No. ___________________

IN THE SUPREME COURT
OF THE UNITED STATES

ROBERT J. JESENIK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Jessica Greenlick Snyder
Counsel of Record
Sugerman Dahab
101 SW Main Street, Suite 910
Portland, Oregon 97204
(503) 228-6474

Attorney for Petitioner

QUESTION PRESENTED

The materiality of a falsehood is an element of—and thus a limit on—the federal fraud statutes. This Court has held that an investor's behavior can be highly relevant to materiality.

The question presented is: Whether the Ninth Circuit's "prophylactic" "bright-line rule" that precludes a defendant's use of investor behavior evidence to prevent "victim blaming," even when such evidence is highly relevant to materiality and other elements of wire fraud, is inconsistent with this Court's precedent, other circuits that follow the Court's precedent, and the defendant's due process rights.

PARTIES TO THE PROCEEDINGS

Petitioner is Robert J. Jesenik, who was the appellant in the court below. Respondent, the United States of America, was the appellee in the court below.

RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit: *United States v. Jesenik*, Nos. 23-2282, 24-5404

United States District Court for the District of Oregon: *United States v. Jesenik*, No. 3:20-cr-00228-SI-1

TABLE OF CONTENTS

Page

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Regulations

Constitutional Provisions

No. __________________

IN THE SUPREME COURT
OF THE UNITED STATES

ROBERT J. JESENIK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

The petitioner, Robert J. Jesenik, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 5, 2025.

OPINIONS BELOW

The Ninth Circuit's opinion is published at 152 F.4th 924 (9th Cir. 2025), and is reprinted in the Appendix to the Petition (Pet. App.) at 2a-44a.

JURISDICTION

The Ninth Circuit entered its judgment on September 5, 2025. Pet. App. 4a. A timely petition for rehearing was denied on December 29, 2025. Pet. App. 67c. On March 27, 2026, this Court extended the time to file for a writ of certiorari until May 28, 2026. This petition is timely under Supreme Court Rule 13.3. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Fifth Amendment

> No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Wire Fraud Statute 18 U.S.C. § 1343

> Whoever, having devised or intended to device 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.

INTRODUCTION

This Court has repeatedly granted review to correct unwarranted overcriminalization under the federal mail and wire fraud statutes and has recently emphasized the importance of the materiality element in checking wire fraud overbreadth. *See Ciminelli v. United States*, 598 U.S. 306, 312–13 (2023) (discussing cases limiting federal fraud statutes); *Kousisis v. United States*, 605 U.S. 114, 132 (2025) (emphasizing that materiality is an essential "limit on" the federal fraud statutes). This case involves the Ninth Circuit's judge-created "prophylactic" rule that prohibits all defense use of investor behavior evidence at trial to disprove materiality or any other element of wire fraud.

In the False Claims Act context, this Court has made clear that investor behavior—specifically an investor's past reliance or lack of reliance on an allegedly false statement—is often highly relevant to whether the statement is material. The Ninth Circuit acknowledges this precedent, and even acknowledges that investor behavior is often highly relevant to materiality in criminal wire fraud, but reasons—inconsistently with its sister circuits—that this Court's False Claims Act jurisprudence on materiality is not relevant to criminal wire fraud and that the blanket exclusion of such evidence is necessary to prevent "victim blaming" in criminal wire fraud prosecutions. No other circuit has gone so far.

The Ninth Circuit's imbalanced rule excludes evidence that is, as it concedes, highly relevant. And the Ninth Circuit's attempt at preventing "victim blaming" has sweeping implications. It dictates, for example, that the government can selectively elicit and rely on investor behavior evidence that supports its case, while the defense is prohibited from doing the same—even when that asymmetry limits a defendant's ability to advance his theory of the case, cross-examine government witnesses, and demonstrate witness bias. That asymmetry is not only inimical to longstanding due process principles—it distorts the jury's understanding of the facts.

