No. 26-

IN THE

# Supreme Court of the United States

BRIAN FEDERICO,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Kousisis v. United States*, 605 U.S. 114 (2025), the Solicitor General relied on *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016) to contend that the mail and wire fraud statutes do not include a net pecuniary loss requirement because the offenses are sufficiently limited by a rigorous and demanding materiality element, which requires an essential benefit of the bargain standard. The question presented is:

Whether *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016) foreshadowed that the materiality element for mail fraud requires the rigorous and demanding essential benefit of the bargain standard.

## STATEMENT OF PARTIES AND RELATED CASES

- The parties to the judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed are Brian Federico and the United States of America.

- *United States v. Brian Federico*, No. 12-cr-00862-YGR, 22-cv-06774-YGR, U.S. District Court for the Northern District of California. Judgments entered February 11, 2020 and January 14, 2025.

- *United States v. Brian Federico*, No. 24-7089, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 30, 2026, rehearing denied August 6, 2026.

- *United States v. Brian Federico*, No. 20-10054, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 6, 2021.

- *United States v. Kevin Laney and Brian Federico*, Nos. 15-10563 and 15-10605, United States Court of Appeals for the Ninth Circuit. Judgement entered February 5, 2018.

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## OPINIONS BELOW

The opinion below can be found at *United States v. Federico*, No. 24-7089, 2026 WL 1952723 (9th Cir. June 30, 2026) and is included in the Appendix. App. 1a-4a.[1] Opinions in prior appeals can be found at *United States v. Federico*, 855 Fed. Appx. 404 (9th Cir. Aug. 6, 2021) and *United States v. Laney*, 881 F.3d 1100 (9th Cir. 2018).

## JURISDICTION

The Ninth Circuit filed its decision on June 30, 2026 and denied a timely petition for rehearing and rehearing *en banc* on August 6, 2026. App. 1a, 5a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS

**18 U.S.C. § 1341. Frauds and swindles**

> 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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or

1. "App." refers to the Appendix. "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record in the Ninth Circuit.

intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122) http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=42USCAS5122&FindType=L, or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

**U.S. Const. Amend. VI**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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.

## STATEMENT OF THE CASE

A 2012 indictment charged petitioner with one count of conspiracy to commit mail fraud under 18 U.S.C. §§ 1341 and 1349 (Count 1) and four counts of substantive mail fraud under § 1341 (Counts 2-5). 8-ER-1561-65. The indictment alleged that petitioner worked at Imperial Shotcrete, which was founded by Miguel Ibarria, and that the two of them, along with employees of Matrix Services, engaged in a scheme to defraud Matrix from 2006 to 2010. *Id.*

The district court held a bench trial in June of 2015 and found petitioner guilty on Counts 1-3 and not guilty on Counts 4-5. The Ninth Circuit reversed due to a defective jury waiver. *See United States v. Laney*, 881 F.3d 1100 (9th Cir. 2018). On remand, a jury trial commenced in September 2019. At trial, petitioner agreed that he engaged in deceptive conduct in an effort to recover money that he believed he was owed by Ibarria;

his defense was that he did not commit *property* fraud *against Matrix* as charged. 8-ER-1454-55. Among other witnesses, the government called Ibarria and former Matrix employees Kevin Laney, Brandon Hourmouzus, and Charles Burnette, who pled guilty pursuant to cooperation agreements. The testimony established the following facts.

Matrix is a contractor focused on the oil and gas industries that provides service for above-ground petroleum tanks, and its customers included Chevron and Plains All American Pipeline. 2-ER-160, 167. When Chevron or Plains needed tanks repaired, they would send a proposal request to Matrix. 2-ER-167. A Matrix project manager would then assemble a bid package, which would include bids from subcontractors. 2-ER-169-70. Project managers would often meet the subcontractor and a representative from Chevron or Plains for a job-walk to discuss the scope of the work. 3-ER-465; 4-ER-681-82. The subcontractor would prepare a job proposal, which the Matrix project manager could accept or reject. 3-ER-465-66; 4-ER-682. The project manager would then finalize a bid package that would include prices from subcontractors and Matrix's in-house construction costs. 3-ER-387, 465.

