26-6106

NO. _____

ORIGINAL

IN THE UNITED STATES SUPREME COURT

ROBERT E. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

FILED
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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the standard of materiality applied under the False Claims Act in *Universal Health Services, Inc., v. United States ex rel. Escobar*, 579 U.S. 176, 187, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016) also apply in a fraudulent inducement prosecution under the federal wire fraud statute?

II. Are fraudulent statements legally material if the victim's contemporaneous conduct proves that they completely disregarded or nullified the fraudulent statements and made their decision based solely on other independent criteria, terms, or conditions?

III. After *Kousisis*, is the "*essential element of the bargain*" or the "*benefit of the bargain*" legitimate federal defenses to a fraudulent inducement prosecution under the federal wire fraud statute?

IV. Does a federal court violate the Fifth & Sixth Amendment right to a fair trial and jury when it refuses to give a requested jury instruction based on a federal defense that the government advocated for and conceded before this court?

PARTIES TO THE PROCEEDING

Petitioner is Robert E. Carter, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RELATED PROCEEDINGS

United States v. Carter, No. 22-cr-124 (W.D. Wis. April 24, 2024)

United States v. Carter, No. 24-2950-cr (7th Cir. January 23, 2026)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert E. Carter seeks a petition of writ of certiorari to review the order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit is unpublished but available at *United States v. Carter*, 2026 U.S. App. LEXIS 1833 (7th Cir. January 23, 2026) It is reprinted at Appendix A to this petition. The order of the United States Court of Appeals for the Seventh Circuit denying rehearing and rehearing en banc is unpublished but available at *United States v. Carter*, 2026 U.S. App. LEXIS 8171 (7th Cir. March 19, 2026) It is reprinted at Appendix B to this petition. The opinion and order of the district court denying the motion to dismiss based on materiality is unpublished. It is reprinted in relevant part at Appendix C to this petition. The district court's oral order denying Petitioner's requests for a theory of defense instruction is unpublished and unreported. It is reprinted in relevant part at Appendix D. The district court opinion regarding the scope of argument for materiality is unpublished. It is reprinted in relevant part at Appendix E. The district court order regarding testimony on the issues of materiality is unpublished. It is reprinted in relevant part at Appendix F.

JURISDICTION

The panel order of the *Seventh* Circuit denying rehearing and rehearing en banc was entered on March 19, 2026, and the panel order and judgment of the *Seventh Circuit* was entered on January 23, 2026. The petition was originally postmarked on

May 7, 2026, and returned by the Clerk on each of July 23, 2026, and August 20, 2026, for corrections pursuant to Rule 14.5 of this Court. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Question I

Section 1343 of Title 18 reads:

> "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."

Section 1349 of Title 18 reads:

> "Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Section 3729(b)(4) of Title 31 reads:

> "the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

Questions II and III

Amendment V of U.S. Constitution provides in relevant part:

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

Question IV

Amendment VI of the U.S. Constitution provides in relevant part:

"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 defen[s]e."

INTRODUCTION

This Court's decision in *Kousisis v. United States*, 605 U.S. 114, 115 S. Ct. 1382, 1390, 221 L. Ed. 2d (2025) raised an important question that it is now critical to answer, whether the materiality standard applied to the False Claims Act ("FCA") and advocated for by the Government in both *Kousisis* and *Universal Health Services, Inc., v. United States ex rel. Escobar*, 579 U.S. 176, 187, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016) is applicable in a prosecution for fraudulent inducement under the federal wire fraud statute. The federal courts of appeal are taking vastly drastic, different, and expansive views of the standard of materiality applicable since this Court left that question open. Furthermore, because the definition of materiality in the FCA is identical to the definition of materiality this Court applied to the federal

wire, mail, and bank fraud statues in *Neder v. United States*, 527 U.S. 1, 22 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), there is strong tension between *Kousisis*, *Universal Health Services*, and *Neder*.

This tension results from this Court's conclusion in *Universal Health Services* that the "likely or *actual behavior*" of the parties involved in contracting are probative of whether a fraudulent misrepresentation is material. From this conclusion arose the view that the "*essence of the parties' bargain*" is critical to a determination regarding materiality. The Government endorsed this standard of materiality in *Universal Health Services* and advocated for it before this Court in *Kousisis*. The Government also conceded before this Court that a defendant is entitled to an "*essence of the bargain*" defense and jury instruction.

Yet, the *Seventh Circuit* has recently held that this Court's decision in *Kousisis* "*forecloses an essence of the bargain defense*" *United States v. Smith*, 141 F. 4th 605 (7th Cir. 2025) and it has rejected the defense that the "*actions*" and "*behavior*" of the parties demonstrated that misrepresentations were not material. *United States v. Clark*, 140 F. 4th 395 (7th Cir. 2025) Similarly, the *Ninth Circuit* has gone even further, recently expanding a brightline rule that forecloses the presentation of any evidence by a defendant to prove that an alleged victim's "*likely or actual behavior*" demonstrated that misrepresentations are not material. *United States v. Jesenik*, 152 F. 4th 924 (9th Cir. 2025) The *Second, Third, Fourth, Fifth, Sixth,* and *Eighth* Circuits have all held too, that in the absence of resolution by this Court, they will continue to apply the broader standard of materiality established in *Neder*. *United States v.*

Runner, 143 F. 4th 146 (2nd Cir. 2025) (statements material if they are capable of influence or affect the benefits expected or received) *United States v. Elfenbein*, 144 F. 4th 551 (statements are material if they are capable of influence); *United States v. Landersman*, 886 F.3d 393 (4th Cir. 2018) (same); *United States v. Evans*, 892 F.3d 692 (5th Cir. 2018) (statements material if they are capable of distracting or misguiding federal investigators); *United States v. Litvak*, 30 F.4th 539 (6th Cir. 2022) (statements material if they affect perceived market value); *United States v. Rice*, 44 F.4th 1104 (8th Cir. 2022) (misrepresentations of compliance on billing forms are material)

Notably, however, the *Tenth* Circuit has embraced the standard advanced by Mr. Carter in this petition and below. *United States v. Camick*, 796 F.3d 1206 (10th Cir. 2015) (if a [misrepresentation] is completely irrelevant to the legal mechanism at play, it lacks the natural tendency to influence the outcome and cannot sustain a criminal conviction) As a result, the federal courts are in disarray regarding the standard of materiality applicable in fraudulent inducement prosecutions under the federal wire fraud statute. Defendants nationwide are being caught in the throes of confusion. They are being denied defenses based on this Court's precedent, a clear concession by the Government, and are being sent to federal prison for years based on victimless crimes. Further, the federal courts are refusing to hold the Government to its own concession that it would not oppose "*essence of the bargain*" defenses. If the standard of materiality applicable in a prosecution for fraudulent inducement remains unsettled, then the "*demanding*" and "*rigorous*" standard found by this Court

in *Kousisis* and *Universal Health Services* will continue to falter and keep open a back door allowing the Government to maintain an expansive use of the federal wire fraud statute.