A defendant's right to present a defense, including the right to cross-examine witnesses and put before the jury all evidence relevant to the elements of the charged offense, is a core guarantee of the Due Process Clause. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). The Ninth Circuit's rule violates that guarantee by preventing a defendant from using the same category of evidence the government may freely deploy. This inequity at trial only compounds the dangers of an already expansive wire fraud statute. As the district court in this case admitted, the result of the Ninth Circuit's "prophylactic" rule is that criminal liability may exist where civil liability could not: "[T]his is one circumstance where the criminal law can punish conduct that the civil law would not compensate for. If we had intentional disregard of information by an investor, that investor would lose a civil lawsuit." Pet. App 85e. Such inconsistency between regulatory and criminal enforcement creates uncertainty for businesses and challenges to due process. *See Cleveland v. United States*, 531 U.S. 12, 24-25 (2000) (discussing problems with fraud criminalization reaching areas traditionally regulated by civil or state authorities); *see also Sorich v. United States*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting from denial of certiorari) (discussing "staggeringly broad swath of behavior" prosecuted under wire fraud statute). This Court should intervene once again to ensure that the federal fraud statutes do not allow criminal conviction in circumstances beyond what civil or regulatory liability can reach, and to ensure that materiality remains an essential check on the government's power in criminal fraud prosecutions.

STATEMENT OF THE CASE

A. Legal Background

1. This Court has narrowly construed criminal wire fraud to avoid overcriminalization.

This Court has repeatedly rejected the government's expansive interpretation of the federal fraud statutes. *See, e.g.*, *Ciminelli*, 598 U.S. at 316 (rejecting government's right-to-control theory because "valuable economic information needed to make discretionary economic decisions is not a traditional property interest"); *Kelly v. United States*, 590 U.S. 391, 403 (2020) ("Federal prosecutors may not use property fraud statutes to 'set[ ] standards of disclosure and good government for local and state officials.'"); *Skilling v. United States*, 561 U.S. 358, 403-12 (2010) (narrowly construing honest services fraud to reach only bribes and kickbacks to avoid unconstitutional vagueness); *Cleveland*, 531 U.S. 26 (rejecting government efforts to extend the "property" element of the mail fraud statute to state-held licenses); *McNally v. United States*, 483 U.S. 350 (1987) (holding fraud statutes protect property rights only).

Even outside the fraud context, this Court has made clear that, absent clear congressional intent, it will not broadly construe federal laws in a way that punishes routine bad acts as a federal felony. *See, e.g.*, *Dubin v. United States*, 599 U.S. 110, 129 (2023) (in narrowing the broad interpretation of the aggravated identity-theft statute, "a final clue comes from the staggering breadth of the Government's reading"); *Van Buren v. United States*, 593 U.S. 374, 393 (2021) (narrowing the Computer Fraud and Abuse Act to avoid attaching "criminal penalties to a breathtaking amount of commonplace computer activity"); *Marinello v. United States*, 584 U.S. 1, 9-10 (2018) (describing routine bad acts that would be swept up in broad construction of federal obstruction statute); *McDonnell v. United States*, 579 U.S. 550, 576 (2016) ("Under the '"standardless sweep"' of the Government's reading [of the bribery statute], public officials could be subject to prosecution, without fair notice, for the most prosaic interactions."); *Yates v. United States*, 574 U.S. 528, 536 (2015) (rejecting the government's "unrestrained reading" of "tangible object" in criminal provision of the Sarbanes-Oxley Act).

Most recently, in *Kousisis*, this Court emphasized the importance of the materiality element of wire fraud in preventing overcriminalization. 605 U.S. at 135 ("The 'demanding' materiality requirement substantially narrows the universe of actionable misrepresentations."). Materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation. *Id.* at 131 (citing *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 193 (2016)). When an investor is the "recipient" of the alleged misrepresentation, that investor's "actions" or "behavior" can be "strong evidence" that a misrepresentation is *or is not* material. *See Kousisis*, 605 U.S. at 139 (Thomas, J., concurring).