The assembled bid package, including proposals by the subcontractors, underwent multiple layers of review within Matrix. 3-ER-469; 4-ER-683. The project manager would present it internally to Matrix management in a bid review process. 3-ER-387, 466. If any proposed prices, including those of the subcontractors, raised an issue, those prices would be discussed internally. 3-ER-467. After the bid review process was completed and the subcontractor bids were accepted by Matrix, the bid package was sent

to Chevron or Plains for approval. 3-ER-368; 4-ER-682. An engineer at Chevron or Plains would review the bid package and pass it along to management for final approval. 3-ER-469. Chevron also conducted audits that included reviews of the proposals from subcontractors. 3-ER-514; 4-ER-572.

Imperial was a sub-contractor for Matrix that did concrete work and repaired storage tanks; Imperial's work for Matrix was overseen by petitioner, who bid lump-sum (flat-fee) prices. 5-ER-835-36; 6-ER-960. Laney, a Matrix project manager, began hiring Imperial in 2003 because petitioner "did great work" at reasonable prices. 3-ER-434-35. Laney testified that, in about 2006, petitioner told him that Ibarria was cheating him, and he had a plan to recover what was owed with Laney's help. 3-ER-397-404, 472-73. Under the plan, Laney would create a shell company that would submit phony invoices to Ibarria at Imperial. *Id.* Unbeknownst to Ibarria, Laney would keep a portion of the payments on the invoices and give the rest to petitioner. *Id.*

Laney agreed to the plan, and petitioner would tell him what information to include on his false invoices to Imperial, such as descriptions of the project, the scope of the work, and the amounts to be invoiced. 3-ER-402, 415, 473. Laney testified that the "description didn't matter at all" and that the invoices to Imperial had nothing to do with petitioner's pricing on that job; in fact, Laney did not receive the numbers to put on his invoices until after the project was completed. 3-ER-441, 473, 493. Petitioner told Laney to send the invoices to Imperial *after* Matrix had sent the check to Imperial for work that petitioner had already completed. 3-ER-474. None of the false invoices

created by Laney (or any other downstream invoices) were sent to Matrix. 3-ER-371, 379, 474; 7-ER-1171.

Laney also testified that he was the project manager on only two of the projects for which he sent false invoices to Imperial, and he had no involvement with any pricing on those projects. 3-ER-485-92. Instead, petitioner and the Chevron engineer, Dana Carrigan, agreed on the scope and price of the work that Imperial performed. 3-ER-481-82, 500. The work flowed through Matrix because Imperial could not contract with Chevron directly. 3-ER-481-82, 490. Carrigan, who "liked the way Brian [petitioner] was doing work because he was on top of things and he was very proactive," 3-ER-408, authorized all of the work and pricing. 3-ER-495.

Similarly, Plains directly approved the pricing for the project underlying Count 2. 4-ER-640, 648; 6-ER-962-63. A government witness, Mark Zembrycki, testified that he was the initial Matrix project manager on the project and that a representative from Plains attended the initial job walk and authorized the work at a lump sum of $90,000. 6-ER-960-63. Khary Sands, who eventually took over as project manager, stated that he thought the price seemed high, but his recollection was questionable, as he mistakenly thought Laney was the initial project manager, and, in any event, he and his supervisor authorized the $90,000 payment to Imperial, as had already been approved by Plains. 3-ER-478; 4-ER-633, 647; 6-ER-964-64.

Count 3 of the indictment alleged a $46,645 payment by Matrix for a Chevron project and for which codefendant Hourmouzus was the project manager. 4-ER-594;

8-ER-1564. Hourmouzus testified that he sometimes let petitioner know whether there was "room" on a bid if petitioner was "coming in too low," although he could not remember whether he did so on this project. 4-ER-581, 596. Ibarria believed that he could have done the project for less money than petitioner bid, 5-ER-783, but the government presented no testimony that Chevron or Matrix believed that the work performed was inadequate for the lump-sum price that was agreed upon, and other testimony by Government witnesses established that the work performed was commensurate with "rule of thumb" pricing (60 feet at $750 per foot for a total of $45,000). 5-ER-778 (project was for a 60-foot diameter tank); 3-ER-470-71 ($750 per foot); 6-ER-966-67 (same). Like Laney, Hourmouzus submitted false invoices to Imperial on petitioner's behalf, and he received a relatively small amount for doing so. 4-ER-587-600.

