No. 24-

In the Supreme Court of the United States

SAM SARKIS SOLAKYAN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Black v. United States*, 561 U.S. 465 (2010), the Court granted certiorari to resolve a circuit split on this question: "Whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged 'scheme to defraud' did not contemplate economic or other property harm to the private party to whom honest services were owed." Pet. for Cert. at i, *Black v. United States*, 561 U.S. 465 (2010), No. 08-876 (Jan. 9, 2009). But the Court did not reach this question in *Black*. Instead, the Court reversed the petitioner's conviction on the ground set forth in *Skilling v. United States*, 561 U.S. 358 (2010), which was decided the same day. The circuit split identified in *Black* has only grown larger since then.

The question presented in this case is the one the Court did not reach in *Black*, with some slight rewording to better reflect the divergence among the circuits. The question is:

Whether a private individual may be convicted of honest-services fraud under 18 U.S.C. § 1346 where the alleged scheme to defraud did not contemplate any harm to the private party to whom honest services were owed.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit: *United States v. Solakyan*, No. 22-50023 (Sept. 30, 2024)

U.S. District Court for the Southern District of California: *United States v. Solakyan*, No. 3:18-cr-04163-BAS-1 (Feb. 4, 2022)

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Sam Sarkis Solakyan respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is published at 119 F.4th 575 (9th Cir. 2024).

JURISDICTION

The Court of Appeals entered its judgment on September 30, 2024. The Court of Appeals denied a timely petition for panel rehearing and rehearing en banc on January 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341 provides in relevant part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, … 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, … shall be fined under this title or imprisoned not more than 20 years, or both."

18 U.S.C. § 1346 provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

STATEMENT

Petitioner Sam Solakyan was convicted under a theory that has been approved by three circuits and rejected by five others. Mr. Solakyan, the owner of companies that provided MRI scans, was alleged to have paid medical personnel to steer MRI business to his companies. The government charged Mr. Solakyan with honest-services mail fraud, on the theory that he deprived the patients who received the MRIs of the honest services of their physicians. But this alleged scheme did not contemplate any harm to the patients, who received high-quality, medically appropriate MRIs. The decision below, which held that in a private sector honest-services case, the government need not prove that the alleged scheme contemplated any harm to the ostensible victims, adds to what is now a 5-3 split.

The Court should grant certiorari and reverse.

Legal Background

The devising of "a scheme or artifice to defraud" is one element of the offenses of mail and wire fraud. 18 U.S.C. §§ 1341, 1343. For these offenses, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.* § 1346.

Congress enacted section 1346 in response to *McNally v. United States*, 483 U.S. 350 (1987), in which the Court held—contrary to the then-prevailing view in the Courts of Appeals—that the mail and wire fraud statutes did not protect the intangible right of the citizenry to the honest services of public officials. The purpose of section 1346 was to reinstate pre-*McNally* caselaw on honest services.

"There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally*." *Skilling v. United States*, 561 U.S. 358, 404 (2010).

Before *McNally*, most honest-services cases were prosecutions of public officials who accepted bribes or kickbacks. *See Percoco v. United States*, 598 U.S. 319, 326 (2023). Section 1346 establishes that such dishonesty on the part of a public official constitutes a "scheme or artifice to defraud" because it deprives the public of the official's honest services, even where the public suffers no financial loss. *Id.*

But some honest-services cases—both before and after *McNally*—take place entirely in the private sector. They involve the prosecution of one private party for causing another private party to be deprived of someone's honest services. In *Skilling*, the Court held that section 1346 does not criminalize the entire vast range of conduct that would satisfy this description. Rather, the Court surveyed the pre-*McNally* caselaw and determined that Congress intended to prohibit only bribes and kickbacks. *Skilling*, 561 U.S. at 408-09.

While the Court was deciding *Skilling*, it was also deciding *Black v. United States*, 561 U.S. 465 (2010), which was argued the same term. The question in *Black* was whether, in private sector cases, the pre-*McNally* caselaw required the government to prove that the alleged scheme contemplated harm to the ostensible victim caused by the deprivation of honest services. Brief for the Petitioners, *Black v. United States*, 561 U.S. 465 (2010), No. 08-876 (July 30, 2009), 22-49.

The Court did not address this contention. Rather, the Court held that the conviction in *Black* suffered from the same infirmity as the conviction in *Skilling* and had to be reversed for that reason. *Black*, 561 U.S. at 467.

This case raises the question the Court did not reach in *Black*.[1]

Facts and Proceedings Below

1. Petitioner Sam Solakyan owned several companies in California operating under the name Vital Imaging that provided magnetic resonance imagery ("MRI") scans. App. 3a. Many of Vital Imaging's patients were pursuing workers' compensation claims for injuries sustained during their employment. *Id.* Under California's workers' compensation system, fees for medical services such as MRI scans are billed directly to insurance companies. *Id.* If the worker's claim is contested, the provider of the service may file a lien against the claim, which is paid if the claim is successful. *Id.*

In California, as in other states, the provision of medical services is intensively regulated by state law. It is a criminal offense for a physician to receive remuneration in exchange for referring workers'

[1] The only substantive difference between our question presented and the one presented in *Black* is that we ask whether *any* contemplated harm is necessary, while the petition in *Black* asked whether contemplated *economic* harm is necessary. We make this change because: (1) the pre-*McNally* caselaw in the Courts of Appeals clearly required *some* contemplated harm, but it is less clear that the harm had to be economic in nature; and (2) the currently existing circuit split is about whether *any* contemplated harm is required, not about whether specifically *economic* harm is required.

compensation patients for procedures such as MRI scans. *Id.*; Cal. Lab. Code § 139.3(a), (b)(4).