2. The Ninth Circuit created a "prophylactic" bright-line exclusion of defense use of victim behavior evidence.

In 2017, in a mortgage fraud case, the Ninth Circuit created a "prophylactic rule against all evidence of individual lender behavior" used as a defense to wire fraud. *United States v. Lindsey*, 850 F.3d 1009, 1018 (9th Cir. 2017). The Ninth Circuit was concerned that "evidence of individual lender behavior can easily touch on lender negligence, intentional disregard, or lack of reliance—none of which is a defense to mortgage fraud." *Id.* at 1017. The Ninth Circuit concluded that "a bright-line rule against evidence of individual lender behavior to disprove materiality is both a reasonable and necessary protection." *Id.* In *United States v. Jesenik*, the opinion below, the Ninth Circuit expanded its bright-line rule to prohibit defense use of individual investor behavior evidence for the purpose of countering not just materiality, but any element of wire fraud. 152 F.4th 924, 945 (9th Cir. 2025) (declining to hold that an investor's "intentional disregard of relevant information" can be used for the defendants' "other defenses").

B. Factual and Procedural Background

This appeal arises from the conviction of Robert Jesenik, the founder and CEO of Aequitas, a legitimate financial company with a substantial portfolio of receivables. Mr. Jesenik successfully helmed Aequitas for over 20 years until a confluence of market factors led to its collapse in January 2016. Nearly five years later, even though investors recouped the vast majority of their losses through a receivership, the government indicted Mr. Jesenik and five other top Aequitas officials for fraud and related charges. C.A.E.R. Vol. 9 at 2187; C.A.E.R. Vol. 12 at 3046-60.

1. District Court Proceedings

Three codefendants—Mr. Jesenik, Andrew MacRitchie, and Brian Rice—asserted their innocence and proceeded to trial, where the government primarily pursued a theory of half-truth liability. Under that theory, the government claimed that the defendants used misleading half-true statements in oral sales pitches and led investors to believe that their investment money would primarily be used to purchase consumer debt, when in reality it was primarily used to pay prior investors and cover Aequitas' operating expenses. *See* C.A. Pet. Br. at 17 (describing government theory at trial with record citations). The government also argued that the defendants' optimistic oral sales pitches led investors to believe that Aequitas was a thriving company when, in fact, it had faced financial setbacks. *Id.*

In his defense, Mr. Jesenik argued not only that he never made misrepresentations in oral sales pitches, but also that each potential investor received comprehensive written disclosures explicitly providing the precise facts the government alleged should have been disclosed: that investor funds could be, and were often, used for operating costs and to pay interest and redemptions on prior investments; that Aequitas operated on a low-liquidity model and the investment was accompanied by substantial risk; and that Aequitas had, currently, and in the past, faced financial challenges. *See* C.A. Pet. Br. at 17–23 (describing defenses at trial with record citations). Aequitas' notes were sold only to "accredited investors," who signed subscription agreements attesting to receipt of the written disclosures. *See* C.A. Pet. Br. at 10 (collecting record citations). Mr. Jesenik further argued that any half-truths in the form of optimistic statements in sales meetings were cured by the robust and truthful attorney-prepared disclosures, and that the disclosures demonstrated that he had no intent to defraud. *See* C.A. Pet. Br. at 17–23 (collecting record citations).

At trial, the question of whether individual investors received, reviewed, and relied on comprehensive disclosure documents was a central issue. *Id.* Several investors and investment advisors offered testimony minimizing the importance of written disclosures in comparison to in-person sales pitches and confirming that they did not review the truthful disclosure documents. C.A. Pet. Br. at 44–48 (collecting record cites). On cross-examination, defense counsel attempted to prove that the investors were not credible when they testified they did not review disclosure documents, the district court intervened, stopping the line of questioning and instructing the jury sua sponte, "we do not seek to blame the victim of criminal fraud." Pet. App. 73f-74f. After asking an investor-witness directly if he reviewed the disclosure documents and the witness responded that he had not "in any detail," the court then announced, in front of the jury, that "nothing else in this document is now going to be relevant." Pet. App. 74f-75f

