No. 24-1066

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

REPLY BRIEF FOR PETITIONER

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As the government concedes (BIO 11-12), the Court granted certiorari in *Black v. United States*, 561 U.S. 465 (2010), to resolve the circuit split on the question presented in our case, but the Court did not address the issue in *Black*.

The government errs, however, in suggesting: (1) that this case is an inappropriate vehicle (BIO 4-5, 14-15); (2) that the Court resolved the circuit split in *Skilling v. United States*, 561 U.S. 358 (2010) (BIO 12-14); and (3) that the decision below is correct (BIO 5-11).

In fact, this case is an excellent vehicle for resolving the split, which the Court did not resolve in *Skilling*. On the merits, the position the government takes here is not just wrong but is directly contrary to the position the government has taken in prior cases.

I. This case is an excellent vehicle.

The government's vehicle argument rests on three misunderstandings of the proceedings below.

First, the Court of Appeals' decision was not "interlocutory" (BIO 4). As we explained in our certiorari petition (Pet. 8 n.4), the Court of Appeals affirmed Mr. Solakyan's convictions but remanded to the District Court for the limited purpose of making findings regarding the appropriate amount of restitution. Pet. App. 35a-36a. The District Court is waiting for this Court to act before it makes these findings. It would make no sense for this Court to wait for the District Court to go first. If we prevail in the District Court as to restitution, we will have nothing to ap-

peal to the Court of Appeals, so we would lose the opportunity to seek certiorari here.

It is not unusual for the Court to grant certiorari when cases are in this posture. In *Skilling*, for example, the Court of Appeals affirmed Skilling's convictions but vacated his sentence and remanded to the District Court for resentencing. *United States v. Skilling*, 554 F.3d 529, 595 (5th Cir. 2009). The Court nevertheless granted Skilling's petition for certiorari.

Second, the government errs (BIO 14) in claiming that our argument here is different from the argument we made in the District Court. As is often the case, our argument in this Court is expressed more precisely than it was in the District Court, because counsel has had more time to shape it, but it is the same argument. In the District Court, we moved to dismiss the indictment on the ground that it failed to allege harm to the ostensible victims, the patients who received the MRIs. Dist. Ct. docket entry 59. We proposed jury instructions to the same effect. Dist. Ct. docket entry 175. The government opposed both requests and the District Court ruled in the government's favor.

In the District Court, in the Court of Appeals, and in this Court, our argument has been the same—that it is not enough for the government to prove merely that the alleged scheme deprived the patients of the honest services of their doctors, but that the government must also prove that the alleged scheme contemplated some kind of harm to the patients beyond the abstract loss of the doctors' honest services. In the District Court, the government understood our argument perfectly. It responded to our motion

by arguing that it did not have to prove either an intent to harm or any actual harm, of any kind. Dist. Ct. docket entry 64, at 10-11. The prosecutor argued to the jury that no harm of any kind was required. ER 898-99. The Court of Appeals found, correctly, that our claim was preserved for review, Pet. App. 14a, before going on to disagree with us on the merits.

There is thus no inconsistency between the argument we made in the District Court and the one we are making here.

Third, the government mistakenly contends (BIO 15) that we would have lost at trial even under our view of the law. The government's mistake is based on its erroneous factual claim that the patients received medically unnecessary MRI scans. This is simply not true, and there is no evidence in the record to support it.[1] The government's own witnesses—doctors who admitted they had been paid to steer MRI business to Mr. Solakyan's company—testified that all the MRI scans they ordered were medically appropriate. Pet. 6; ER 637, 700, 708-09. These were MRIs that would have been performed by a different provider had they not been steered to Mr. Solakyan's company. And the doctors testified that the scans performed by Mr. Solakyan's company were as good as, or even better than, the scans performed by other providers. Pet. 6; ER 640, 699, 706. No patients were harmed.

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[1] The portions of the record cited by the government for its assertion that patients received unnecessary scans—C.A. Supp. E.R. 827, 1007-10, 1024-25, 1036-37—contain no support for this claim.