Mr. Solakyan was charged in a 12-count indictment with paying (in money and in promises of supplying future patients) a physician named Steven Rigler and two medical schedulers to refer patients to Vital Imaging for MRI scans. App. 3a-4a. Count 1 alleged that this scheme constituted conspiracy to commit honest-services mail fraud, 18 U.S.C. §§ 1341 and 1346, and health care fraud, *id.* § 1347. App. 4a. Counts 2 through 12 alleged that eleven individual payments each constituted honest-services mail fraud. *Id.*

The count of conspiracy to commit health care fraud identified the victims as the insurers who paid the workers' compensation claims. Indictment ¶ 12(b) (ER 263).[2] For the counts of honest-services mail fraud, however, the only victims alleged in the indictment were the patients who obtained the MRI scans. The indictment alleged that these patients had been deprived of the honest services of their physicians. *Id.* ¶¶ 12(a), 17-18 (ER 262-63, 271).

Before trial, Mr. Solakyan moved to dismiss the honest-services charges on the ground that the indictment did not allege that the scheme contemplated any harm to the patients. Dist. Ct. docket entry 59. The District Court denied the motion. ER 234-36, 249-50.

At trial, the government presented the testimony of three physicians: Dr. Rigler, Dr. Guy Trimble, and Dr. Phong Tran. All three were cooperating witness-

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[2] The abbreviation "ER" refers to the Excerpts of Record filed in the Court of Appeals.

es who admitted that they had been paid to steer MRI business to Vital Imaging. But each explained that the scans were all medically appropriate, and that they had not prescribed any unnecessary scans. ER 637 (Rigler), 700 (Trimble), 708-09 (Tran). There would have been an MRI scan in each case; the only question was whether the work would be done by Vital Imaging or by another provider.

The physicians also praised the quality of the work done by Vital Imaging. Dr. Rigler declared that "the services I got were great." *Id.* at 640. He particularly appreciated the detailed reports supplied by Vital Imaging, which he found much more informative than the reports supplied by other MRI providers. *Id.* Dr. Trimble valued the speed with which he obtained results from scans performed by Vital Imaging, *id.* at 699, and the fact that Vital Imaging had multiple locations, which made its services more convenient for patients, *id.* at 706.

At the close of trial, Mr. Solakyan proposed a jury instruction on honest-services fraud that included harm to the patients as an element of the offense. Dist. Ct. docket entry 175. The District Court declined to give the instruction and noted that the defense had preserved its objection. ER 852-53.

In closing argument, the prosecutor insisted to the jury that contemplated harm to the patients was irrelevant to the honest-services charges. *Id.* at 898. "[E]ven if it were great medicine," he argued, "it wouldn't matter, that wouldn't be a defense to this case because at issue here is not whether the patients received appropriate care." *Id.* He continued: "[E]ven if they did, the patients have a right to the honest services of their doctor. You have a right to go

to a doctor and trust that doctor." *Id.* The prosecutor concluded: "[E]ven if these patients were benefiting, … it would still be a crime." *Id.* at 899.

Mr. Solakyan was convicted on all counts. App. 4a. He was sentenced to serve sixty months in prison and to pay $27,937,175 in restitution to several insurance companies. *Id.* at 4a-5a. He was not required to pay any restitution to the patients who received MRI scans from Vital Imaging.

2. The Court of Appeals for the Ninth Circuit affirmed. *Id.* at 1a-36a. The court concluded that "actual or intended tangible harm is not an element of honest-services fraud." *Id.* at 14a.[3]

The Court of Appeals noted that in *public* sector honest-services cases, circuit precedent did not require any contemplated harm. *Id.* at 15a. But the court recognized that in *private* sector cases the question was still an open one in the circuit. *Id.* "We must therefore determine," the court explained, "whether § 1346 requires the government to prove in a private-sector case that the victims of the fraudu-

[3] Mr. Solakyan's argument below, as here, was that private sector honest-services fraud requires the government to prove that the scheme contemplated *actual* harm to the victims, not "tangible" harm, as the Ninth Circuit called it. Petr's 9th Cir. Br. at 20-27. But this difference in terminology is of no practical importance, because both formulations describe the same argument—that in prosecutions for private sector honest-services fraud, the scheme must contemplate some harm to the victim caused by the deprivation of honest services. That is, the mere loss of honest services in the abstract, without any resulting harm, is not sufficient to constitute honest-services fraud in the private sector.

lent scheme suffered some kind of tangible harm." *Id.* at 17a.