Over extensive objection, the district court adhered to its ruling and prohibited cross-examination of potential investors about disclosure documents once they claimed not to have reviewed them, no matter how unbelievably. C.A. Pet. Br. at 44–48 (collecting record citations). Over defense objection, the district court also instructed the jury at the close of evidence that the investor's negligent or intentional disregard of information was not a defense:

> It is not a defense to a charge of mail or wire fraud or a charge of conspiracy to commit mail or wire fraud that an investor or registered investment advisor may have been gullible, careless, naïve, or negligent or even that a[n] investor or registered investment advisor *intentionally disregarded* information.

Pet. App. 69d (emphasis added). As written, the instruction told jurors that a truthful disclosure that might otherwise have cured a half-truth is not a defense so long as the disclosure is ignored by the potential investor. The court also rejected the defendant's requested instruction that the disclosure of the second half of a half-truth would negate a misrepresentation: "If the speaker does provide that critical qualifying information, the duty to speak is satisfied and the statement does not amount to a misrepresentation." C.A.E.R. Vol.1 at 198.

The jury deliberated for four days, returning mixed verdicts. C.A.E.R. Vol. 18 at 4649. It found Mr. Jesenik guilty of Counts 1 to 29 (the wire fraud related counts) and 31 (bank fraud), and acquitted him of Count 30 (conspiracy to commit money laundering). C.A.E.R. Vol. 7 at 1684–92.

At sentencing, the government agreed that Mr. Jesenik's offense was not a "classic, dark-hearted fraud" and that he was not motivated by personal enrichment. C.A.E.R. Vol. 4 at 861–63 ("There was no tell-tale fleet of Bentleys and Rolls-Royces, no yachts, no mansions in posh foreign enclaves."). Even in the government's view, Aequitas "was a real finance company" with "substantial portfolios of receivables" and other valuable assets, from which investors had recovered "much of their losses." C.A.E.R. Vol. 4 at 863–64. Nonetheless, the government requested a 200-month sentence.

The district court found that Mr. Jesenik had zero criminal history, that the offense was an aberration, and that Mr. Jesenik had otherwise led an "exemplary" life. C.A.E.R. Vol. 2 at 485. The court varied six levels below the guideline range and imposed a sentence of 168 months' imprisonment with three years of supervised release. C.A.E.R. Vol. 1 at 23–24; C.A.E.R. Vol. 2 at 487. Mr. Jesenik self-surrendered to Lompoc II FCI on January 2, 2024. His projected release date is January 5, 2035.

2. Ninth Circuit Proceedings

The court of appeals affirmed. On appeal, Mr. Jesenik argued that the district court's application and expansion of *Lindsey* was inconsistent with this Court's precedent and prevented him from presenting his defense. Mr. Jesenik argued that the district court erred by (1) cutting off cross-examination of sophisticated investors who claimed to have disregarded truthful written disclosures; (2) commenting to the jury that such questioning was "victim blaming" and that questions about the disclosures were "minimally relevant"; and (3) instructing the jurors that it was "not a defense to fraud" that an investor negligently or "intentionally disregarded information." C.A. Pet. Br. at 44–60. Mr. Jesenik argued that the district court's expansion of *Lindsey*'s holding had no basis in law and crippled his defense in violation of the Due Process Clause. *Id.*

In a published opinion, the court of appeals rejected the defendant's arguments. The court first held that it was not error for the district court to limit cross-examination of the investor witnesses' claim that they had not reviewed the disclosure documents because *Lindsey* establishes a "bright-line rule" against a defendant using any evidence of individual investor behavior. The court explained:

> To the extent that the defendants challenge the district court's preclusion of evidence about investor negligence or non-reliance, their argument is foreclosed by *Lindsey*, a case involving mortgage fraud. We held that "a bright-line rule against evidence of individual lender behavior to disprove materiality is both a reasonable and necessary protection" because "evidence of individual lender behavior can easily touch on lender negligence, intentional disregard or lack of reliance—none of which is a defense to mortgage fraud." We find no reason to adopt a different rule in this case, simply because the loans gave rise to promissory notes instead of mortgages.