STATEMENT OF THE CASE

A. Background

This case arises from commercial contract negotiations in the Western District of Wisconsin. The Government charged Petitioner, Robert E. Carter, with wire fraud under 18 U.S.C. § 1343 and attempted wire fraud under 18 U.S.C. § 1349, alleging that he submitted fraudulent financial statements to induce two sophisticated commercial entities—Ryder Transportation Services, Inc. ("Ryder") and Nuss Trucking Equipment ("Nuss")—to enter into equipment lease contracts.[1] Dkt. 213 The factual record demonstrates that the financial statements submitted by Mr. Carter did not "*induce*" or "*motivate*" the "*actual behavior*" of either commercial counterparty and they failed to form the "*essence of the bargain*" for either transaction. As to Ryder, the company explicitly informed Mr. Carter during negotiations that it could not and would not sign the contract based on the fraudulent financial statements alone. Pet. App. 23a-25a It explicitly rejected Brian Clark's ("Clark") request to enter the lease contract and deliver the equipment solely on the fraudulent financial statements.[2] Pet. App. 23a-24a

Instead, Ryder responded by completely insulating itself from exposure to commercial risks by requiring four strict, structural conditions precedent to the

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[1] Dkt. refers to filings in the district court

[2] Brian Clark was the Business Development Officer who testified at trial in this case

execution of the contract: (1) a cash security deposit of $17,500; (2) commercial insurance covering the full economic value of the equipment; (3) automatic electronic payments drawn directly from his business account; and (4) an absolute corporate guaranty. Pet. App. 23a-25a Absent the strict fulfillment of these four independent financial conditions, Ryder stated it would not contract. Pet. App. 24a-25a Mr. Carter met every condition, and the lease contract was signed. Ryder received the exact protection that it demanded despite its receipt of the fraudulent statements. The Government never charged that the four conditions were fraudulent. Pet. App. 25a.

As to Nuss, the company handled the financial statements with absolute skepticism. Upon reviewing the financial statements, the president of Nuss concluded that "*something didn't smell right.*" Rather than relying on the statements, the president instructed his Director of Leasing to conduct an independent background check on Mr. Carter.[3] Pet. App. 31a The background check revealed adverse information, and Nuss made the immediate business decision not to enter into any contract. Nuss faced no commercial risks, relied completely on its own due diligence, and rejected the transaction entirely. Pet. App. 31a-34a

B. Proceedings in the District Court

At trial, Mr. Carter moved to dismiss the superseding indictment arguing that the indictment failed to state an offense because *inter alia*, the "*actual behavior*" of Ryder and Nuss demonstrated by indisputable evidence that the fraudulent statements were not material either to Ryder's decision to enter into the leases or

[3] Christopher Pyle, the Director of Leasing, testified at trial in this case.

Nuss' decision to decline to enter into the leases. Dkt. 166, 167, 201, 221, 225 He also requested jury instructions on a "*benefit of the bargain*" or "*essence of the bargain*" theory of defense. Dkt. 255, 283; Pet. App. 35a-38a He argued that a statement cannot be material if the recipient's "*likely* or *actual behavior*" demonstrates that it either explicitly disclaimed sole reliance on the statements (*Camick*, 796 F.3d 1206) and imposed four independent financial conditions to bypass them (Ryder), or independently investigated, discovered the truth, and rejected the deal outright (Nuss).

The district court ordered further briefing on materiality. Dkt. 205, 206 Mr. Carter insisted that the "*actual behavior*" of Ryder and Nuss was determinative since the Government did not dispute their "*actual behavior.*"[4] Dkt. 224, 229, 332 The Government fiercely opposed dismissal and the instructions, arguing that under *Neder v. United States*, 527 U.S. 1 (1999), it was not required to prove actual reliance and that the "*actual behavior*" of Ryder and Nuss was entirely irrelevant. Dkt. 193, 218, 295 The District Court agreed. It denied the motion to dismiss and rejected Mr. Carter's theory of defense instruction. Dkt. 200 Further, the court refused to give the requested jury instructions because the court concluded that they were not legally cognizable. Pet. App. 12a Over Mr. Carter's written objections, the district court

[4] The Government disputed whether Mr. Nuss' statement "*something didn't smell right*" was related to his review of the statements. It did not dispute that he reviewed the statements, that he directed his Director of Leasing to conduct a background investigation, that the investigation was done, and that after the investigation, the Director of Leasing decided not to enter into a contract. Mr. Carter moved for an evidentiary hearing because Ryder and Nuss' actual behavior was determinative without a trial. Dkt. 259 The district court denied the motion. Dkt. 325

instructed the jury under the loose, abstract *Neder* standard and Mr. Carter was convicted. Dkt. 380 Pet. App. 39a-41a

C. Appellate Proceedings

Mr. Carter appealed, arguing, *inter alia*, the following three issues. *First*, the standard of materiality applicable to his prosecution was the standard applied in *Universal Health Services* and reemphasized in *Kousisis*. If applied, his convictions could not stand because the evidence established at trial that the "*actual behavior*" of Ryder and Nuss demonstrated that the statements were not material. *Second*, he was entitled to a theory of defense jury instruction based on either (1) the "*benefit of the bargain*" theory or (2) the "*essence of the bargain*" theory of defense. He argued that the evidence supported the defenses and proved that Ryder specifically rejected a request to approve the leases based solely on the statements and that he met the four conditions precedent on which the fate of the contract rested. Further, he argued that the district court erred in refusing to give the instructions which deprived him of a fair trial. Pet. App. 1a-6a

Third, that the Seventh Circuit is at odds with this Court's holding regarding an "*essence of the bargain*" defense theory and that it was issuing confusing and contradicting panel opinions on the issue of materiality. He urged the court to address the issue squarely raised by his appeal. The Seventh Circuit declined. Pet. App. 1a-6a

Instead, it issued a non-published order affirming the convictions. Pet. App. 1a-6a To sustain the convictions under the broader *Neder* standard without setting

binding circuit precedent and avoiding the question of materiality altogether, the *Seventh* Circuit arbitrarily and capriciously relied upon a conclusion expressly contradicted by the record. It concluded wrongly that Ryder and Nuss relied upon the fraudulent statements, despite a clear factual record demonstrating that Ryder plainly refused to rely upon the statements and rejected transferring the equipment based upon the statements alone. Pet. App. 22a-25a

The record was also plain that Nuss rejected the deal based entirely on an independent background check. Pet. App. 33a-34 The *Seventh* Circuit further held that an "*essence of the bargain*" or "*benefit of the bargain*" theory are not defenses to a fraudulent inducement prosecution under the federal wire fraud statute. Pet. App. 5a Mr. Carter petitioned for rehearing and rehearing en banc, asking the *Seventh* Circuit to reconsider its decisions in *Clark* and *Smith* and apply the narrower standard of materiality in a fraudulent-inducement theory of prosecution under the federal wire fraud statute. The *Seventh* Circuit denied the petition. Pet. App. 7a

REASONS FOR GRANTING THE PETITION

I. This court should resolve the tension between *Neder v. United States*, 527 U.S. 1 (1999) on the one hand and *Universal Health Services, Inc., v. United States v. Ex rel. Escobar*, 579 U.S. 176 (2016) and *Kousisis v. United States*, 605 U.S. 114 (2025) on the other.