The Court of Appeals observed that the circuits are divided on this question. *Id.* It noted that in *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996), the Eighth Circuit held that harm to the victim is necessary in a private sector case and thus reversed the conviction of a psychologist for honest-services fraud where the government failed to prove that the fraud affected the quality or cost of the psychologist's services to his patients. App. 17a-18a. By contrast, the court continued, "the Seventh Circuit flatly rejected this reasoning" in *United States v. Nayak*, 769 F.3d 978 (7th Cir. 2014). App. 18a.

The Court of Appeals sided with the Seventh Circuit over the Eighth. *Id.* at 19a. The court reasoned that the text of 18 U.S.C. § 1346 does not expressly include harm as an element of the offense. *Id.* The court added that section 1346 was enacted to reinstate the theory of honest-services fraud this Court had rejected in *McNally v. United States*, 483 U.S. 350 (1987), and that this pre-*McNally* body of law included private sector cases along with public sector cases. App. 19a-20a. The court suggested that a requirement of contemplated harm "would render § 1346 superfluous in private-sector cases," because fraud that harmed victims was already prohibited by sections 1341 and 1343. *Id.* at 20a.[4]

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[4] After affirming Mr. Solakyan's convictions, the Court of Appeals vacated the District Court's restitution order and remanded the case to the District Court for the limited purpose of making specific findings regarding the appropriate amount of restitution. App. 35a-36a. These further proceedings have not

The Court of Appeals denied panel rehearing and rehearing en banc. *Id.* at 37a.

REASONS FOR GRANTING THE WRIT

In a private sector honest-services case under 18 U.S.C. § 1346, must the government prove that the alleged scheme contemplated some kind of harm to the ostensible victims from the deprivation of honest services? The Courts of Appeals have been divided on this question for many years. The split is much deeper than the court below recognized.

The decision below is incorrect. Before *McNally*, the caselaw was clear that in private sector cases, the government must prove that the alleged scheme contemplated harm to the private party to whom honest services were owed. This case presents a perfect opportunity to resolve this important question.

I. The circuits are deeply divided over whether, in a private sector honest-services case, the government must prove that the defendant's scheme contemplated harm to the ostensible victims.

The Courts of Appeals are divided five to three on this question. The Court granted certiorari in *Black* to resolve this split, but the Court did not reach the issue. Contrary to the view of the court below, the Court did not resolve this split in *Skilling*.

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yet taken place because the Court of Appeals has stayed its mandate pending this Court's final disposition of the case.

A. The Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits require the government to prove that the alleged scheme contemplated harm to the private party to whom honest services were owed.

Five circuits hold that in a private sector case under section 1346, the government must prove that the alleged scheme contemplated harm to the ostensible victim from the deprivation of honest services.

In *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001), the Fourth Circuit observed that some circuits require contemplated harm—i.e., that harm is a reasonably foreseeable consequence of the defendant's conduct—while other circuits do not. The court held that "the reasonably foreseeable harm test … is the better approach." *Id.* at 328. The court noted that "[t]he reasonably foreseeable harm test neither requires an actual economic loss nor an intent to economically harm." *Id.* at 329. Rather, "the reasonably foreseeable harm test is met whenever, at the time of the fraud scheme, the [defendant] could foresee that the scheme potentially might be detrimental to the [victim's] economic well-being." *Id.*

The holding of *Vinyard* is still the law in the Fourth Circuit. *See Elgawhary v. United States*, 2018 WL 398284, *5 (D. Md. 2018) (citing *Vinyard* for the proposition that in a private sector honest-services prosecution of an employee for depriving his employer of his honest services, the government must prove that "the defendant employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the

breach") (internal quotation marks omitted); *United States v. Lusk*, 2017 WL 508589, *11 n.5 (S.D.W. Va. 2017) (describing *Vinyard*'s requirement of contemplated harm as "clear precedent from the Fourth Circuit"); Eric Wm. Ruschky & Miller W. Shealy, Jr., *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina* 268 (2024 Online Edition).

The Sixth Circuit likewise holds that in a private sector honest-services case, the government must prove that the scheme contemplated harm to the person who was deprived of honest services. In *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), university professors were prosecuted for depriving the university that employed them of their honest services. The Sixth Circuit held that "[t]he prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *Id.* at 368.

Frost is still the law in the Sixth Circuit. *See Rizk v. United States*, 2023 WL 5275505, *3 (6th Cir. 2023) (quoting the statement in *Frost* that "an employee deprives his employer of honest services when the defendant might reasonably have contemplated some concrete business harm to his employer") (bracket, citation, and internal quotation marks omitted); *United States v. Hu*, 2021 WL 4130515, *17 (E.D. Tenn. 2021); *United States v. Dobson*, 2013 WL 4049595, *5 (E.D. Tenn. 2013).

The law is the same in the Eighth Circuit. In *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996), a case with relevant facts nearly identical to those of

our case, a psychologist was convicted of honest-services fraud for receiving payments from a hospital to refer patients to the hospital. The theory of the prosecution was that the psychologist deprived his patients of his honest services. *Id.* at 438. But the patients suffered no actual harm, because they received the same proper care for the same cost that they would have received from any alternative hospital. *Id.* at 441. The Eighth Circuit reversed the psychologist's conviction because his scheme did not contemplate any harm to the patients. *Id.* at 442.