Pet. App. 38a-39a. The Ninth Circuit went even further, reasoning that *Lindsey*'s "bright-line rule" extends beyond the question of materiality—prohibiting a defendant from using an investor's individual reliance or non-reliance on disclosure documents "to show whether the defendants had an intent to defraud." Pet. App. 39a (reasoning that the defendants were permitted to submit other evidence, such as the disclosure documents themselves, to pursue "legitimate disclosure-based defense theories"). Finally, the court also held that it was not error for the district court to instruct the jury that "[i]t is not a defense to a charge of mail or wire fraud or a charge of conspiracy to commit mail or wire fraud that an investor or registered investment advisor may have been gullible, careless, naïve, or negligent or even that an investor or registered investment advisor intentionally disregarded information." Pet. App. 41a. The court reasoned that this instruction was proper because it was "drawn from *Lindsey*," and "negligence is not a defense to wire fraud." Pet. App. 41a.

Mr. Jesenik filed a petition for rehearing en banc arguing that the Ninth Circuit's ruling conflicted with this Court's precedent and resulted in overbreadth and unfairness in wire fraud trials across the circuit. The Ninth Circuit denied the petition. Pet. App. 67c.

REASONS FOR GRANTING THE WRIT

This case presents multiple compelling grounds for certiorari. First, the court of appeals' decision below is plainly wrong. Investor behavior is relevant to materiality, and the Ninth Circuit's judge-created "prophylactic" rule runs counter to a defendant's constitutional right to a fair trial and this Court's materiality precedent. Second, the Ninth Circuit is openly in conflict with other circuits over whether a "bright-line" preclusion of defense use of investor behavior evidence is appropriate, and whether this Court's False Claims Act reasoning regarding materiality applies to criminal wire fraud cases. Third, the issue is recurring and important, raising serious concerns of overcriminalization and violations of due process in all wire fraud trials in the Ninth Circuit. The issue was properly raised and preserved at every stage below, so this case is an ideal vehicle for this Court to resolve the circuit split and ensure that the materiality element continues to act as a meaningful check against the overreach of the wire fraud statute.

A. The Ninth Circuit's "prophylactic" "bright-line rule" prohibiting defense use of individual investor behavior evidence is wrong.

The materiality of a falsehood is an element of, and thus a critical limit on, the wire fraud statute. *Kousisis*, 605 U.S. at 131–32. As with any criminal statute, due process requires that a defendant be permitted to attack each element of the wire fraud statute with all relevant and admissible evidence. *Holmes*, 547 U.S. at 324; *Crane*, 476 U.S. at 690. A defendant's ability to present evidence to disprove the materiality element of wire fraud is essential to the due process right to present a defense. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) ("[A]t a minimum," criminal defendants have "the right to put before a jury evidence that might influence the determination of guilt.").

The Ninth Circuit's rule allows the government to use evidence of an investor's subjective reliance to prove materiality, but prohibits a defendant from using evidence of an investor's subjective disregard to disprove materiality. Pet. App. 38a ("We held [in *Lindsey*] that 'a bright-line rule against evidence of individual lender behavior to disprove materiality is both a reasonable and necessary protection.'").

That lopsided ruling is inconsistent with fundamental fairness and this Court's precedent. In *Universal Health Services*, this Court wrote that lender behavior evidence is highly relevant to materiality. 579 U.S. at 193. Justice Thomas, writing for the unanimous Court, reasoned that evidence of the government's subjective reliance was "very strong evidence" of materiality, and conversely, evidence of the government's subjective non-reliance was "very strong evidence" of a lack of materiality:

> Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 194–95.

To justify its lopsided "bright-line rule," the Ninth Circuit incorrectly reasoned that evidence relating to materiality under the False Claims Act should be treated differently than evidence relating to materiality under the wire and mail fraud statutes. But the government has since conceded, with this Court's endorsement, that the same standard applies in both contexts. *See*

Kousisis, 605 U.S. at 131–32, 140–41. In his *Kousisis* concurrence Justice Thomas commented that using the "familiar and rigorous" principles relating to materiality in both contexts also "align[s] with authoritative treatises and the common law." *Id.* at 140–41.

