No. 25-447

In the Supreme Court of the United States

MARK SCHENA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner violated the Eliminating Kickbacks in Recovery Act of 2018 (EKRA), Pub. L. No. 115-271, 132 Stat. 3894 (18 U.S.C. 220), by making percentage-based payments to marketers who engaged in deceitful conduct that gave them undue influence over referrals to petitioner's laboratory.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 142 F.4th 1217. An accompanying memorandum disposition (Pet. App. 20a-28a) is available at 2025 WL 1918267. The order of the district court (Pet. App. 46a-56a) is unreported. A subsequent order of the district court (Pet. App. 29a-45a) is available at 2023 WL 3170050.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2025. The petition for a writ of certiorari was filed on October 9, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of conspiring to commit

healthcare fraud and wire fraud, in violation of 18 U.S.C. 1349; two counts of healthcare fraud, in violation of 18 U.S.C. 1347 and 2; three counts of securities fraud, in violation of 15 U.S.C. 78j and 18 U.S.C. 2; one count of conspiring to violate the Eliminating Kickbacks in Recovery Act of 2018 (EKRA), 18 U.S.C. 220(a)(2)(A), in violation of 18 U.S.C. 371; and two counts of paying illegal kickbacks, in violation of the EKRA, 18 U.S.C. 220(a)(2)(A), and 18 U.S.C. 2. Am. Judgment 1; see Superseding Indictment 1-16. The court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release; ordered him to pay more than $24 million in restitution; and entered an almost $3 million forfeiture money judgment. Am. Judgment 2-3, 6-7; D. Ct. Doc. 254 (Oct. 19, 2023). The court of appeals affirmed petitioner's convictions and the forfeiture order but vacated in part the restitution order and remanded for further proceedings. Pet. App. 1a-28a.

1. Petitioner operated Arrayit, a medical laboratory in Northern California. Pet. App. 2a. Arrayit focused on clinical diagnostics and, in particular, blood testing for allergies. *Id.* at 3a. Arrayit's tests screened for 120 allergens, even though that was not medically necessary for most patients. *Id.* at 3a-4a. Petitioner had an "'obsession' with medical billing codes" and "wanted a way to make large amounts of money from billing insurers." *Id.* at 3a. And he developed and implemented a scheme to bill patients' insurance providers up to $10,000 for blood-allergy tests that cost Arrayit a small fraction of that price. *Ibid.*

To obtain patient samples, petitioner paid "marketers" a percentage of the revenue that they brought to Arrayit by targeting "'naïve' doctors who lacked allergy

experience" with misrepresentations about Arrayit's blood-allergy tests. Pet. App. 4a; see *id.* at 3a-4a. The marketers would falsely claim to the uninformed doctors that Arrayit's blood allergy tests were "'highly accurate' and 'far superior' to skin tests," when in fact "allergists considered skin testing to be superior," and Arrayit's blood tests were unable to detect whether a patient actually "had an allergy (as opposed to having been exposed to an allergen)." *Id.* at 4a. And at trial, one marketer testified that the marketers also "'controlled' which lab the blood samples would be sent to." *Ibid.*

When the COVID-19 pandemic began and Arrayit's volume of allergy testing "fell dramatically," petitioner transitioned Arrayit to perform a form of COVID testing using a blood test. Pet. App. 4a. At petitioner's direction, the marketers promoted Arrayit's COVID test as superior to or equivalent to the "gold standard" PCR tests, even though Arrayit's COVID test could only test for antibodies while PCR tests could detect infections. *Ibid.* And at petitioner's direction, the marketers bundled Arrayit's blood-allergy test with the COVID test. *Id.* at 5a. The marketers "falsely claimed that according to Dr. Anthony Fauci, COVID and allergies could be confused" such that both tests were needed. *Ibid.*

Between October 2018 and June 2020, Arrayit billed insurers more than $77 million, with an average of $5200 per patient—more than any other laboratory in the country. Pet. App. 5a.

2. A federal grand jury in the Northern District of California indicted petitioner on one count of conspiring to commit healthcare fraud and wire fraud, in violation of 18 U.S.C. 1349; two counts of healthcare fraud, in violation of 18 U.S.C. 1347 and 2; three counts of

securities fraud, in violation of 15 U.S.C. 78j and 18 U.S.C. 2; one count of conspiring to violate the EKRA, in violation of 18 U.S.C. 371; and two counts of paying illegal kickbacks, in violation of the EKRA, 18 U.S.C. 220(a)(2)(A), and 18 U.S.C. 2. Superseding Indictment 1-16; see Am. Judgment 1.

The EKRA makes it unlawful to, *inter alia*, "pay[] or offer[] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind * * * to induce a referral of an individual to a * * * laboratory." 18 U.S.C. 220(a)(2)(A). Petitioner here moved to dismiss his EKRA counts on the theory that his payments to marketers, rather than doctors, were as a matter of law not payments "to induce a referral." *Ibid.*; see D. Ct. Doc. 98, at 5-9 (Feb. 3, 2022). The district court denied the motion. Pet. App. 46a-56a.

The district court explained that the EKRA contains "no requirement of 'directness,'" but instead "by its terms" applies to payments made to "'induce'" referrals for laboratory services. Pet. App. 55a (citation omitted). And the court observed that the "plain meaning of 'to induce a referral of an individual' includes situations where a marketer causes an individual to obtain a referral from a physician." *Ibid.* (citing Induce, *Black's Law Dictionary* (5th ed. 1979)).