A. *Neder*, *Universal Health Services*, and *Kousisis* are in tension

This Court should grant certiorari to resolve the critical questions left open by *Kousisis v. United States*, 605 U.S. 114 (2025). In *Kousisis*, this Court eliminated the "*net economic loss*" requirement under the wire fraud statute and reassured the public that the outer boundaries of federal fraud prosecution are strictly policed by a

"*demanding materiality requirement.*" However, because this Court did not explicitly define the parameters of that demanding requirement ("We need not settle the debate here...Alpha and Kousisis have not contested that their misrepresentations were material") *Id.* or clarify the instructions to which a defendant is entitled, there is profound tension between three critical precedents of this Court regarding the standard of materiality.

In *Neder v. United States*, 527 U.S. 1, 25 119 S. Ct. 1827, 144 Ed. 2d. 35 (1999), this Court first adopted the broader standard of materiality, holding that "[i]n general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision-making body to which it was addressed.'" It held that this standard of materiality was applicable to the federal mail, wire, and bank fraud statutes. Since that time, the federal courts have taken and maintained this broad view of materiality, but only in the criminal context. Seventeen years later, in *Universal Health Services, Inc., v. United States ex rel. Escobar*, 579 U.S. 176, 187 136 S. Ct. 1989, 195 L Ed. 2d 348 (2016) this Court would take a different view of materiality, holding that materiality is a "*demanding*" and "*rigorous*" standard. Explaining how the materiality standard should be applied, this Court stated that, "a misrepresentation is material ***only*** if it goes to the "*essence of the parties bargain.*" Inevitably, this conclusion narrowed the definition of materiality in *Neder*.

But *Universal Health Services* was a civil case, analyzing materiality as it was to be applied in a fraud case under the False Claims Act ('FCA"). (See 31 U.S.C. §

3729(b)(4)) So, the federal courts have refused to apply it in the criminal context. Tellingly though, the definition of materiality under the FCA is nearly identical to the definition of materiality under *Neder*. Yet this Court reasoned that it was unnecessary to distinguish the language of the definition of materiality because "under ***any*** understanding of the concept, materiality looks to the ***effect on the likely or actual behavior of the recipient of the alleged misrepresentation***." *Universal Health Services*, U.S. 579 at 193, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (quoting 26 R. Lord, Williston on Contracts Sec. 69:12, p. 549 (4th Ed. 2003) (Williston)

Further, this Court looked to both tort and contract law when reasoning that materiality must go to the "*essence of the parties' bargain*". ("In tort law, for instance, a matter is material in only two circumstances: (1) if a reasonable man would attach importance to it in determining his choice of action in the transaction; or (2) if the defendant knew or had reasons to know that the recipient of the representation attaches importance to specific matter in determining his choice of action even though a reasonable person would not." *Restatement* (Second) of *Torts* Sec. 538 at 80 (Materiality in contract law is substantially similar. *See Restatement (Second) of Contracts* Sec. 162(2) and Comment c, pp. 439, 441 (1979) ("A misrepresentation is material only if it would likely induce a reasonable person to manifest his accent or the defendant knows that for some special reason the representation is likely to induce the particular recipient to manifest his assent to the transaction. *Universal Health Services*, U.S. 579 at 193, 136 S. Ct. 1989, 195 L. Ed. 2d 348

The Court also identified specific boundaries of materiality. For example, "a misrepresentation cannot be deemed material [simply] because [a party] designates a contractual requirement as a condition of payment." Materiality also "could not be found where the noncompliance is minor or insubstantial." *Universal Health Services*, U.S. 579 at 193, 136 S. Ct. 1989, 195 L. Ed. 2d 348; *See also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543, 63 S. Ct. 379 87 L. Ed. 443 (1943) (Contractors misrepresentation that they satisfied a non-collusive bidding requirement for federal program contracts violated False Claims Act because the government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive) *See also Junius Construction Corp. v. Cohen*, 257 N.Y. 393, 400, 178 N.E. 672, 674 (1931) (an undisclosed fact was material because no one can say with reason that the plaintiff would have signed this contract if informed of the likelihood of the undisclosed fact.)

Finally, this Court concluded that identifying conditions of a contract that are necessary to some subsequent act can be relevant to whether the conditions are material but are not dispositive. If either party has knowledge that an act may or may not be taken, that is evidence of materiality. And when a party to the contract takes specific action despite misrepresentations, that is "***strong evidence***" that the conditions causing the act is not material. *Universal Health Services* made clear that a materiality determination rest upon an evaluation of the "*likely or actual behavior*" of the recipient of the misrepresentation.

Kousisis reaffirmed the reasoning of *Universal Health Services* with one important caveat, the Government's advocation of the more "*demanding*" and "*rigorous*" standard of materiality. ("The Government by contrast, proposes an "*essence of the bargain*" test, under which a misrepresentation is material only if it goes to the very essence of the parties' bargain.") *Kousisis v. United States*, 605 U.S. 114 (2025); *Universal Health Services,* 579 U.S. at 194 n.5, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (quoting *Junius Construction Corp*, 257 N.Y. 393, 400, 178 N.E. 672, 674) (*See also Kousisis*, Brief for the United States, at 43-45) At oral argument in *Kousisis*, the Government went further, admitting that a defendant is entitled to a defense based on the "*essence of the bargain*" theory and explained that jury instructions should be tailored to meet that defense.[5]

Given this Court's recent precedent, and under any reasonable analysis, the standard of materiality in *Neder* cannot and does not conform to the "*demanding*" and "*rigorous*" standard of materiality that this Court has found to apply in *Universal Health Services* and *Kousisis*. See "The essence of the bargain: False Claims Act Enforcement after Kousisis." Covington & Burling, LLP January 22, 2026 These two cases essentially render the *Neder* standard superfluous. The reason is that the *Neder* standard is subsumed by the *Universal Health Services* and *Kousisis* standard of materiality. As such, there is no legal basis to allow federal courts to continue to apply the *Neder* standard of materiality in the criminal context. The federal courts have

[5] "They've identified a couple instances in their brief where the government opposed an essence of the bargain instruction. The government should not be doing that. And we filed a corrective letter in one case, and the other case is post-verdict, and we intend to confess error in that case as well." *Kousisis*, Oral Arg. at 78)

been willing to apply the more "*demanding*" and "*rigorous*" standard but only in the civil context.[6] That must change not only because it is inconsistent with *Universal Health Services* and *Kousisis*, but also because defendants are being charged with federal crimes where the conditions of the contract are not the very "*essence of the bargain*" and they are receiving multiple years in prison for what is amounting to victimless crimes. *Junis Constr. Corp*, 257 N.Y. 393, 400, 178 N. E. 672, 674; *see also* 23 Williston Sec. 63:3, p. 483 (4th ed. 2018) ("materiality goes to the root of the parties' agreement and touches the fundamental purpose of the agreement.")