A one-sided restriction on the use of investor behavior evidence is also inconsistent with this Court's recognition of a defendant's right to present a defense. *See Crane*, 476 U.S. at 690 ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"); *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts. . . . This right is a fundamental element of due process of law."). The right to present a complete defense includes the right to put before a jury evidence that might influence the determination of guilt. *Holmes*, 547 U.S. at 327. For those reasons, this Court favors expansive witness cross-examination in criminal trials. *Olden v. Kentucky*, 488 U.S. 227, 231 (1988). Prohibiting the defense use of evidence relevant to a key element, and defense cross-examination of a witness on a crucial issue, violates these core constitutional protections.

As this Court has repeatedly emphasized, materiality is a "demanding" element of criminal fraud. *See Kousisis*, 605 U.S. at 131–32. The Ninth

Circuit's one-sided prophylactic rule, created originally in *Lindsey* and now entrenched further in *Jesenik*, establishes an unjustifiable imbalance and excludes important defense evidence. This rule is inconsistent with this Court's materiality precedent, and with the constitutional protections that a defendant is owed when facing criminal prosecution.

B. The circuits are divided on the issue of whether investor behavior evidence can be used by defendants to disprove materiality.

The Ninth Circuit's extreme rule has created a circuit split. No other circuit has gone so far as to create an absolute bar on any defense use of individual investor behavior in criminal wire fraud prosecutions. And while the Ninth Circuit has concluded that the Supreme Court's False Claims Act precedent does not apply to criminal wire fraud prosecutions, other circuits to consider that issue have disagreed. The Ninth Circuit has had nine years, guidance from this Court, and a direct opportunity to correct the error. But rather than correct it, the Ninth Circuit expanded its erroneous rule.

This Court should grant review to resolve the conflict. Without its intervention, juries in the Ninth Circuit will be restricted from considering plainly relevant evidence that juries in the remaining circuits will be permitted to consider. This inequality could lead to unfairly disparate outcomes in criminal wire fraud prosecutions across the country.

1. Other circuits disagree with the Ninth Circuit's bright-line rule and the reasoning behind it.

No other circuit has created a "prophylactic rule" against defense use of all evidence of individual investor behavior in wire fraud cases. In fact, the Fourth Circuit, while acknowledging that it agreed with the Ninth Circuit that materiality is an objective standard, noted that it "need not go so far" as to "bar[] evidentiary use of a lender's past lending practices on the materiality issue." *United States v. Raza*, 876 F.3d 604, 621 (4th Cir. 2017).

Other circuits—including the Seventh, Third, and Fourth Circuits—have also disagreed with the Ninth Circuit's position that *Universal Health Services* does not apply in the wire fraud context. *See United States v. Clark*, 140 F.4th 395, 418 (7th Cir. 2025) (citing *Universal Health Services* to define materiality standard in criminal wire fraud case); *United States v. Ferriero*, 866 F.3d 107, 120–22 (3d Cir. 2017) (applying *Universal Health Services* False Claims Act half-truth standards to criminal wire fraud); *United States v. Palin*, 874 F.3d 418, 422–23 (4th Cir. 2017) (assuming that *Universal Health Services* materiality standard applies to criminal wire fraud).

These cases demonstrate that the Ninth Circuit is in conflict with the other circuits regarding what evidence can be used by defendants to disprove materiality. The conflict is unlikely to resolve without this Court's intervention.

2. The Ninth Circuit has failed to correct its erroneous holding.

The Ninth Circuit has had nine years to correct its overexpansive and problematic holding in *Lindsey*, but has declined to do so. Instead, it has doubled down. Even after this Court's guidance in *Kousisis*, regarding the demanding nature of the materiality standard, the Ninth Circuit continues to hold that a blanket preclusion of defense use of investor behavior evidence is appropriate.