This is why the government objected to our proposed jury instruction on harm. It is also why the prosecutor was so adamant in arguing to the jury that harm to the patients is not an element of the offense. ER 898. "[E]ven if it were great medicine," he insisted, "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.

In any event, regardless of the evidence, the case was litigated on the theory that the government need not prove contemplated harm to the patients, who were the ostensible victims. The jury was instructed that harm was not a requirement. The prosecutor argued this theory to the jury. Even if there had been evidence that the scheme contemplated harm to the patients, Mr. Solakyan's convictions would still have to be reversed, because the instructions allowed the jury to convict without finding any contemplated harm.

II. The Court did not resolve the circuit split in *Skilling*.

The government also errs in claiming (BIO 12-14) that *Skilling* resolved the circuit split on the question presented. We discussed this point at length in our certiorari petition, Pet. 10-20, but the government does not refute anything we said there.

Our issue was not present in *Skilling*, which addressed a different question—whether section 1346 is unconstitutionally vague. The Court held that it is not unconstitutionally vague because it prohibits only bribes and kickbacks. 561 U.S. at 404-09. The Court had no occasion to decide whether the government must prove contemplated harm to the victim in private sector cases. The Court's only discussion of the issue was in a footnote, which merely explained 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).

Ever 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 in *Skilling*, "[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* 16 (May 18, 2020) (noting that after *Skilling*, courts are still divided over whether the government must prove foreseeable harm in private sector cases); 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) (noting that although the two sides of the circuit split on our issue "were established prior to *Skilling*, they are not implicated by *Skilling's* reasoning").

Because *Skilling* did not address our issue, the circuit split that existed before *Skilling* still exists today. As we showed in our certiorari petition (Pet. 10-15), the decisions on the majority side of the split are still the law in the Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. In these circuits, the government must still prove, in private sector honest-services cases, that the alleged scheme contemplated harm to the party to whom honest services were owed. Sam Solakyan could not have been convicted of honest-services fraud if he lived in one of these circuits.

The government's only response (BIO 13) is that these circuits have not published any recent decisions reversing a conviction on this ground. But they would have no occasion to. Because the law in these circuits is clear, prosecutors would not charge private sector honest-services fraud without alleging that the scheme contemplated harm to the ostensible victim. The issue could not arise on appeal.

Nor did *Skilling* remove the practical reason to address this issue. By providing a limiting construction of section 1346, *Skilling* stopped the government from prosecuting a large and amorphous category of conduct as honest-services fraud. But the Court's failure to answer the question presented in

Black—the issue in our case—left a different large and amorphous category of conduct open to the government for prosecuting as honest-services fraud. To this day, the government continues to prosecute all sorts of private sector conduct under section 1346 without any showing of contemplated harm, including cases in which physicians are charged with depriving their patients of their honest services. *See* Pet. 29-30.

The government also errs in suggesting (BIO 14) that the Court would benefit from further percolation in light of *Kousisis v. United States*, 145 S. Ct. 1382 (2025). *Kousisis* did not involve honest-services fraud. *Id.* at 1391 n.3 (explaining that the law of honest-services fraud "is irrelevant here"). It involved ordinary fraud, in which the defendant deprives the victim of money or property. Our issue concerns the definition of honest-services fraud, so *Kousisis* will not cause the lower courts to reevaluate their holdings. Our issue has already been percolating for so many years that there is nothing to gain from letting the circuit conflict fester even longer.

III. The decision below is wrong.

The government spends the largest portion of its brief in opposition (BIO 5-11) defending the decision below on the merits. This defense is faulty in several respects.