In sum, multiple Government witnesses testified that petitioner did "excellent work" and "always great work" at reasonable prices and even *lower* prices than most other contractors. 3-ER-408, 434-35, 468; 6-ER-952, 959, 961. Faced with such testimony, the prosecution argued that "integrity" was Matrix's main asset and that it would not have made the payments for the projects had it known that its employees were receiving payments from petitioner. 8-ER-1430-31.

The jury returned guilty verdicts on Counts 1-3, and petitioner received a 60-month sentence, three years of supervised release, a $50,000 fine, and $1,287,000 in restitution. 1-ER-19-24. The Ninth Circuit affirmed the judgment. *See United States v. Federico*, 855 Fed. Appx. 404 (9th Cir. 2021). Petitioner filed a timely 28 U.S.C.

§ 2255 motion raising actual innocence and ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). App. 2a. In January 2025, the district court denied the motion. 1-ER-2-18.

The Ninth Circuit granted a certificate of appealability. App. 2a. On appeal, the Government conceded that the jury instructions erroneously failed to convey the essential benefit of the bargain standard for the materiality element of mail fraud, as set forth in current Ninth Circuit model instructions, and the Ninth Circuit similarly recognized this error. App. 3a-4a. The Ninth Circuit, however, accepted the Government's contention that counsel did not perform deficiently under *Strickland* by failing to make arguments in support of such an instruction at the time of the trial in 2019 because counsel could not be expected to anticipate later legal developments. *Id.* The Ninth Circuit summarily denied rehearing and rehearing *en banc*. App. 5a-6a.

## ARGUMENT

### I. The Court should clarify that the materiality element of mail fraud requires the rigorous and demanding essential benefit of the bargain standard articulated in *Universal Health Services*.

#### A. This Court left the materiality question unresolved in *Kousisis*

In *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016), this Court addressed the materiality element of fraud in the context of the False Claims Act ("FCA"). It explained that the materiality

requirement "descends from 'common-law antecedents'" and that "the common law could not have conceived of 'fraud' without proof of materiality.'" *Id.* at 193. This Court described the materiality standard as "demanding" and "rigorous." *Id.* at 192, 194. And it cited Chief Justice Cardozo's opinion in *Junius Constr. Co. v. Cohen*, 257 N.Y. 393, 400 (1931) to state that "a misrepresentation is material if it 'went to the very essence of the bargain[.]'" *Universal Health Services*, 579 U.S. at 194 n.5.

Almost a decade later, this Court addressed whether the wire fraud statute, 18 U.S.C. § 1343, permits a prosecution under a fraudulent inducement theory "regardless of whether the fraudster . . . seeks to cause the victim *net* pecuniary loss." *Kousisis v. United States*, 605 U.S. 114, 118 (2025). In arguing that the federal criminal fraud statutes allow such a theory, the Solicitor General asserted that any overbreadth concerns were addressed by the statutes' demanding materiality element, which requires "an essence-of-the-bargain test, under which a misrepresentation is material only if it goes 'to the very essence' of the parties' 'bargain.'" *Id.* at 131-32 (quoting *Universal Health Services*, 579 U.S. at 194 n.5). This Court concluded that it "need not settle the" requisite standard for materiality because petitioners had "not contested that their misrepresentations were material." *Id.* at 132. It was "enough to reiterate 'that materiality of falsehood is an element of' – and thus a limit on – the federal fraud statutes." *Id.*

Justice Thomas concurred because petitioners had not contested materiality, but he was "skeptical" that their misrepresentations were material. *Id.* at 136 (Thomas, J., concurring). He pointed out that the "Government argues

that the standard for materiality in this context is the one this Court articulated in *Universal Health Services* – whether a misrepresentation went to the 'very essence of the bargain.'" *Id.* at 138 (citations omitted). Justice Thomas, like "[t]he Court reserved the question whether the standard for materiality in the FCA context is identical to the standard that applies to wire-fraud prosecutions," but he noted that "the standard we articulated in *Universal Health Services* was a 'familiar' one that aligned authoritative treatises and the common law[, a]nd, particularly in light of the Government's endorsement, it, *at a minimum*, provides a useful baseline for evaluating . . . materiality." *Id.* at 140-41 (emphasis added) (citations omitted). He also concluded: "In persuading the Court to reject petitioners' economic-loss arguments today, the Government has assured us that 'the 'essence of the bargain' standard for materiality' will ensure that federal wire-fraud prosecutions cannot be used to target benign, everyday misstatements. Because a demanding approach to materiality is all that prevents an 'extraordinarily expansive view of liability' from rendering the federal wire-fraud statute nearly limitless in scope, lower courts should hold the Government to its word." *Id.* at 146 (citation omitted).