In the appeal below, although the Ninth Circuit was directly presented with an opportunity to correct its judge-created prophylactic rule, it only further expanded its problematic precedent. Now, in the Ninth Circuit, defendants are prevented from using evidence of investor behavior to disprove other essential elements of wire fraud including *mens rea*. Under this expanded *Lindsey* rule, an investor's "intentional disregard" of truthful disclosures is not a defense to criminal wire fraud, even when the defendant intended for the investors to review the truthful disclosures and take them seriously. Without correction from this Court, the Ninth Circuit's precedent will impact the fairness of more and more criminal wire fraud trials;

preventing defendants from presenting evidence relevant to their defenses as to not just materiality, but the entire case against them.

C. The bright-line rule preventing defense use of evidence relevant to the materiality element is a recurring issue of critical importance, and this case is the right vehicle for resolving it.

The Ninth Circuit's prophylactic rule impacts every wire fraud trial in the Ninth Circuit and leads to fundamental unfairness and overcriminalization. The lopsided nature of the rule and its broad prohibition against "victim blaming" violates wire fraud defendants' right to present a robust defense. Moreover, under the *Jesenik* expansion of the *Lindsey* rule, in the context of half-truth theories of wire fraud, alleged victims will be able to control whether a defendant is criminally liable through their "intentional disregard" of truthful disclosures. This creates a circumstance where, as the district court in this case acknowledged, criminal liability exists where no civil liability could. This case is the right vehicle to resolve these significant ongoing issues.

1. The Ninth Circuit's rule precludes defendants from presenting their theory of the case in violation of due process rights, and the reasoning is not cabined to wire fraud.

The reasoning behind the Ninth Circuit's rule demonstrates its potentially expansive impact. First, the lopsided nature of the rule is particularly concerning and has wide-reaching implications. Allowing the government to use individual investor behavior to prove its case, while preventing the defense from doing the same, is fundamentally inconsistent with the structure and principles of our criminal system, where the government faces the burden of persuasion and proof. This Court has held similar lopsided rules to be unconstitutional and arbitrary. In *Washington v. Texas*, for instance, this Court struck down a Texas statute that barred individuals charged as co-participants in the same crime from testifying for one another, but allowed the co-participants to testify on behalf of the prosecution. 388 U.S. 14 (1967) (emphasizing that due process includes "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"); *see also Brady v. Maryland*, 373 U.S. 83 (1963) (discussing equal-footing principles).

Second, concern for protecting a victim's reputation, or preventing the jury from developing bias against the victim, is not a justification that can overcome a defendant's right to present his defense, cross-examine government witnesses, or demonstrate a victim's bias. *See Olden v. Kentucky*, 488 U.S. 227 (1988) (reversing conviction where trial court excluded victim's living arrangements with corroborating witness in a rape case out of concern that revealing an interracial relationship would prejudice the jury against the victim); *Davis v. Alaska*, 415 U.S. 308 (1974) (juvenile record protection rules cannot trump confrontation clause rights). The Ninth Circuit's holding that precluding defense argument under the justification of preventing "victim blaming" could reach criminal trials beyond the wire fraud context and could thus expand the impact of the due process violations caused by the Ninth Circuit's rule.

2. The Ninth Circuit's rule has wide-reaching implications for half-truth prosecutions, allowing criminal liability to reach further than civil and regulatory liability.

The Ninth Circuit's bright-line rule is particularly far-reaching in the context of wire fraud prosecutions under the half-truth theory of fraud. In the Ninth Circuit now, a defendant can be held liable for an optimistic sales pitch that was truthful but not complete, even when the sales pitch was accompanied by robust and truthful disclosure documents, if the investor deliberately disregarded the disclosure documents before investing. In those circumstances, the investor would control whether a defendant was liable for a half-truth misrepresentation. The practical consequence of this is to expose vast swaths of routine commercial activity to an unpredictable threat of federal wire fraud prosecution.