The Eighth Circuit explained:

> It is certainly true that the literal language of § 1346 extends to private sector schemes to defraud another of the right to "honest services." But the transition from public to private sector in this context raises troublesome issues. In a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated. But in the private sector, most relationships are limited to more concrete matters. When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible "rights" have been violated. For example, what "honest services" do we expect from a used car salesman, beyond a truthful description of the car being sold?

Id. at 441-42. The Eighth Circuit concluded, in words that apply equally well to our case, that "all the evidence suggests that Dr. Jain intended to provide and did in fact provide his patients with the highest quality psychological services. While he also extract-

ed undisclosed, unethical referral fees from an interested third party provider, there is no independent evidence proving that he thereby intended to defraud his patients." *Id.* at 442.

The Eighth Circuit took the same view in *United States v. Kidd*, 963 F.3d 742 (8th Cir. 2020), another case with facts similar to those of our case. The defendant in *Kidd* was a physician who paid runners to solicit victims of car accidents as patients and billed insurance companies for providing the ensuing treatment. *Id.* at 746. The Eighth Circuit observed that under *Jain*, if the patients had not suffered any harm from the physician's scheme, the physician could not have been convicted of depriving the patients of his honest services. *Id.* at 749. But the court noted that the physician could not rely on *Jain*, because, perhaps because of *Jain*, he had been charged with defrauding the insurance companies of money, not with defrauding his patients of his honest services. *Id. See also United States v. Woods*, 978 F.3d 554, 568 (8th Cir. 2020) (citing *Jain* for the proposition that "the victims of the scheme need not have been injured. However, the government must show that some actual harm or injury was contemplated by the schemer.").

The Eleventh Circuit agrees that in a private sector honest-services case, the government must prove that the scheme contemplated some kind of harm to the victim. "The meaning of the 'intangible right of honest services' has different implications," the court has explained, "when applied to public official malfeasance and private sector misconduct." *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999). This is because "[p]ublic officials inherently

owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *Id.* As a result, "taking kickbacks or benefitting from an undisclosed conflict of interest will support the conviction of a public official for depriving his or her constituents of the official's honest services" even without any other harm to the public. *Id.* "Illicit personal gain by a government official deprives the public of its intangible right to the honest services of the official." *Id.*

But the Eleventh Circuit explained that matters are very different in private sector honest-services cases, because "such a strict duty of loyalty ordinarily is not part of private sector relationships." *Id.* The court concluded: "Therefore, for a private sector defendant to have violated the victim's right to honest services, it is not enough to prove the defendant's breach of loyalty alone." *Id.* at 1328. Rather, in a case where the defendant was an employee alleged to have deprived his employer of his honest services, "[t]he prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *Id.* at 1329.

The holding of *deVegter* is still the law in the Eleventh Circuit. *See United States v. Henderson*, 2016 WL 5853743, *4 (N.D. Ala. 2016) (citing *deVegter* for the proposition that "a private sector violation of § 1346 honest services fraud involves a breach of a fiduciary duty and reasonably foreseeable economic harm") (footnote omitted). The Eleventh Circuit's Pattern Jury Instructions currently state, based on *deVegter*, that the government must prove that "the

Defendant foresaw or reasonably should have foreseen that the victim might suffer economic harm as a result of the scheme." 11th Cir. Pattern Crim. Jury Instr. O50.4 (2024).

The D.C. Circuit agrees that in a private sector honest-services case, there can be no conviction "[a]bsent reasonably foreseeable economic harm" to the victim. *United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999). The court held that in private sector prosecutions under section 1346, "breaches of fiduciary duty are criminally fraudulent only when accompanied by a misrepresentation or nondisclosure that is intended or is contemplated to deprive the person to whom the duty is owed of some legally significant benefit." *Id.* at 974 (internal quotation marks and emphasis omitted).

In these five circuits, in a private sector honest-services case, the government must prove that the defendant's scheme contemplated some kind of harm to the alleged victim that was caused by the deprivation of honest services. Mr. Solakyan could not have been convicted of honest-services fraud in any of these circuits, because the theory of the prosecution was that even if all the MRI scans had been medically appropriate and had been performed flawlessly, the workers who received the scans were still deprived of the honest services of their doctors.

B. The Second, Seventh, and Ninth Circuits do not require the government to prove that the alleged scheme contemplated harm to the private party to whom honest services were owed.

Three other Courts of Appeals have reached the opposite holding. In these circuits, in a private sector honest-services case, the government need not prove that the scheme contemplated any harm to the alleged victim beyond the mere deprivation of honest services.

In *United States v. Tanner*, 942 F.3d 60, 64 (2d Cir. 2019), the defendant was convicted of depriving his employer, a company called Valeant, of his honest services by taking payments from a competitor named Davenport. The Second Circuit rejected the defendant's challenge to the sufficiency of the evidence on the ground that "the Government was not required to prove that acts that Tanner performed or promised to perform for Davenport were contrary to Valeant's interests, or that they caused or were intended to cause it financial harm; it needed to prove only that Valeant lost its right to Tanner's honest services." *Id.* at 65.