Justice Gorsuch wrote his own concurrence, disagreeing with footnote five of the majority opinion, which he concluded was dicta, and he too looked to the essential benefit of the bargain standard articulated in *Universal Health Services*. *Id.* at 155-56 (Gorsuch, J., concurring). Likewise, Justice Sotomayor's concurrence stated that the Court did not need to resolve the standard for materiality but recognized that the Government proposed a "demanding standard" where "misstatements

are material only if they go to the very 'essence of the bargain'" at issue, a standard that "stems from *Universal Health Services*, which discussed materiality under the False Claims Act." *Id.* at 160-61 (Sotomayor, J., concurring) (citations omitted). She also emphasized that the Court's opinion did not address "a class of fraudulent-inducement cases distinct from this one: those in which a defendant provides exactly the goods or services that they promised to deliver, but lies in other ways to induce the transaction." *Id.* at 159. Thus, "[f]uture cases presenting such fact patterns will require the Court to confront the outer limits of the federal fraud statute's reach to decide what satisfies its materiality element." *Id.*

In short, this Court did not definitively resolve the materiality standard required under the mail and wire fraud statutes. However, the Government conceded and this Court strongly suggested that the demanding essential benefit of the bargain standard articulated in *Universal Health Services* was the minimum required. As discussed below, the lower courts are in need of guidance, and this Court should grant this petition to resolve the requisite materiality standard.

### B. Confusion remains after *Kousisis*, requiring this Court's intervention

Since *Kousisis*, the Eighth Circuit has held that it was not error to refuse an essence of the bargain materiality instruction for wire fraud. *See United States v. Crump*, 179 F.4th 1137, 1154-55 (8th Cir. 2026). Likewise, the Third and Seventh Circuits have stated that *Kousisis* abrogated a "benefit of the bargain" standard. *See United States v. Abrams*, 165 F.4th 784, 803 (3d Cir. 2026); *United States*

*v. Smith*, 150 F.4th 832, 843-44 (7th Cir. 2025). While this Court rejected a net pecuniary loss requirement in *Kousisis*, it certainly did not reject a benefit of the bargain standard. To the contrary, as discussed above, the Government conceded and this Court strongly suggested that an essential benefit of the bargain standard was the minimum required for the materiality element of federal criminal fraud.

Thus, some lower courts have already misconstrued the meaning of *Kousisis*, perhaps because of its unusual posture where the petitioners were not contesting the materiality element. For this reason alone, this Court's intervention is needed to clarify that the demanding essential benefit of the bargain standard articulated in *Universal Health Services* is the materiality test applicable to the mail and wire fraud statutes.

Moreover, this Court should clarify what that standard means in the context of federal criminal fraud. Footnote seven of the majority opinion in *Kousisis* stated that "materiality is judged according to an objective standard." *Kousisis*, 605 U.S. at 131 n.7 (quoting *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 459 (2013)). The text of the majority opinion, however, also stated that, under *Universal Health Services*, "a misrepresentation is material if a reasonable person would attach importance to it in deciding how to proceed, *or* if the defendant knew (or should have known) that the recipient would likely deem it important." *Id.* at 131 (emphasis added). Under this disjunctive formulation, the first method of showing materiality is an objective test, but the second method would appear to be a subjective one, creating some tension and cause for confusion.

Justice Thomas also explained in *Kousisis* that, under *Universal Health Services*, a term may not be material even if contractual language would objectively indicate otherwise. *Id.* at 139 (Thomas, J., concurring). "A party's actions may reveal that a contract term is not material even if the contract's language would suggest otherwise. For example, '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.* (quoting *Universal Health Services*, 579 U.S. at 195). Likewise, materiality should also be assessed "from the viewpoint of the allegedly misleading statement's maker," who could reasonably conclude that, "contract language notwithstanding," an alleged fraud victim "does not actually consider [an explicit provision to be] essential to its contracts." *Id.* at 143-44.