Next, fraud in the inducement is a "common-law antecedent." *Kungys v. United States*, 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) *See also State v. Mills,* 17 Me. 211 (1840); *Clark v. White*, 12 Pet. 178, 196 (1838) And since Congress did not define phrases such as "scheme to defraud," or "false and fraudulent pretenses" in the federal wire fraud statute, this Court has embraced the "well settled principle of interpretation that absent other indication, Congress intends to incorporate the well settled meaning of the common-law terms it uses." *Sekher v. United States*, 570 U. S. 729, 733, 133 S. Ct. 2720, 186 L. Ed. 2d 794 (2013) *Kemp v. United States*, 596 U.S. 528, 539 (2022) Thus, fraud is a generic common-law term that gives it limitless reach. So, this Court explained in *Kousisis* that, "materiality

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[6] United States ex rel. Streck v. Eli Lily & Co., 152 F. 4th 816 (7th Cir. 2025) ("The rule served one mechanism, to keep telecommunications services affordable to schools and libraries...because the entire purpose of the program was to keep costs low, it was reasonable to infer that if the government knew of the actual overcharges, it would not approve the claims...in other words, because the misrepresentation went to the very essence of the bargain, it was material.") (applying "essence of the bargain" theory to find materiality) Landmark Health Solutions, LLC v. Not for Profit Hospital Corp., 950 F. Supp. 130, 137-138 (D.C. 2013) ("Compliance with the districts requirement to be registered and obtain a license did go to the essential purpose of the contract for providing management consulting services and staffing services.") (applying essence of the bargain to contract interpretation)

resembles a *but-for* standard and asks whether the misrepresentation constituted an "*inducement*" or "*motive*" to enter into the transaction." This *but-for* standard cannot be met without an evaluation of the parties "*likely or actual behavior*." *Kousisis v. United States*, 605 U.S. 114; *See also* "Mail and Wire Fraud" Am Crim. L. Rev. 62 (2025) 861

Further evidence supporting the *Universal Health Services* standard of materiality is the common law itself as identified by Justice Barrett in *Kousisis*. Justice Barrett, writing for a unanimous court, stated that the federal fraud statutes must be interpreted in light of the common law of fraud. ("As petitioners note, we have long interpreted the statutory term "fraud" (and its variations) this way—that is, by reference to its common-law pedigree...[T]he term 'fraudulent' is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud") *Kousisis v. United States*, 605 U.S. 114 The common law has a long-standing defense regarding independent investigations. *Restatement* (Second) *of Torts* § 547 (1977) The common law explicitly states that if the recipient of a fraudulent misrepresentation relies entirely upon an independent investigation of his own and has discovered the truth or the red flags, the maker of the misrepresentation is not liable for fraud.

Thus, the broader materiality standard under *Neder* not only forecloses a prosecution for wire fraud where the fraudulent statements were not relied upon, but it also deprives defendants of the opportunity to present a *but-for* defense. Mr. Carter sought to put forth this *but-for* defense and to secure a jury instruction that it was

the four conditions which Ryder imposed that "*induced*" and "*motivated*" it to enter the lease contracts. And it was the very fraudulent statements charged in the indictment by the Government which caused Nuss to do a background check leading to its decision to refuse to enter into a contract. The statements therefore neither "*induced*" nor "*motivated*" either company to enter a contract. *Neder* wrongfully won the day.

Why? Because the parties' "*actual behavior*" tells us exactly whether the fraudulent statements were material to their decision. The record was clear that Ryder refused to rely on the fraudulent statements alone by rejecting Brian Clark's request to enter the leases based on them. Pet. App. 25a Nuss' skepticism of the statements was also clear when they prompted an independent background check which led to its refusal to enter into a contract at all. Pet. App. 31a, 34a *See Restatement* (Second) *of Torts* § 547 (1977) (If the recipient of a fraudulent misrepresentation relies entirely upon an independent investigation of his own and has discovered the truth or the red flags, the maker of the misrepresentation is not liable for fraud) Christopher Pyle's ("Pyle") testimony is critical on this point. He testified on direct examination about his "*actual behavior*" at the direction of Nuss, his boss, after he reviewed the fraudulent financial statements:

> **Q**: Okay. What additional tasks did you do to check into Carter Transportation Group?
> **A**: I did some Google searching, looked at –
> **Q**: Generally?
> **A**: Yeah, general looking around.
> **Q**: And what did you decide to ultimately do with this deal?
> **A**: We decided not to take the deal. Pet. App. 31a

Mr. Carter was therefore convicted of wire fraud in a case where both alleged victims outright rejected the fraudulent statements as the basis for entering into the contract. This is the exact position that the *Tenth* Circuit adopted in *Camick*. And it is this exact kind of behavior that *Universal Health Services* says is "***strong evidence***" that a condition is not material.

The record was also clear that the fraudulent statements were "*insubstantial*" and failed to "*induce*" or "*motivate*" a contract on the part of either Ryder or Nuss. The testimony of two officials from Ryder confirmed that it specifically rejected entering the contracts based on the statements. Pet. App. 22a-25a It imposed the four conditions to obtain "*extra security*" and to "*secure Ryder's interests.*" This testimony is an acknowledgement by Ryder that the fraudulent statements were "*insubstantial*" and therefore not material. *Kousisis v. United States*, 605 U.S. 114 ("If the DBE conditions went to very essence of the parties' bargain, the failure to meet those conditions presumably would have had some impact on the final work product.") (Thomas, J. *concurring*) *Universal Health Services*, 579 U.S. at 193, 136 S. Ct. 1989, 195 L. Ed. 2d 348 ("...Even in the face of contrary contract language, materiality cannot be found where noncompliance is minor or insubstantial.") (Thomas, J. *majority*) *See Cohen,* 257 N.Y., at 400, 178 N.E. at 674 (describing term that goes to an agreement's essence as one if not met would destroy the agreement's value) *See also, 3511 13th St. St., N.W. Residences, LLC* 922 A. 2d 439, 445 (D.C. 2007) ("For a breach to be material, it must be so serious as to destroy the essential object of the agreement.") *Smith v. Richards*, 38 U.S. 26, 13 Pet. 26, 39 10 L. Ed. 42 (1839)

In this case, the testimony of Micheal Johnson ("Johnson") was contrary to his "*actual behavior*." He testified that the financial statements were "the sole basis for [the] credit approval decision." Pet. App.26a-27a Yet, when he was asked to approve the contract and allow transfer of the equipment based only on the fraudulent statements, he specifically **rejected** that request. Pet. App. 22a On cross-examination too, he admitted that he would take no further action on the contract without a $16,000.00 security deposit. Pet. App. 28a Thus, Johnson's own action demonstrates that the statements were "*insubstantial*" and insufficient to "*induce*" or "*motivate*" Ryder to enter the contract. Johnson demanded four conditions that would give him what the fraudulent statements could not, the full and unequivocal protection of Ryder's property. Only when those conditions were met did Ryder enter into the contract. Pet. App. 22a, 24a-25a If the *Universal Health Services* standard had been applied and the jury properly instructed, no reasonable person could have found the fraudulent statements to be material because Ryder's decision rested exclusively on the four conditions.