The Seventh Circuit has taken the same view, in a case with facts like those of our case. In *United States v. Nayak*, 769 F.3d 978, 979 (7th Cir. 2014), the owner of surgery centers paid physicians to refer patients to his centers. He was convicted of honest-services fraud on the theory that he had deprived the patients of the honest services of their physicians. *Id.* The government conceded that the patients had not suffered any physical or monetary harm. *Id.* The defendant, relying on the Eighth Circuit's decision in

Jain, argued that contemplated harm to the ostensible victims is an element of private sector honest-services fraud. *Id.* at 981-82.

The Seventh Circuit disagreed with the Eighth Circuit's decision in *Jain*. "We find this analysis unpersuasive, most notably because the proposed distinction between private and public corruption has no textual basis in § 1346," the court reasoned. *Id.* at 982. "But even if *Jain* was convincing at the time it was decided," the Seventh Circuit continued, "its holding is no longer good law, as *Skilling* clearly states that private fraud schemes fall under § 1346." *Id.* The court concluded that "[t]his Circuit has never required the government to establish a 'contemplated harm to the victim' in a private sector honest-services case." *Id.* at 982-83 (citation and internal quotation marks omitted).

In the decision below, the Ninth Circuit joined this side of the split. App. 19a ("We are persuaded by *Nayak*'s reasoning …. *Jain*'s conclusion that in a private-sector prosecution for honest-services fraud the victim must suffer tangible harm cannot be squared with the plain text of § 1346.").

In these three circuits, a defendant can be convicted of private sector honest-services fraud even if the scheme did not contemplate any harm to the ostensible victims.

C. The Court did not resolve this conflict in *Skilling*.

The court below mistakenly believed that this Court resolved the circuit split in *Skilling*. *Id.* at 20a-21a. But this is clearly not so, as can be seen by reading *Skilling* itself and by considering the views

expressed by courts and commentators in the years since *Skilling*.

The question the Court decided in *Skilling* was whether section 1346 is unconstitutionally vague. 561 U.S. at 399. The Court held that it is not unconstitutionally vague, on the ground that Congress intended section 1346 to prohibit only bribes and kickbacks, not every literal deprivation of honest services. *Id.* at 404-09.

In *Skilling*, the Court had no occasion to decide, and thus did not decide, whether the government must prove contemplated harm to the victim in private sector cases. The Court did mention the issue in a footnote, but only to explain that the Courts of Appeals were divided on the question. *Id.* at 403 n.36 ("Courts have disagreed about … whether a defendant must contemplate that the victim suffer economic harm.") (citations omitted). Justice Scalia mentioned the issue in his dissenting opinion, but again, only to note the circuit split. *Id.* at 419-20 (Scalia, J., dissenting) ("Other courts required that the victim suffer some loss—a proposition that, of course, other courts rejected.") (citations omitted).

Nor would it have made any sense for the Court to address the issue in *Skilling*, because the question was squarely presented in *Black*, which had been argued four months before *Skilling*. *See Black*, 561 U.S. 465. The Court held oral argument in *Black* before any of the briefs in *Skilling* were even filed. The Court presumably planned to decide the issue in *Black*, until the resolution of *Skilling* meant that there was no longer any need to.

In the years since, commentators have agreed that *Skilling* did not decide whether the government

must prove contemplated harm to the victim in private sector cases. *See* Sara Sun Beale, *An Honest Services Debate*, 8 Ohio St. J. Crim. L. 251, 252 (2010) (noting that although the Court granted certiorari in *Black* to decide whether contemplated harm is a requirement, "[t]he Court did not resolve—or even discuss—whether a state law violation, economic harm, and/or private gain were necessary elements"); Congressional Research Service, *Bribery, Kickbacks, and Self-Dealing: An Overview of Honest Services Fraud and Issues for Congress* 15 (May 18, 2020) ("Given that the Supreme Court in *Skilling* neither explicitly endorsed nor rejected any of the Section 1346 'limiting principles' developed by the lower courts, the decision's impact on the disputes among the courts of appeals was not immediately clear."); *id.* at 16 (noting that courts are still divided over whether the government must prove foreseeable harm in private sector cases).

The Second Circuit held *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011), in abeyance until the Court decided *Black*, but after the Court published its opinions in *Skilling* and *Black*, the Second Circuit recognized that the Court "issued an opinion only in connection with the substantive issue presented by *Skilling*," not the one presented by *Black*. *Id.* at 622.