To begin with, the government errs (BIO 6-8) in interpreting the text of section 1346. The statutory phrase "honest services" is a term of art, by which Congress meant "to refer to and incorporate the honest-services doctrine recognized in Court of Appeals' decisions before *McNally*." *Skilling*, 561 U.S. at 404;

see also Percoco v. United States, 598 U.S. 319, 328 (2023); *Ciminelli v. United States*, 598 U.S. 306, 313 (2023). Before *McNally*, as we showed in our certiorari petition (Pet. 21-26), 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. The government is mistaken in claiming that all these cases addressed different issues. Under the pre-*McNally* caselaw, Sam Solakyan could not have been convicted of honest-services fraud.

The government used to be more candid about these cases. In *Black*, the government acknowledged:

> The pre-*McNally* cases from the Second Circuit that petitioners cite indicate that, in order to prove that an employee defrauded his employer of his honest services, the government must show that "*some* actual harm or injury [to the employer] was at least contemplated." *United States v. Von Barta*, 635 F.2d 999, 1006 n.14 (1980) (emphasis added), cert. denied, 450 U.S. 998 (1981); see *United States v. Dixon*, 536 F.2d 1388, 139 n.11 (1976) (Friendly, J.). But, unlike the D.C. Circuit in *Lemire*, the Second Circuit did not state that the harm must take an economic form. Likewise, the Seventh Circuit in *United States v. Feldman*, 711 F.2d 758, 763, cert. denied, 464 U.S. 939 (1983), and the Fifth Circuit in *United States v. Ballard*, 663 F.2d 534, 540 (Unit B Dec. 1981), modified on reh'g, 680 F.2d 352 (Unit B 1982) (per curiam), required a showing of some possible "harm" or "possible detriment" to the employer.

Brief for the United States, *Black v. United States*, 561 U.S. 465 (2010), No. 08-876 (Sept. 30, 2009), 30-31.

Likewise, when the government summed up the state of the pre-*McNally* case law on private sector honest-services fraud, in a brief filed just a few weeks before the Court decided *McNally*, this is what the government had to say:

> 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).

The government has evidently now changed its view of these pre-*McNally* cases, but the government does not provide any reason for the change.

This pre-*McNally* consensus was firmly grounded in traditional principles of fraud. Fraud has always

required injury (i.e., harm) to the victim. *Kousisis*, 145 S. Ct. at 1394 & n.5. A plan is not a "scheme or artifice to defraud," 18 U.S.C. §§ 1341, 1346, unless it contemplates harm to someone.

The pre-*McNally* caselaw recognized that there is an important difference between the public sector and the private sector when it comes to the harm caused by the deprivation of honest services. In the public sector, the pre-*McNally* caselaw counted the public's loss of a government official's honest services as a harm, in itself, that sufficed to constitute fraud, even if the public received the same services as it would have otherwise. *See, e.g.*, *United States v. Holzer*, 816 F.2d 304, 308 (7th Cir. 1987) ("[T]he systematic and long-continued receipt of bribes by a public official … is fraud. … It is irrelevant that, so far as appears, Holzer never ruled differently in a case because of a lawyer's willingness or unwillingness to make him a loan, so that his conduct caused no demonstrable loss either to a litigant or to the public at large."). When a government official takes a bribe, the public loses something of great value, even if the public receives the same services at the same cost as before. *See Skilling*, 561 U.S. at 400 (giving the example of "a city mayor" who "accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length"). The defendant who bribes a government official thus defrauds the public by depriving the public of the official's honest services, even if the defendant does not contemplate any other harm to the public.

The private sector is different, as the Courts of Appeals recognized before *McNally*. Under the pre-*McNally* case law, one private party's loss of another private party's honest services was not sufficient to constitute fraud if the services themselves were unaffected. As the D.C. Circuit 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.

United States v. Lemire, 720 F.2d 1327, 1336 (D.C. Cir. 1983). *See also United States v. Dixon*, 536 F.2d 1388, 1399 (2d Cir. 1976) (Friendly, J.) ("[W]e have been cited to no case, and our research has discovered none, 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.").

When Congress enacted section 1346, this requirement of contemplated harm in private sector cases was part of the pre-*McNally* doctrine that Congress reinstated. The Court of Appeals erred in holding otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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