of prosecution, and which breach of contract should be resolved by way of a civil suit. *See McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (declining

to construe a "criminal statute on the assumption that the Government will 'use it responsibly'").

This case also involves serious federalism concerns. The Government's overriding concern in this case seemed to be policing what it viewed as an unscrupulous, though not illegal, relationship between Williams and the Gows. But in our system of federalism, the Federal Government is not authorized to act as a roving ethics watchdog, intruding in private contractual relationships and using the federal criminal code to police parties' business dealings. *See McDonnell*, 136 S. Ct. at 2373. If affirmed, this case would almost certainly chill permissible interactions between local branches of state government and their constituents, particularly those interested in submitting grant applications, because a wire fraud prosecution might arise from any ambiguous statements made during the course of applying for and negotiating the terms of a grant agreement.

The statements identified as fraudulent in this case illustrate this problem. The Eleventh Circuit found that Dr. Gow acted with intent to defraud because she claimed in the FIRST grant application that VR Labs was "multinational business enterprise." But Dr. Gow did not make that statement of her own accord; she simply checked one of the boxes in response to the question on the grant application. Moreover, HerbalScience previously

operated out of Singapore, and VR Labs employed Reg Steele who led GNC's international efforts to establish almost 2,000 stores abroad.

Grant applicants must be given leeway to make forward-looking statements regarding the entity's projected growth. Elsewhere in the grant application, the County invited applicants to do just that. In one area, the application asks: "How many total jobs are *expected* to be created for all phases as part of this project?" The application also asks about the "*anticipated* annualized average wage" and the "*estimated* percentage of gross receipts or final sales" that will be made outside of Florida. One could hardly fault Dr. Gow for using forward-looking statements regarding the company's expected geographic scope when the application itself repeatedly calls for future projections regarding other aspects of the project.

And one could hardly blame prospective grant applicants for deciding to forgo applying for funding, given a potential wire fraud prosecution could be lurking if the venture proves unsuccessful. The chilling, deterrent effect of decisions like this one could ultimately harm the very same party—Lee County, Florida—the federal government was purporting to protect by dissuading potentially viable applicants from seeking grant funding. For these reasons, the Court should grant this petition and

explain when, if ever, a simple breach of contract can suffice to support a conviction under 18 U.S.C. § 1343

II. The Court Should Resolve the Uncertainty as to Whether Courts Imposing Criminal Liability for Wire Fraud may Disregard the Plain Language of an Investment Agreement that Negates an Investor's Claim that he was Misled.

In civil litigation arising from the realm of investing, courts have long held that, even where a person claims he was promised lofty returns, if the contract provides otherwise, there can be no fraud because "no jury could find that a reasonable investor would be misled . . . when the truth was under his nose in black and white." *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 570-71 (7th Cir. 1991) (holding that there was no fraud, and thus no RICO violation, where the defendant allegedly promised lofty returns, but the parties' contract said otherwise).

Likewise, in the context of civil securities litigation, Judge Easterbrook on Seventh Circuit made the following useful observations:

> [S]ecurities laws are designed to encourage the complete and careful written presentation of material information. A seller who fully discloses all material information in writing

> should be secure in the knowledge that it has done what the law requires. Just as in the law of contracts a written declaration informing one party of an important fact dominates a contrary oral declaration, so in the law of securities a written disclosure trumps an inconsistent oral statement. Otherwise even the most careful seller is at risk, for it is easy to claim: 'Despite what the written documents say, one of your agents told me something else.' If such a claim of oral inconsistency were enough, sellers' risk would be greatly enlarged. All buyers would have to pay a risk premium to cover this extra cost of doing business.

Acme Propane, Inc. v. Tenexco, Inc., 844 F.2d 1317, 1322 (7th Cir. 1988) (emphasis added).

Based on these well-settled principles, if this case were to have arisen in the civil context, Dr. Gow would certainly prevail. Indeed, as Haynes admitted at trial, his civil suit against Dr. Gow and her husband was "unsuccessful." This is hardly surprising, as his claims of fraud are refuted by the subscription agreement and the record.