Justices Thomas and Gorsuch predicted that this exact type of case would find its way back to this Court, observing that, "th[e] materiality inquiry does not rest on contract labels...a party's actions may reveal that a contract term is not material even if the contract's language would suggest otherwise," (*Kousisis*, Thomas, J. concurring) and "the same holds true when it comes to the materiality element, where courts must decide whether a defendant misrepresented a minor (immaterial) term or an essential (material) one." (*Kousisis*, Gorsuch, J. concurring) *See also Matrixx*

Initiatives, Inc., v. Siracusano, 563 U.S. 27, 39 131 S. Ct. 1309, 179 L. Ed 2d 398 (2011) ("materiality cannot rest on a single fact or occurrence as always determinative")

Clark's testimony proves Justices Thomas and Gorsuch are correct. And it is the clearest evidence that this Court should grant certiorari and clearly adopt the *Universal Health Services* standard of materiality in fraudulent inducement prosecutions under the federal wire fraud statute. During direct examination Clark testified:

> **Q**: Did Micheal Johnson approve Carter's lease?
> **A**: Yes, with some stipulations.
> **Q**: What were those stipulations?
> **A**: We needed a guaranty. We needed a deposit. I believe it was around $16,000 as down—it's not a down payment; it's a deposit. And then we had to set up ACH payments, which is a monthly draw from their account, based on the—the invoices. Pet. App. 22a

On cross-examination Clark testified:

> **Q**: And during your dealings with the defendant, did the defendant agree with that additional security decision.
> **A**: Yes.
> **Q**: And did the defendant agree to make a – or cash deposit with Ryder as a condition?
> **A**: Yes.
> **Q**: So, Ryder received a $16,000 deposit from the defendant: correct?
> **A**: Yes.
> Q: Ryder received an ACH authorization to automatically withdraw payments; correct?
> **A**: Yes.
> **Q**: And Ryder received a security agreement executed by the defendant; correct?
> **A**: Yes.
> **Q**: All before the defendant got tractors correct?
> **A**: Yes.

> **Q**: ...was Ryder willing to do this deal without the defendant paying or meeting these additional criteria?
> **A**: No. No. Pet. App. 25a

This testimony also demonstrates that the fraudulent statements could not have "trick[ed]" Ryder and "cost it its property." *Kousisis v. United States*, 605 U.S. 114 ("Under the fraudulent-inducement theory, a defendant commits federal fraud whenever he uses a material misstatement to trick a victim into a contract that requires handing over her money or property...") (Barrett, J. unanimous opinion)

Clark and Johnson's testimony show that in the current state of confusion regarding the materiality element, the broader *Neder* standard does not square with the "*but-for*" requirement in a fraudulent inducement prosecution. The *Seventh* Circuit says that the "*likely or actual behavior*" of the parties is completely irrelevant. The *Ninth* Circuit says that evidence of such "*likely or actual behavior*" cannot even be presented to a jury. But the *Seventh* and *Ninth* Circuits are wrong. As Justice Gorsuch observed, "when it comes to fraud's materiality element...details can matter, sometimes difficult lines must be drawn and in drawing them courts may have to attend carefully to the circumstances surrounding the parties' dealings." (*Kousisis*, Gorsuch, J. concurring) The details of the parties "*actual behavior*" mattered greatly in this case. It is this exact type of "*actual behavior*" that the *Neder* standard does not require an inquiry into whereas *Universal Health Services* and *Kousisis* does.

The "*natural tendency to influence*" and "*being capable of influencing*" phrases of the *Neder* standard are so broad and subjective that the Government can easily

obtain a conviction simply by citing a misrepresentation. Congress could not have meant such a broad definition to apply in the criminal context which is why the definition of materiality appears in a civil statute and not a criminal one. *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") Thus, even Congress meant for the Government to meet a higher standard of materiality in a federal criminal prosecution. This view is supported by this Court's reasoning in *Universal Health Services* that the parties' "*actual behavior*" can dictate whether a term or condition of a contract is material. That is the Government's conceded view too.

The broad reading of materiality under *Neder* applicable to the federal wire fraud statute has run its course. Failure of this Court to intervene now runs the risk of more routine lies and "*unethical business decisions*" becoming the basis for more federal criminal prosecutions.

Because *Universal Health Services* and *Kousisis* establishes a standard of materiality that requires misrepresentations to go to the "*very essence of the parties' bargain*," is "*demanding*" and "*rigorous*" such that it "distinguishes everyday misrepresentations from actionable fraud," subsumes the *Neder* standard, and the Government has advocated for and conceded that an "*essence of the bargain*" defense is available to a defendant charged with federal fraud, this Court should grant certiorari and hold that the *Universal Health Services* standard of materiality held

applicable to the FCA is also applicable in a fraudulent inducement prosecution under the federal wire fraud statute.

II. The federal courts lack clarity on and are creating confusion about which standard of materiality applies in a fraudulent inducement prosecution under the federal wire fraud statute preventing defendants from establishing effective defenses

A. The Federal Courts Inconsistency Regarding Materiality

The Seventh Circuit is in open, internal disarray post-*Kousisis*. In *Clark*, 140 F.4th 395 (7th Cir. 2025), the court openly acknowledged that the materiality standard remains completely unresolved, noting that a falsity must either satisfy the broad *Neder* "*capable of influencing*" standard or, more narrowly, go to "*the very essence of the bargain*" standard in *Universal Health Services and Kousisis*. Yet, in Mr. Carter's case, it slammed the door shut on that exact theory, relying on *Smith*, 150 F.4th 832 (7th Cir. 2025). (The defendants ask us to apply the essential element of the bargain requirement here...but *Kousisis* forecloses the defendant's essence of the bargain argument.") *Kousisis* does no such thing. The *Seventh Circuit* is plainly wrong. The Seventh Circuit's conclusion conflicts with its own holding in *Clark* acknowledging this Court's recognition of the "*essence of the bargain*" theory. The Seventh Circuit has incorrectly analyzed a Supreme Court decision meant to enforce boundaries to avoid resolving the difficult task of requiring the Government to meet the "*demanding*" and "*rigorous*" standard of materiality.