Thus, to ensure an objective standard and to sufficiently cabin federal *criminal* fraud, this Court should clarify that the test derived from *Universal Health Services* is conjunctive, not disjunctive. *See Kousisis*, 605 U.S. at 146 (Thomas, J., concurring). In other words, a misrepresentation is material if a reasonable person would consider it essential to the bargain *and* the defendant knew that the recipient deemed it essential to the bargain. *Id.* at 155 (Gorsuch, J., concurring) ("Suppose a defendant promises to deliver a 'horse called the Charley.' That representation would be material if the parties' dealings reveal that a reasonable person in the buyer's shoes would care about the specific identity of the horse. But if those dealings indicate that, in the circumstances of a particular industry or transaction, a buyer would have been interested only in a horse of a particular kind

and quality, the representation would not be material.") (citation omitted). Such a conjunctive test harmonizes the principles discussed in *Universal Health Services* and is needed to provide a sufficient limitation on the mail and wire fraud statutes.

### C. The materiality question is exceptionally important

It goes without saying that the mail and wire fraud statutes are among the most important weapons in the federal prosecutor's arsenal and result in thousands of prosecutions each year. "As one future judge put it during his tenure as a prosecutor, these statutes are our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart – and our true love." *United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980)).

The dangers and constitutional uncertainties of an unbounded interpretation of the mail and wire fraud statutes are well-documented, and this Court has repeatedly warned against "mak[ing] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law – in flat contradiction with our caution that, 'absent a clear statement by Congress,' courts should 'not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.'" *Ciminelli v. United States*, 598 U.S. 306, 315-16 (2023) (quoting *Cleveland v. United States*, 531 U.S. 12, 27 (2000)). After *Kousisis*, this Court has left the responsibility of shouldering necessary limiting principles

to the materiality element, but it has not definitively adopted an essential benefit of the bargain standard, nor has it clarified the contours of that standard.

As mentioned, some circuits have already balked at recognizing an essential benefit of the bargain test for materiality, *see Crump*, 179 F.4th at 154-55; *Abrams*, 165 F.4th at 803; *Smith*, 150 F.4th at 843-44, despite Justice Thomas's plea that lower courts hold the government to this rigorous standard. *See Kousisis*, 605 U.S. at 146 (Thomas, J., concurring). In addition to the federalism and overbreadth concerns, at stake are significant penalties, up to 20 years per count; the mail and wire fraud statutes also serve as predicate offenses under RICO and the money laundering statutes. *See Cleveland*, 531 U.S. at 25. For all of these reasons, this Court's immediate intervention is warranted to provide clarity on this important issue.

## II. The Court should hold that the rigorous and demanding essential benefit of the bargain standard was foreshadowed by *Universal Health Services*, and it should remand for a prejudice determination.

The *Strickland* test for ineffective assistance of counsel requires deficient performance and prejudice. *See Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). Unlike the circuits that have balked at the essential benefit of the bargain standard, the Ninth Circuit at least recognized below that a jury instruction on the essential benefit of the bargain standard should have been given. App. 3a. It concluded, however, that petitioner's counsel was not ineffective for failing to request such a materiality instruction because she could not be expected to anticipate

later opinions; instead, it declared, deficient performance should be evaluated as of the time of counsel's conduct. App. 3a-4a.

This Court has stated that "[l]ack of clarity in the law" "does not obviate" deficient performance under the *Strickland* test. *Padilla*, 559 U.S. at 369 n.10. Thus, it is well-settled that "defense counsel may be required to anticipate arguments foreshadowed but not yet adopted by existing case law." *Harris v. United States*, 13 F.4th 623, 629 (7th Cir. 2021) (quoting *Bridges v. United States*, 991 F.3d 793, 803 (7th Cir. 2021)); *see Leeds v. Russell*, 75 F.4th 1009, 1018-20 (9th Cir. 2023); *United States v. Carthone*, 878 F.3d 458, 465-66 (4th Cir. 2017).

Here, the essential benefit of the bargain test was foreshadowed by *Universal Health Services*, which was decided three years before petitioner's 2019 trial. *See Universal Health Services*, 579 U.S. at 194 and n.5. Indeed, the Ninth Circuit had already explained that *Universal Health Services* was applicable to the materiality element of mail and wire fraud two years before petitioner's trial. *See United States v. Lindsey*, 850 F.3d 1009, 1016-17 and n.4 (9th Cir. 2017) (extensively relying on *Universal Health Services* and noting that this Court "has used cases on materiality in one context as precedent for materiality in another"). Also two years before petitioner's 2019 trial, the Ninth Circuit recognized that *Universal Health Services* "clarified" the "rigorous[]" materiality standard for fraud and "rejected a view that the test for materiality 'is whether the person knew that the [victim] could lawfully withhold payment.'" *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 333-34 (9th Cir. 2017). The essential benefit of the bargain standard was so

clearly foreshadowed by *Universal Health Services* that *the Government* argued it was the standard governing materiality in *Kousisis*. *See Kousisis*, 605 U.S. at 131-32. At the very least, trial counsel had a compelling argument that an essential benefit of the bargain standard applied, and it was deficient performance to fail to seek such an instruction.