Under this Court's definition of wire fraud, a false statement can include a "misleading half-truth"—representations that are partly true but misleading "because of [the defendant's] failure to state additional or qualifying matter." *Universal Health Services*, 579 U.S. at 188. A pure omission, however, cannot constitute a false statement for the purposes of fraud liability, absent a special relationship that creates a duty to speak. *Id.* When a special relationship is not present, as was true below, the omission is actionable only if its absence makes the true statement misleading. *Id.* at 188–89.

The classic example of a half-truth, repeated in this Court's jurisprudence, is the situation where a seller of a house tells a buyer that there may be two new roads built near the property but fails to disclose that a third new road might bisect the property. *Id.* Although the first statement is literally true, the omission of the second statement creates the misleading misimpression that there are only two new roads anticipated near the property and no other road that could affect the value of the property. *Id.* If the seller disclosed the third road to the buyer, that disclosure would likely cure the omission that made the true statement misleading and would be highly relevant in a fraud prosecution based on the half-truth.

Despite acknowledging that the government here pursued a half-truth theory, the Ninth Circuit in this case nonetheless concluded that the district court did not err in instructing the jury that it is not a defense to wire fraud that the investor negligently or intentionally ignored information. Applying the Ninth Circuit's holding to the hypothetical above, the instruction told the jury that disclosure of the third road would not be a defense to wire fraud so long as the buyer negligently or deliberately ignored the disclosure.

This creates a situation where the investor's conduct controls whether fraud occurred, regardless of the defendant's good faith effort to disclose relevant and complete information. That should not be the law. The instruction affirmed in this case would allow criminal liability for a defendant to depend on whether or not an investor reviewed a disclosure or negligently or deliberately ignored it. This is inconsistent with this Court's precedent on half-truths and the good faith defense. *See Universal Health Services*, 579 U.S. at 188–89.

The Ninth Circuit's bright-line rule, especially when applied to a half-truth disclosure defense as it was in the case below, creates criminal liability where civil and regulatory liability does not exist. Disclosures in the private securities context are often—and were here—based on legal advice on what is material to disclose in connection with a specific offering. Where disclosures fail to apprise an investor of the material risks of an investment, federal securities laws apply, which carry robust enforcement mechanisms including industry bars, disgorgement, and monetary penalties. *See, e.g.*, 17 C.F.R. § 230.501-506, Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Act of Act of 1934. Private security sales are also regulated at the state level. *See, e.g.*, Or. Rev. Stat. §§ 59.049, 59.135, 59.991, 59.995. Unsurprisingly, none of these laws contemplate that after a truthful disclosure is made, the individual may be penalized if the investor intentionally disregards the disclosure.

Under the Ninth Circuit's rule, an optimistic sales pitch in an arm's-length transaction would not only trigger a robust disclosure obligation, but would also allow the investor to control whether or not criminal liability occurred by their intentional disregard of the relevant disclosures. State and federal regulations do not go so far—and neither should this Court's wire fraud jurisprudence. *See Kelly v. United States*, 590 U.S. 391, 403 (2020) ("Federal prosecutors may not use property fraud statutes to 'set[ ] standards of disclosure and good government for local and state officials.'").

3. This case is the right vehicle for resolving the question presented.

This case squarely presents the question of whether a blanket "prophylactic" rule that excludes any defense use of investor behavior evidence violates due process, when such evidence is highly relevant to materiality and other elements of wire fraud. Petitioner was unquestionably convicted after the exclusion, over objection, of such evidence. The jury instructions made clear that an investor's "intentional disregard" of truthful disclosures was not a defense that the jury could consider. And the court of appeals upheld Mr. Jesenik's conviction on that same ground. Pet. App. 40a–44a. If the Ninth Circuit's rule is invalid, Mr. Jesenik's conviction must be vacated. This case cleanly presents the question. This Court should act to safeguard due process in wire fraud trials and to ensure that the materiality element meaningfully constrains the scope of federal fraud prosecutions.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 28th day of May, 2026.

Jessica Greenlick Snyder
Attorney for Petitioner