The federal courts' inconsistency and rejection of applying the *Universal Health Services* standard of materiality in the criminal context is national in scope. Multiple courts of appeals have issued post-*Kousisis* decisions that completely

disregard the "*demanding*" and "*rigorous*" "*actual behavior*"-based standard required by this Court. They continue to apply the expansive, pre-*Kousisis* framework of *Neder* to insulate convictions from behavioral scrutiny. For example, the *Second Circuit* has provided an even more expansive view of the standard of materiality. It now holds that materiality can be shown under two different circumstances. *See United States v. Runner*, 143 F.4th 146, 154–55 (2d Cir. 2025) (firmly rejecting calls to narrow the fraud statutes post-*Kousisis* and holding that, "A material misrepresentation exists when there is a discrepancy between benefits reasonably anticipated because of misleading misrepresentations and the actual benefits which the defendant delivered or intended to deliver...or a material misrepresentation is a misinformation or omission that would naturally tend to lead or is capable of leading a reasonable person to change his conduct.").

The Fourth Circuit has doubled down on the loose "natural tendency to influence test." *See United States v. Elfenbein*, 144 F.4th 551, n.10 (4th Cir. 2025) ("...the jury was instructed that it could only convict if the alleged fraudulent misrepresentation was material or one that would reasonably be expected of concern to a reasonable and prudent person in relying upon the misrepresentation or statement in making a decision.")

However, most concerning is *United States v. Jesenik*, 152 F.4th 924 (9th Cir. 2025). The *Ninth* Circuit has gone even further, holding that individual victims or investors' behavior is entirely irrelevant to the materiality inquiry as a matter of law. *See United States v. Lindsey*, 850 F.3d 1009 (9th Cir. 2001) (establishing the brightline

rule that a criminal defendant cannot present evidence of the victim's specific conduct or vigilance to prove a statement was immaterial) Under the *Jesenik* framework, the Government can secure a conviction by showcasing an abstract document and arguing its hypothetical capability to deceive, while strictly prohibiting the defense from introducing evidence that the actual counterparties completely ignored the statements or made their decisions based on separate, truthful disclosures.

The conflict is further calcified by the *Seventh* Circuit's use of a non-published, non-precedential order to dispatch Mr. Carter's constitutional claims. By burying this profound statutory tension inside an unpublished disposition, the court below insulated its untenable factual finding—that the counterparties "relied" on a statement they explicitly rejected or audited—from standard ordinary and en banc review. This practice highlights a systemic trend where lower courts utilize non-published orders to apply the outdated *Neder* architecture to white-collar defendants, avoiding the difficult task of reconciling their decisions with this Court's mandate in *Universal Health Services* and *Kousisis*.

B. The Lower Courts' Abstract Approach Directly Defies *Universal Health Services* and Triggers Deep Constitutional Errors

The decisions below and the rules applied across the *Second*, *Third*, *Fourth*, *Fifth*, *Sixth*, *Seventh*, *Eighth*, and *Ninth* Circuits directly contradict this Court's mandate in *Universal Health Services and Kousisis*. These courts have explicitly established that materiality as defined under 31 U.S.C. § 3729(b)(4) and *Neder* is not a real-world, behavior-driven inquiry. But this Court noted that the "*likely* or *actual behavior*" of the parties is highly probative; if a recipient knows of a misstatement

but continues to transact or pay anyway, that "*actual behavior*" is "***strong evidence***" that the misstatement was not material. The operational reality of leaving this materiality question unresolved has forced lower courts into these untenable legal positions. To bridge the gap between *Neder's* abstract "*capability*" test and the realities of commercial life, the *Seventh Circuit* manufactured "*reliance*" out of whole cloth in Mr. Carter's case.

Had the lower court applied the "*rigorous*", behavior-based materiality standard of *Universal Health Services*, it would have been forced to acknowledge what the record plainly shows: Ryder relied on a cash deposit, insurance, autopayments, and a guaranty—not the fraudulent financial statements; and Nuss relied on its Director of Leasing's independent background check to decline the deal entirely. These facts fit neatly within this Court's precedent examining the actual impact that the fraudulent statements had upon the scheme and support Mr. Carter's request for certiorari.

For example, proving wire fraud requires the execution of a scheme. The government identified the fraudulent statements as the basis on which the scheme was executed. Naturally, the question is what role in the scheme did the statements play? Or if the *Universal Health Services* standard were applied, the question is how were the statements material? The Government and the *Seventh* Circuit concluded that Ryder and Nuss either "*relied*" upon the statements or the statements were "*capable of influencing*" both. Except below, two government witnesses testified that (1) Ryder refused to contract based on the statements alone and (2) conditioned the

contract upon very specific conditions that if not met would prevent a contract. Ryder's "*actual behavior*" therefore nullified the fraudulent statements, giving them zero impact upon Ryder's decision.

The four conditions controlled the outcome of the contract, not the statements. In other words, the conditions were material and the fraudulent statements were not. The statements were rendered "*insubstantial*" and therefore not material to Ryder's decision after it imposed the four conditions. The conditions changed the economic circumstances of the contract. In other words, they went to the very essence of the contract. Thus, this Court's precedent examining the impact of fraudulent documents upon the scheme is persuasive in demonstrating why it should grant certiorari and apply the *Universal Health Services* and *Kousisis* standard of materiality in criminal wire fraud prosecutions. *See Kann v. United States*, 323 U.S. 88 (1944) (holding that, "it was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank."); *Parr v. United State*s, 363 U.S. 370 (1960) ("It was immaterial to them, or to any consummation of the scheme, how the [oil company] . . . would collect from the [District]." *See also United States v. Maze*, 414 U.S. 395 (1974) ("there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss.")

The same analysis applies to the conduct of Nuss. A third government witness testified that his boss viewed the fraudulent statements with skepticism. Pet. App. 31a That skepticism prompted a background check, which resulted in a decision not to enter into a contract. Pet. App. 34a Even if the statements were considered by

Nuss, the only evidence presented by the Government proves that the statements were the basis for declining to enter into the contract.

This is why the Government leaned heavily on the *Neder* standard. Without it, the testimony of its own witness sank its case. The testimony proved that Nuss rejected the statements. Materiality was critical to the outcome in this case and had the more "*rigorous*" and "*demanding*" standard been applied, this case likely would not have even proceeded to trial, and the outcome certainly may have been different because the jury would have been instructed differently.