The Ninth Circuit only relied on the deficient performance prong of *Strickland*; it did not address the prejudice prong. App. 3a-4a. Accordingly, this Court should find deficient performance and remand for a prejudice determination in the first instance. *See, e.g.*, *McFadden v. United States*, 576 U.S. 186, 197 (2015). Petitioner notes, however, that he had a very strong essential benefit of the bargain defense. *See Kousisis*, 605 U.S. at 141-45 (Thomas, J., concurring) (suggesting lack of materiality under essence of the bargain test in similar circumstances). Petitioner maintains that he is actually innocent because he "provide[d] exactly the goods or services that [he] promised to deliver" to Matrix, and he did not misrepresent any term of the parties' contracts. *Id*. at 159 (Sotomayor, J., concurring). At the very least, however, there is a strong probability that the jury's verdict would have been different if it had been given an essential benefit of the bargain instruction. *See Strickland*, 466 U.S. at 694-95.

There was ample testimony from the Government's own witnesses that petitioner's work was outstanding and reasonably priced such that a jury could have found that Matrix received the essence of its bargain. 3-ER-408, 434-35, 468; 6-ER-952, 959, 961. Matrix and its clients agreed to lump-sum (flat-fee) contracts with petitioner,

which he satisfactorily performed, and he charged reasonable rates and was generally the low bidder. 6-ER-961 ("Brian's lump-sum proposals" were *not* "inflated" and "generally he was the lower bidder"); *see* 2-ER-201 (lump-sum contracts "would have no impact" as there was an "agreed-upon price"); 3-ER-468-69 ("reasonable" prices); 6-ER-952 (petitioner "did good work" and was "cheaper compared to other contractors"), 6-ER-959 (if petitioner's "price was too high" he "would not have got the job"); 2-SER-287 (example of the contracts with firm lump-sum price).

Furthermore, any false invoices were sent *to Imperial* (not Matrix) only *after* Matrix had sent the check to Imperial for the contract that petitioner had already performed. 3-ER-371 ("Imperial didn't send those invoices . . . up to Matrix"), 379 ("We did not see those invoices in Matrix files"), 473-74 ("invoices . . . were for jobs Brian had already completed" and "never sent . . . invoices to Matrix"), 493 (invoices "[a]fter the work was done"); 7-ER-1171 ("none of those invoices were – were sent to Matrix").[2] The fake invoices were not passed on to Matrix because those invoices did not go to the bargain struck by Matrix and its clients, as they had agreed to lump-sum contracts with Imperial. In sum, petitioner had a strong essential benefit of the bargain defense, and therefore the Ninth Circuit will likely find on remand that he was prejudiced by his counsel's failure to secure such a materiality instruction. *See Crace v. Herzog*, 798 F.3d

2. Only a flat-fee invoice was sent to Matrix. 2-SER-262 (example of flat-fee invoice). The Government also argued below that "affidavit forms" were submitted to Matrix, but those forms were merely releases of liens certifying that work was complete and there were no outstanding invoices. 2-SER-338.

840, 847, 849 (9th Cir. 2015); *Riley v. McDaniel*, 786 F.3d 719, 725-26 (9th Cir. 2015); *United States v. Alferahin*, 433 F.3d 1148, 1161-62 (9th Cir. 2006).

## CONCLUSION

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

Dated: November 4, 2026

Respectfully submitted,

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# APPENDIX

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**APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 30, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-7089
D.C. Nos. 4:12-cr-00862-YGR-2, 4:22-cv-06774-YGR

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

BRIAN FEDERICO,

*Defendant-Appellant.*

Filed June 30, 2026

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Submitted June 26, 2026**

Before: MURGUIA, Chief Judge, and KOH and H.A. THOMAS, Circuit Judges.