More recently, a district court agreed with the government's concession that "the *Skilling* Court did not address the circuit split regarding … reasonably foreseeable harm." *Lusk*, 2017 WL 508589 at *11 n.5. "To the contrary," the court continued, "the *Skilling* Court addressed an entirely different requirement under the honest-services doctrine—namely, the types of schemes (bribery or kickback) that sur-

vive a vagueness challenge and may sustain an honest-services charge." *Id.* The court added that it "would welcome further case law from the Supreme Court" on the issue of harm. *Id.*

Indeed, while the Department of Justice and the National Association of Criminal Defense Lawyers may not agree on much, they agree here. The official publications of both organizations have observed that after *Skilling*, the circuits remain divided over whether the government must prove contemplated harm in private sector honest-services fraud cases. *See* Byung J. Pak, *Private Sector Honest Services Fraud Prosecutions After* Skilling v. United States, 66 Dept. of Justice J. of Fed. L. & Practice 149, 155 (2018) ("Courts continue to split on whether the government needs to prove that the victim to whom a duty is owed suffered any economic harm, or that such harm was foreseeable to the defendant."); Jonathan S. Jeffress & William E. Zapf, *Honest-Services Fraud in the Private Sector After* Skilling v. United States*: Continuing Vagueness and Resulting Opportunities for Clients*, 43 The Champion 26, 34 (Sept./Oct. 2019) ("There are two main camps in the courts of appeals: One camp imposes a 'reasonably-foreseeable-harm test,' while the other camp follows a 'materiality test.' Although these tests were established prior to *Skilling*, they are not implicated by *Skilling's* reasoning, nor has there been any indication that they are no longer applicable.").

The Court of Appeals below thus erred in concluding that *Skilling* resolved the circuit split on the question presented in this case. The split is still as deep as it was when the Court granted certiorari to resolve it in *Black*.

II. The decision below is wrong.

Certiorari is also warranted because the decision below is wrong.

The mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, prohibit the devising of "a scheme or artifice to defraud." Section 1346 provides that the term "scheme or artifice to defraud" includes a scheme "to deprive another of the intangible right of honest services." In enacting section 1346, Congress meant to restore the law regarding honest-services fraud that existed in the Court of Appeals before the Court decided *McNally*. *Skilling*, 561 U.S. at 404 ("[W]e look to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase 'the intangible right of honest services.'"); *id.* ("There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud.").

Before *McNally*, the Courts of Appeals uniformly held that in private sector honest-services cases, the government must prove that the defendant's scheme contemplated some harm to the ostensible victim.

In *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976) (Friendly, J.), for example, the Second Circuit reversed the honest-services mail fraud convictions of a corporate officer for omitting information required in a proxy statement, because the government had not proven that the officer's scheme contemplated any harm to anyone. "[W]e have been cited to no case, and our research has discovered none," the court explained, "which has sustained a conviction for mail fraud on the basis of nothing more than

the failure to mail a correct proxy solicitation where this was not in furtherance of some larger scheme contemplating pecuniary loss to someone." *Id.* at 1399. The court noted that "since the statute requires only a scheme to defraud and not actual fraud it is not essential that the Government allege or prove that purchasers were in fact defrauded." *Id.* at 1399 n.11 (internal quotation marks omitted). But, the court cautioned, "this does not mean that the government can escape the burden of showing that some actual harm or injury was contemplated." *Id.* (internal quotation marks omitted).

See also United States v. Bronston, 658 F.2d 920, 926 (2d Cir. 1981) ("[T]he concealment by a fiduciary of material information which he is under a duty to disclose to another *under circumstances where the nondisclosure could or does result in harm to the other* is a violation of the statute.") (emphasis added); *United States v. Newman*, 664 F.2d 12, 19 (2d Cir. 1981) (same, quoting *Bronston*); *United States v. Siegel*, 717 F.2d 9, 14 (2d Cir. 1983) (same, quoting *Bronston*); *United States v. Weiss*, 752 F.2d 777, 784 (2d Cir. 1985) (same, quoting *Bronston*); *United States v. von Barta*, 635 F.2d 999, 1005 n.14 (2d Cir. 1980) ("[A]lthough the Government need not show that the scheme's victims were in fact defrauded, the prosecution must prove that some actual harm or injury was at least contemplated." (citation omitted).

The law was the same in the Fourth Circuit. In *United States v. Venneri*, 736 F.2d 995, 996 (4th Cir. 1984), the defendant was prosecuted for devising a scheme "to defraud Marriott Corporation of the honest, faithful and loyal performance of the duties and services of its employee." The Fourth Circuit ap-

proved of a jury instruction that referred to "the need to find that the defendant contemplated injury to Marriott." *Id.* at 996 n.**.

Ditto for the Fifth Circuit. *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), was a prosecution of oil traders for depriving their employers of their honest services by organizing trades in a manner that enabled them to earn extra commissions. Because of the way the oil market was regulated, however, their employers still earned the maximum profit legally obtainable, so they were not harmed by the scheme. *Id.* at 541. The Fifth Circuit reversed their convictions for this reason. "We believe that a breach of fiduciary duty can constitute an illegal fraud under § 1341 only when there is some detriment to the employer," the court held. *Id.* at 540. *See also United States v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982) ("the Government must prove that some actual harm was contemplated by the defendant").