It simply cannot be said with any reasonable degree of certainty that this case would have proceeded to trial or that a jury would not have rendered a different verdict had the *Universal Health Services* and *Kousisis* standard of materiality applied. *See Kotteakos v. United States*, 328 U.S. 750 (1946) (If a court cannot say, "with a fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," the conviction cannot stand.) (reversing convictions for conspiring to fraudulent induce banks to issue loans) Not applying the appropriate materiality standard here had serious and detrimental consequences for Mr. Carter at trial. He received a three-year prison sentence for a victimless crime, in a case where the alleged victims rejected the fraudulent documents charged by the Government as the basis for the scheme to defraud and imposed four specific conditions which resulted in an immediate payment of cash, secured its property, and ensured payments for the use of its property. It was on the meeting of these exclusive conditions that Ryder was

willingly to contract. This court should grant the petition and explicitly hold that the *Universal Health Services* standard of materiality applied to the FCA and conceded by the Government in *Kousisis* must also be applied in fraudulent inducement prosecutions under the federal wire fraud statute.

III. Neither the government, federal district courts nor the federal appeals courts are holding the government to its concession before this Court regarding the "*essence of the bargain*" defense as each prevents defendant's from presenting the defense at jury trials.

This Court has long recognized that the Government is bound by the structural legal concessions it makes in its briefs and oral arguments to secure favorable judgments. In *Ornelas v. United States*, 517 U.S. 690, 695 n.4 (1996), this Court emphasized that it would hold the Government to its strategic concessions of law, refusing to permit a dual-track litigation strategy where the Government pacifies this Court with narrow statutory interpretations while untethering its prosecutors in lower courts. Furthermore, allowing the Government to secure criminal convictions by actively opposing the legal boundaries it conceded in *Kousisis* violates the integrity of the judicial process. Under the principles articulated in *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001), a party is equitably precluded from assuming a contrary position in a legal proceeding simply because its interests have changed.

While the Government routinely argues it is immune from equitable estoppel, this Court has repeatedly clarified that the sovereign cannot maintain "inconsistent positions" across different phases of federal litigation to the severe detriment of a criminal defendant's liberty interest. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925). Moreover, this Court cannot trust the government to keep its word

when it comes to the expansive use of criminal fraud statutes. *See Dubin v. United States*, 599, U.S. 110 (2023) ("...the Government makes a familiar plea: There is no reason to mistrust its sweeping reading, because prosecutors will act responsibly. To this, the Court gives a just as familiar response: We cannot construe a criminal statute on the assumption that the Government will use it responsibly.") (citing *McDonnell v. United States*, 579 U.S. at 576, 136 S. Ct. 2355, 195 L. Ed. 639 (2015) (quoting *United States v. Stevens*, 559 U.S 460, 480, 130 S. Ct. 2355, 195 L. Ed. 2d 435 (2010)

The questions presented by Mr. Carter's petition make it an appropriate vehicle for certiorari because the Government has taken a completely irreconcilable position before this Court and the courts below. As a result, the lower courts' decisions are resulting in distinct constitutional violations under the *Fifth* and *Sixth* Amendments. During oral arguments in *Kousisis*, the Government explicitly advocated for the use of the *Universal Health Services* standard and conceded that a criminal defendant is entitled to an "*essence of the bargain*" defense to prevent the over-criminalization of routine commercial transactions. Yet, in active trials across the country—and specifically at Mr. Carter's trial and on appeal, the Government fiercely opposed the very position it conceded before this Court.

But Mr. Jesenik's case is as egregious as Mr. Carter's. The Government argued that Mr. Jesenik should not be allowed to present a defense that implies that the misrepresentations went to the essence of the decision that the investors were making. Surely, if the information being disclosed to the investors was information

that would have "*induced*" or "*motivated*" them to invest, then it would be "***strong evidence***" about its materiality. *Universal Health Services*, 579 U.S. at 193, 136 S. Ct. 1989, 195 L. Ed. 2d 348 The district court agreed and excluded an entire category of evidence meant to prove that the investor's "*actual behavior*" demonstrated immateriality. And while these examples are serious, the federal appeals courts have shown no signs of curbing the Government's two-fold strategy on the element of materiality, taking one position before this Court and another in the lower courts.[7] This strategy is the basis on which thousands of convictions are being wrongfully obtained. More important, it is a useful avenue through which the Government can maintain expansive use of the federal wire fraud statute. It represents the most egregious deprivation of the right to due process and fair play under the law.

The Government deployed this strategy below in the lower courts and it directly cost Mr. Carter the opportunity to have the jury instructed on a theory of defense he believed was legal because the Government told this Court that it was. Pet. App. 35a-41a Then, the Government convinced a federal district court and the *Seventh* Circuit that it was not. This petition is the exact vehicle through which this Court can remedy this structural contradiction and hold the Government to its word.

IV. It is a violation of the defendant's fundamental right to a fair trial under the *Sixth* Amendment when he is denied jury instructions where the evidence supports a defense advocated for and conceded by the Government before this Court.

[7] Mr. Carter repeatedly brought the Government's concession regarding the materiality standard to the district court and the Seventh Circuit's attention, asking each to consider the concession. Both rejected it, instead both bolstered the Government's untenable position.

A federal defendant's *Sixth* Amendment right to a fair jury trial and *Fifth* Amendment right to Due Process guarantee a "meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Mathews v. United States,* 485 U.S. 58, 63 (1988). This core constitutional architecture is fundamentally broken when a district court refuses to give a requested jury instruction or excludes an entire category of evidence based on a valid legal theory of defense that has an evidentiary foundation in the record. Under this Court's landmark ruling in *Stevenson v. United States*, 162 U.S. 313, 323 (1916), a trial court commits reversible constitutional error when it withdraws a legally cognizable defense from the jury's consideration if there is any evidence in the record to support it.

By branding the "*essence of the bargain*" instruction as "foreclosed" as a matter of law—even though the Government explicitly admitted it was a legitimate defense in *Kousisis*— the *Seventh* and *Ninth* Circuits are permitting a severe erosion of the jury's constitutional fact-finding province under the *Sixth* Amendment. As Justice Scalia observed in *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting), when a trial court refuses to instruct the jury on an essential theory or element of a defense that directly negates a statutory requirement, it structuralizes an unfair trial. When a district court forces a standard *Neder* instruction onto a record where the corporate victims openly state that they disregarded the fraudulent statements (Ryder) or used them to actively reject the deal (Nuss), it effectively directs a verdict for the prosecution on materiality.