Haynes did as much due diligence on his potential investment as anyone could possibly hope to conduct. He communicated with VR Labs for months and actively pursued the opportunity of

working there. He met with the scientists and the key executives and had extensive discussions over the course of three days, during which time he learned all about the technology in which he was investing. Haynes, moreover, had an MBA and considerable experience in the very same field, having worked since 1998 in the development and marketing of pharmaceutical products.

It was not as if Haynes was bereft of any experience with startups either. His previous job was with a biotechnology startup that was eventually bought out by a large pharmaceutical company. If any investor had the capability of assessing potential risks and benefits of an investment in VR Labs, it was Haynes.

Most importantly, however, Haynes was apprised of all the risks associated with his investment prior to his investment. The subscription agreement notified him that the company would be operating in a highly competitive market. It told him that other competitors might have better capitalization, substantially more resources, and established relationships with prospective purchasers, risks that could limit the company's sales and market penetration and make it difficult to achieve profitability. The contract also disclosed the risk that Haynes could suffer the complete loss of his investment because VR Labs was a new company in a highly competitive marketplace.

Haynes claimed at trial that Robert Gow influenced him by mentioning that Kottkamp had invested money in the company. But the subscription agreement accurately listed the shares, shareholders, and the amount of capital the shareholders had contributed—and Kottkamp's name did not appear as a contributor. The "truth" on that score was right "under his nose in black and white" in the subscription agreement. *Assocs. in Adolescent Psychiatry*, 941 F.2d at 570-71. Thus, no reasonable jury could find he was misled.

At trial, the Government also made much of the fact that Haynes was not permitted to see the financial statements prior to his investment. But, in the subscriber agreement, Haynes attested to the fact that he had an "opportunity to ask questions and receive answers from the company regarding the terms of the operating agreement and the business properties, prospects and financial condition of the company" and was "satisfied with the opportunity and has had all of the subscriber's questions answered to subscriber's satisfaction." He also agreed that he "had an opportunity to ask questions about the company's business plan" and understood that the company was a "pre-revenue enterprise which has not yet had significant revenue." In other words, his own contractual attestations refute any suggestion that Haynes was defrauded when Mr. Gow refused to allow him to review the financial statements of VR Labs.

The facts of this case raise a startling anomaly: Even though Dr. Gow could not be found liable in civil court, where the standard is only a preponderance of the evidence, she could be found guilty of a federal criminal offense predicated on the same facts *beyond a reasonable doubt*. This Court should grant this petition and hold that an individual does not lose the contractual protections afforded civil litigants just because the case involves criminal charges for wire fraud. As in civil litigation, a "written declaration informing" an alleged victim "of an important fact" should "dominate[] a contrary oral declaration" and should "trump an inconsistent oral statement" offered at trial.

Failing to intercede would not just pose the same type of due process and fair notice problems described above, it would raise the costs of investment opportunities because sellers of securities would take on not just the risk of civil litigation; they would also face potential *criminal* penalties should a counterparty make post-hoc claims in the event of a lost investment.

In sum, Haynes was apprised of the risks associated with his investment in VR Labs, including the very risk—undercapitalization—that caused him to lose his money. Just because the "bottom dropped out" on his investment in VR Labs does not mean that anyone defrauded him. *United States v. Grossman*, 117 F. 3d 255, 261 (5th Cir. 1997)

(quotations omitted). The "decline of any market is part and parcel of the risks of investing," *id.*, and it is not the role of the federal courts to insure investors against all losses, no matter how foreseeable.

CONCLUSION

Justice Ginsberg, like Justice Scalia, warned that an "incautious reading of [the wire fraud] statute could dramatically expand the reach of federal criminal law." *Pasquantino v. United States*, 544 U.S. 349, 377 (2005) (Ginsburg, J., dissenting). For this reason, the Court has long "refused to apply the proscription exorbitantly." *Id.*

This case presents yet another example of how an incautious reading of the federal wire fraud statute can be used to impose criminal liability for lawful conduct, such as breaching a contract. This Court should therefore grant this petition and review the decision below.

Respectfully submitted on this 14th day of January, 2022.

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