The Seventh Circuit likewise held that private sector honest-services fraud requires contemplated harm to the ostensible victim. In *United States v. Feldman*, 711 F.2d 758, 763 (7th Cir. 1983), the court observed: "It is well established that a scheme which deprives an employer of the honest and faithful services of an employee or the right to have his business conducted in an honest manner can constitute a scheme to defraud under the mail fraud statute." But the court cautioned that "not every breach of duty by an employee works as a criminal fraud." *Id.* The court explained that "[w]hen an employee breaches a fiduciary duty to disclose information to his employer, that breach of duty can support a mail or wire fraud conviction only if the nondisclosed in-

formation was material to the conduct of the employer's business *and the nondisclosure could or does result in harm to the employer*." *Id.* (emphasis added). *See also United States v. Bryza*, 522 F.2d 414, 422 (7th Cir. 1975) (affirming where the victim suffered a "real detriment" from being "deprived of … the right to make the best possible purchase"); *United States v. George*, 477 F.2d 508, 514 (7th Cir. 1973) (affirming because "George must have known that some actual injury to Zenith was the reasonably probable result of this scheme.").

The Eleventh Circuit agreed. In *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985), the court reversed a conviction on one count of fraud but affirmed convictions on all the other counts. The difference, the court explained, was that when an employee was charged with depriving his employer of his honest services, the employee's "breach of a fiduciary duty must be accompanied by some detriment to the employer in order to constitute a violation." *Id.* at 573 (internal quotation marks omitted). The Eleventh Circuit reversed on the lone count involving a transaction that caused no detriment to the defendants' employer. *Id.*

The law was identical in the D.C. Circuit. The court noted that while a "scheme to defraud" can include an employee's breach of his employer's trust, "the wire fraud statute makes criminal only breaches of duty that are accompanied by a misrepresentation or non-disclosure that is intended or is contemplated to deprive the person to whom the duty is owed of some legally significant benefit." *United States v. Lemire*, 720 F.2d 1327, 1335 (D.C. Cir. 1983). The court explained:

> An employer values the loyalty of his employees and prohibits conflicts of interest primarily because such conflicts create an incentive for the employee to act in a manner detrimental to the employer's tangible monetary interests. Employee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the employer. An employee's undisclosed conflict of interest does not by itself necessarily pose the threat of economic harm to the employer. Therefore it does not alone constitute a sufficient indicium that the employee intended any criminally cognizable harm to the employer. Other surrounding circumstances may of course provide the necessary proof that the employee intended such harm. We hold today, however, that an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute. There must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer.

Id. at 1336-37 (citation and footnotes omitted).

The outcome would have been the same in the Sixth Circuit, which did not allow *any* private sector honest-services prosecutions, with or without contemplated harm to the victim. *See United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986) ("[M]isconduct of a fiduciary in the administration of exclusively private matters in his capacity as a private individual which does not involve the misuse of public office or public trust, is not actionable as a vi-

olation of the mail fraud statute under an intangible rights theory.").

Every Court of Appeals that addressed the question before *McNally* thus held that in a private sector prosecution for honest-services fraud, the government must prove that the scheme contemplated some kind of harm to the victim caused by the deprivation of honest services.

Even the government agrees with this assessment of the pre-*McNally* caselaw. In a brief filed a few weeks before the Court decided *McNally*, the government stated:

> The courts of appeals have thus uniformly held, in Judge Friendly's words, that "a scheme to use a private fiduciary position to obtain direct pecuniary gain is within the mail fraud statute," *at least where that scheme contemplates some sort of harm to the principal*. *United States v. Dixon,* 536 F.2d 1388, 1399-1400 (2d Cir. 1976). Without dissent on the point, the courts of appeals have concluded, as the District of Columbia Circuit explained in a thoughtful opinion, that "[s]o long as the jury finds [that the employee's] non-disclosure furthers a scheme to abuse the trust of the employer *in a manner that makes an identifiable harm to him, apart from the breach itself*, reasonably foreseeable, it may convict the employee of fraud." *Lemire,* 720 F.2d at 1337.

Brief for the United States, *Carpenter v. United States*, 484 U.S. 19 (1987), No. 86-422 (May 29, 1987), 19-20 (emphases added).

In *Black*, the government agreed once again that contemplated harm is required in private sector honest-services cases. The government's argument in *Black* was merely that the harm need not be *economic* harm, as the petitioner in *Black* contended. Brief for the United States, *Black v. United States*, 561 U.S. 465 (2010), No. 08-876 (Sept. 30, 2009), 30-32.

When section 1346 was enacted, it was thus clear that in a private sector case, a conviction for honest-services fraud required the government to prove that the deprivation of honest services contemplated some kind of harm to the alleged victim.

Below, the Ninth Circuit erroneously believed that this traditional rule would render section 1346 superfluous in private sector cases, on the theory that where the defendant's scheme contemplated harm to the victim, the scheme would necessarily be one to deprive the victim of money or property, so it would already be prohibited by sections 1341 or 1343. App. 20a. The Ninth Circuit was wrong, because harm can take many forms other than the deprivation of money or property. In our case, for example, if the government had been required to prove that the patients received substandard medical care, that would have been a sufficient harm, even if the patients lost no money or property. Under the traditional rule requiring contemplated harm in private sector cases, section 1346 thus still has a role to play.