As the district court did in *Jesenik*, the district court below excluded critical evidence even after acknowledging that the evidence was relevant.[8] Pet. App. 17a-19a Because materiality was heavily in dispute, Mr. Carter requested that the district court issue a subpoena for the testimony of Nuss' president who had made the statement "*something didn't smell right*" in order to directly ask Nuss what he meant by this statement and whether the fraudulent financial statements were the basis of his decision to do a background check. Dkt. 360, Pet. App. 17a-19a Instead, the district court forced Mr. Carter to cross-examine a government witness about what he thought Nuss meant by his statement.[9] The district court violated the rule set forth by this Court in *Harrison v. United States*, 392 U.S. 219 (1968) (when a key defense figure is structurally compelled to testify to overcome an error injected by the [government] or the court, the resulting prejudice is of constitutional magnitude) Mr. Carter was forced to seek the testimony of Nuss after Pyle's testimony failed to provide the simple facts about Nuss' view of the fraudulent statements and his action as a result of them. Pet. App. 31a, 34a

The district court also deprived Mr. Carter of an opportunity to disprove materiality in violation of this Court's holding in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-74, 102 S. Ct. 3440 73 L. Ed. 2d 1193 (1987) ("evidence is material

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[8] Mr. Carter submitted a stipulation to be reviewed by the district court which summarized the testimony that Robert Nuss would provide on the issue of materiality. That stipulation was supported by Mr. Nuss' government Memorandum of Interview.

[9] The government stated that the facts that Mr. Carter wanted on the record and before the jury could be introduced by another government witness, Christopher Pyle. Mr. Carter conceded that if Pyle could testify to the facts regarding Nuss' statement then he wouldn't need Nuss' testimony. But when Pyle testified he did not testify about Nuss' actual statements and at one point even denied a statement was made. This made the testimony of Nuss even more important on the issue of materiality.

if a reasonable likelihood exist that it could have affected the judgment of the trier of fact") If the jury had heard Nuss explain in his own words and confirm his view of the fraudulent statements, Mr. Carter could not have been convicted of attempted wire fraud. But the district court denied the request as too late. Pet. App. 19a-20a The decision contradicted this Court's holding that, "the right to compulsory process guaranteed by the *Sixth* Amendment is a fundamental element of due process of law and as such it should be interpreted broadly." *Washington v. Texas*, 388 U.S. 14, 19 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967)

Mr. Carter asked the district court to direct the Government to disclose its witness list early and nearly a month before trial due to his pro se status. Dkt. 260 The court sat on the motion until one week before trial to address the motion. Dkt. 356 With four days until trial, the Government disclosed its witness list and Nuss was not on it. Dkt. 361 Mr. Carter moved immediately to subpoena Nuss and explained to the district court the importance of Nuss' testimony on the issue of materiality. Pet. App. 19a-20a After having sat on the motion for a month, the district court faulted Mr. Carter and denied the request for Nuss' testimony as being "too late." It told Mr. Carter he would have to use the Government's witness regarding Nuss' statement and view of the statements. The Seventh Circuit refused to review the issue and dismissed it as meritless. Neither of these conclusions accord with this court's holding in *Washington v. Texas*. Because the district court knew that materiality was heavily in dispute and Nuss' testimony was directly related to that

dispute, it should have granted the request for the subpoena so the jury could hear testimony on materiality of the statements.

Mr. Carter also asked the district court to instruct the jury on a "*benefit of the bargain*" theory of defense because the four conditions that Ryder imposed were clear evidence that the fraudulent statements were not the basis on which it entered the transaction and thus were not material. Dkt. 255; *See also* Pet. App. 39a-41a An "*essence of the bargain*" jury instruction was appropriate because Ryder focused on the security and protection of its property which the fraudulent statements did not give it. However, the four conditions it imposed did, so Ryder signed the contract. The record made clear that without the four conditions, there was to be no contract. If the statements were the only basis to contract, as the government alleged in the indictment, the testimony of Ryder's officials that the deal could not go forward on that basis alone makes Ryder's "*actual behavior*" critical to a jury determination of guilt, so Mr. Carter asked the district court to instruct the jury on that theory as well. Dkt. 283 The district court refused to give either of the proposed jury instructions stating that it would give the Seventh Circuit Modern Pattern instructions instead. Pet. App. 39a-41a

But there is no Modern Pattern Jury Instruction that accommodates the "*benefit of the bargain*" or "*essence of the bargain*" defenses. As observed by Justice Kavanaugh at oral argument in *Kousisis*, it is critical to understand what a jury instruction would or should look like when a defendant challenges the element of

materiality.[10] The Government explained that such instruction would likely vary depending upon the facts of the case. Because the standard of materiality remains "*unsettled*" the district court and the *Seventh* Circuit held below that these defenses do not exist. Without definitive resolution from this Court that the *Universal Health Services* and *Kousisis* standard of materiality applies in a fraudulent inducement prosecution under the federal wire fraud statute, defendants across the country will continue to struggle to secure jury instructions or even present evidence that will challenge the element of materiality on an "*essence of the bargain*" theory.

As a result, Mr. Carter was denied a fair trial under the *Sixth* Amendment. The district court rejected his defense that Ryder and Nuss' "*actual behavior*" demonstrated that the fraudulent statements were not material to the decisions they made. Materiality was a central issue and heavily disputed in the district court. The *Seventh* Circuit refused to even decide which standard of materiality applied even though Mr. Carter's appeal presented that exact question. It summarily affirmed convictions on a basis explicitly contradicted by the record. It has issued multiple conflicting opinions on the standard of materiality and wrongly concluded that this Court foreclosed the "*essence of the bargain*" defense theory in *Kousisis*.

Defendants like Messrs. Carter and Jesenik nationwide will continue to be denied legitimate defenses. The Government has demonstrated in both the *Seventh* and *Ninth* Circuits that it will not prosecute fraudulent inducement cases with the

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[10] Justice Kavanaugh: Right. And then on materiality...which you emphasize as being a critical limit here, what's the – what should the jury instruction look like there? What is the standard jury instruction there? Because you reference "essence of the bargain" which I think is not giving a huge amount of guidance. So?

restraint it promised this Court in *Kousisis*. It promised one thing before this Court and did another in the district courts. If this Court does not resolve the critical questions raised in this petition, defendants will be denied the opportunity to present a complete defense and effectively challenge the government on the element of materiality.

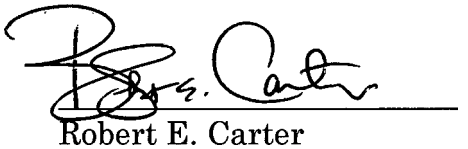
The *Neder* standard of materiality can no longer withstand scrutiny against the narrower standard of materiality in *Universal Health Services* and *Kousisis*. As Justice Thomas observed in *Kousisis*, "a demanding approach to materiality is all that prevents an extraordinary expansive view of liability from rendering the federal wire fraud statute nearly limitless in scope, [the] lower courts should hold the Government to its word." The lower courts have not, so this Court must. Granting this petition for certiorari offers this Court the perfect vehicle to resolve questions that bring clarity to the lower courts and ensure the fairness of federal criminal trials nationwide.

CONCLUSION

For the foregoing reasons, this Court should GRANT this petition for writ of certiorari.

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Respectfully submitted,



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