**MEMORANDUM***

Brian Federico was convicted of wire fraud offenses against Matrix Service Company ("Matrix") and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

sentenced to 60 months of imprisonment and three years of supervised release. We affirmed his conviction on direct appeal. *United States v. Federico*, 855 F. App'x 404 (9th Cir. 2021). Federico now appeals the district court's denial of his motion to vacate his conviction pursuant to 28 U.S.C. § 2255. We granted a certificate of appealability as to the following question: "whether trial counsel was ineffective for failing to argue that appellant's conduct did not constitute mail fraud against Matrix pursuant to *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), and related cases." We have jurisdiction under 28 U.S.C. §§ 1291, 2253, and 2255(d). We review a district court's denial of a section 2255 motion de novo and its underlying factual findings for clear error. *United States v. Zuno-Arce*, 339 F.3d 886, 888 (9th Cir. 2003). We affirm.

1. Federico has not established ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Juliano*, 12 F.4th 937, 940 (9th Cir. 2021) (explaining that to establish ineffective assistance of counsel under *Strickland*, a defendant must show both deficient performance and prejudice). Federico has not "overcome the presumption that, under the circumstances, the challenged action"—trial counsel's failure to argue *Starr* and related cases—"might be considered sound trial strategy," not deficient performance. *Strickland*, 466 U.S. at 689 (citation omitted); *see United States v. Cochrane*, 985 F.2d 1027, 1030 (9th Cir. 1993) (holding that counsel's failure to present certain authorities "does not demonstrate incompetency," but rather "might have been reasonable trial strategy").

*Starr* and related cases invalidated mail or wire fraud convictions for failure to establish intent to harm "where the evidence merely indicate[d] that the services contracted for were dishonestly completed." *United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006); *see also Starr*, 816 F.2d at 99 (finding intent to harm lacking where defendants "in no way misrepresented to their customers the nature or quality of the service they were providing"). The evidence at trial showed that Federico conspired with others to misrepresent the value of bids and invoices submitted by his employer Imperial Shotcrete ("Imperial") to Matrix by falsely inflating the costs incurred by Imperial on the Matrix projects. Because Federico's misrepresentations went to the very "nature of the bargain," *see United States v. Milheiser*, 98 F.4th 935, 944 (9th Cir. 2024), the cases Federico cites—even if controlling in this circuit—would therefore not have likely changed the outcome of his case. The Supreme Court's decision in *Kousisis v. United States*, 605 U.S. 114 (2025), moreover, abrogated the approach to the intent to harm element formulated in *Starr* and related cases. *See United States v. Runner*, 143 F.4th 146, 155 (2d Cir. 2025).

Federico also has not shown that counsel performed deficiently by failing to raise *Starr* and related cases in support of a jury instruction on the essential benefit of the bargain standard for materiality. The holding in *Starr* pertained to the intent element, not materiality. *See Starr*, 816 F.2d at 98. Although such a materiality instruction is now part of our circuit's model jury instructions following *Milheiser, see* 9th Cir. Manual of Model Crim. Jury Instr. 15.32 (revised Sept. 2025), an attorney "cannot be required

to anticipate our decision in this later case, because his conduct must be evaluated . . . 'as of the time of counsel's conduct,'" *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (quoting *Strickland*, 466 U.S. at 690).

2. Federico raises the following uncertified issue: "whether this Court should vacate the restitution order under *Ellingburg v. United States*, No. 24-482." We decline to expand the certificate of appealability to include Federico's restitution claim. *See Delgadillo v. Woodford*, 527 F.3d 919, 930 (9th Cir. 2008); 9th Cir. R. 22-1(e). "[J]urists of reason would not debate that [Federico] should be denied relief," *Buck v. Davis*, 580 U.S. 100, 115 (2017), because claims for relief from a restitution order "cannot be brought in a § 2255 motion, whether or not the motion also contains cognizable claims for release from custody," *United States v. Thiele*, 314 F.3d 399, 400 (9th Cir. 2002).

**AFFIRMED.**

**APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 6, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-7089

D.C. Nos. 4:12-cr-00862-YGR-2,
4:22-cv-06774-YGR

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

BRIAN FEDERICO,

*Defendant-Appellant.*

Filed August 6, 2026

Before: MURGUIA, Chief Judge, and KOH and H.A. THOMAS, Circuit Judges.

**ORDER**

The panel has unanimously voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested

a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. The petition for panel rehearing and the petition for rehearing en banc, Dkt. No. 35, are **DENIED**.