The good sense of the traditional rule is readily apparent in our case. Mr. Solakyan was charged with paying medical personnel to steer MRI business to his companies. But "the practice of medicine" is "traditionally left to state control." *Moyle v. United*

States, 603 U.S. 324, 356 (2024) (Alito, J., dissenting). States make "carefully calibrated policy decisions," *Snyder v. United States*, 603 U.S. 1, 14 (2024), about how to regulate doctors. Indeed, Mr. Solakyan's charged conduct could constitute several offenses under California law. *See* Cal. Bus. & Prof. Code § 650.01; Cal. Welf. & Inst. Code § 14107.2; Cal. Lab. Code § 139.3(c). These state offenses are punishable by a prison term of one year at most, unlike federal mail and wire fraud, which have maximum sentences of twenty years in prison.

It is difficult to discern any legitimate federal interest served by the U.S. Attorney's eagerness to further regulate medical practice in California, especially where no patients were harmed. As the Court has repeatedly cautioned, "'[a]bsent [a] clear statement by Congress,' courts should 'not read the mail [and wire] fraud statute[s] 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)); *see also McDonnell v. United States*, 579 U.S. 550, 576-77 (2016).

Moreover, as the Courts of Appeals on the majority side of the split have recognized, there is a genuine difference between the public and private sectors. The integrity of a public official is an end in itself, not merely a means to some other end. The public loses something of great value when an official takes bribes, even if the government provides the same public services at the same cost as before. There is no straightforward analogy in the private sector. If a physician takes bribes to choose one MRI provider over another, and the two providers are

equally good and cost the same, the physician no doubt acts unethically and competing MRI providers will lose business, but have the physician's *patients* been defrauded? If a company's employee takes bribes to have the company buy widgets from one vendor, rather than identically priced widgets of the same quality from another vendor, the employee acts unethically and the latter vendor loses business, but has the *company* been defrauded? It was this concern that caused the Courts of Appeals to treat private sector cases differently from public sector cases before *McNally*, and it should still cause us to treat them differently today.[5]

III. This is an important issue, and this case is an excellent vehicle for resolving it.

This issue is at least as important today as it was when the Court agreed to decide it in *Black*. The circuit split has only grown larger. The government continues to prosecute private sector honest-services cases in a wide range of contexts in which the presence or absence of contemplated harm can make all the difference. *See, e.g.*, *United States v. Full Play Group, S.A.*, 690 F. Supp. 3d 5, 33-36 (E.D.N.Y. 2023); *United States v. Ristik*, 2023 WL 2525361 (N.D. Ill. 2023), *3; *United States v. Simon*, 12 F.4th 1 (1st Cir. 2021); *United States v. Ernst*, 502 F. Supp. 3d 637, 649-51 (D. Mass. 2020). Indeed, several re-

[5] *Kousisis v. United States*, No. 23-909 (argued Dec. 9, 2024), is unlikely to affect the outcome of our case. *Kousisis* is not about honest-services fraud. Rather, the issue in *Kousisis* concerns the scope of ordinary fraud, in which the defendant is alleged to have deprived someone of money or property.

cent cases involve physicians who were convicted of honest-services fraud, on the theory that they deprived their patients of their honest services, without any showing that the physicians contemplated any harm to their patients. *See, e.g.*, *United States v. Savino*, 788 F. App'x 869, 872-73 (3d Cir. 2019); *United States v. Gross*, 370 F. Supp. 3d 1139, 1148 (C.D. Cal. 2019); *United States v. Greenspan*, 2016 WL 4402822, *15-*16 (D.N.J. 2016).

"The intangible right of honest services must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances." *Percoco*, 598 U.S. at 328 (brackets and internal quotation marks omitted). As one U.S. Attorney recently lamented, however, "[f]ederal prosecutors should be aware of the future litigation risks that the 'intangible right to honest services' theory poses prior to pursuing this theory of mail/wire fraud," because "[c]ourts continue to split on whether the government needs to prove that the victim to whom a duty is owed suffered any economic harm, or that such harm was foreseeable to the defendant." Pak, *Private Sector Honest Services Prosecutions*, at 157, 155. When it comes to private sector cases, "no one knows what 'honest-services fraud' encompasses." *Percoco*, 598 U.S. at 333 (Gorsuch, J., concurring in the judgment). If the question presented was worth deciding in *Black*, it is still worth deciding now.

This case is an ideal vehicle. The case was argued to the jury on the theory that it made no difference whether the allegedly fraudulent scheme contemplated any harm to the scheme's ostensible victims, the patients who were referred to Mr. Solakyan's

companies for MRI scans. As the prosecutor told the jury, "even if these patients were benefiting, … it would still be a crime." ER 899. Mr. Solakyan moved to dismiss the honest-services charges on the ground that the indictment did not allege that the scheme contemplated any harm to the patients, but his motion was denied. *Supra* at 5. He requested a jury instruction on harm, but his request was refused. *Id.* at 6. If the jury had been properly instructed that contemplated harm was a requirement, Mr. Solakyan would almost certainly have been acquitted of the honest-services charges, because the government's own witnesses testified that the patients received first-rate, medically appropriate MRI scans. *Id.* The facts make this case perfect for deciding whether a private individual may be convicted of honest-services fraud under 18 U.S.C. § 1346 where the alleged scheme did not contemplate any harm to the private party to whom honest services were owed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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