A jury found petitioner guilty on all counts, Am. Judgment 1, and the district court denied petitioner's motion for acquittal and a new trial, see Pet. App. 29a-45a. The court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 2-3. The court also ordered petitioner to pay $24,289,540.95 in restitution and entered a

$2,727,240 forfeiture money judgment. *Id.* at 6-7; D. Ct. Doc. 254.

3. The court of appeals affirmed petitioner's convictions, but vacated the portion of the restitution award attributable to the losses arising from petitioner's securities-fraud violations and remanded for further proceedings. Pet. App. 1a-19a (rejecting challenge to EKRA counts); *id.* at 20a-28a (rejecting other challenges and partially vacating restitution award).

The court of appeals rejected petitioner's claim that the EKRA's prohibition on payments "to induce a referral," 18 U.S.C. 220(a)(2)(A), is categorically inapplicable to intermediaries like marketers. See Pet. App. 9a-12a. The court explained that "[n]othing in" 18 U.S.C. 220(a)(2)(A) "limits its reach to payments made specifically to persons who have the authority to refer patients or who directly interact with patients." Pet. App. 9a. In particular, the court observed that a person could "'induce a referral' by paying someone who could in turn effect a referral, even if the person who received the payment did not himself have the ability to order a laboratory test." *Ibid.* The court also noted that the statute applies to "anyone who pays remuneration 'directly or *indirectly*' to induce a referral." *Ibid.* And the court found that "a reasonable jury could find that [petitioner] was paying marketers with the goal that individuals would be referred to Arrayit." *Id.* at 12a.

The court of appeals further considered "what it means to 'induce a referral,'" in a case where a defendant makes payments to a marketing intermediary. Pet. App. 13a; see *id.* at 13a-18a. The court reasoned that, to fall within the EKRA, a payment to a marketing intermediary requires sufficient evidence that its purpose was to induce referrals rather than simply to

compensate marketing efforts. *Id.* at 13a; see *id.* at 16a; see also *id.* at 13a-14a (discussing *United States* v. *Hansen*, 599 U.S. 762 (2023)). The court made clear that "the mere fact of a percentage-based marketing arrangement, without more," would not "constitute a per se violation of [the] EKRA." *Id.* at 16a. But it explained that at least where "percentage-based payments are made to marketing agents who are directed to mislead those making the referrals about the nature of and need for the covered medical services, those payments would violate [the] EKRA." *Id.* at 17a-18a. And it observed that here, a jury could have found that petitioner "paid marketing agents to induce referrals to his lab" by "direct[ing] marketers to engage in deceitful conduct that gave the marketers undue influence over the referrals." *Id.* at 18a.

ARGUMENT

Petitioner renews his contention (Pet. 12-20) that the EKRA is categorically inapplicable to kickbacks to marketing intermediaries. As a threshold matter, the petition for a writ of certiorari is interlocutory, which alone provides a sufficient reason to deny it. In any event, the court of appeals correctly rejected petitioner's contention, and its decision does not implicate any conflict in the courts of appeals on the interpretation of the EKRA. Review of the question presented would therefore be premature at best. The petition for a writ of certiorari should be denied.

1. The decision that petitioner asks this Court to review is interlocutory. The court of appeals affirmed petitioner's convictions but vacated in part the district court's restitution order and remanded the case for further proceedings. See Pet. App. 19a, 28a. The interlocutory posture of the case "alone furnishe[s] sufficient

ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari).

This Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 4-55 n.72 (11th ed. 2019). That practice promotes judicial economy. Here, it would enable petitioner to raise his current claim, along with any other claims that may arise on remand, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case presents no occasion for this Court to depart from its usual practice.

2. The court of appeals correctly rejected petitioner's contention (Pet. 12-17) that the EKRA is categorically inapplicable to marketing intermediaries. That contention cannot be squared with the plain text of the statute. See *Groff* v. *DeJoy*, 600 U.S. 447, 468 (2023) ("[S]tatutory interpretation must 'begi[n] with,' and ultimately heed, what a statute actually says.") (citation omitted; second set of brackets in original).

The EKRA makes it illegal to "pay[] or offer[] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind * * * to induce a referral of an individual to a * * * laboratory." 18 U.S.C. 220(a)(2)(A). As the court of appeals recognized, nothing in 18 U.S.C. 220(a)(2)(A) "limits its reach" to persons who "refer patients" or those

who "directly interact with patients." Pet. App. 9a. And courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

As a matter of plain English, a person can pay remuneration "to induce a referral" within the meaning of the statute, 18 U.S.C. 220(a)(2)(A), by paying an intermediary "who could in turn effect a referral," Pet. App. 9a. "[T]he ordinary meaning of 'induce' is 'to lead on; to influence; to prevail on; to move by persuasion or influence.'" *Pharmaceutical Coal. for Patient Access* v. *United States*, 126 F.4th 947, 954 (4th Cir. 2025) (quoting *United States* v. *Hansen*, 599 U.S. 762, 774 (2023)). Paying someone else to generate a referral "by persuasion or influence," *ibid.* (citation omitted), is a payment "to induce a referral," 18 U.S.C. 220(a)(2)(A).

Section 220(a)(2)(A) reinforces the scope of its coverage through its application to "*any* remuneration," including "*any* kickback, bribe, or rebate." 18 U.S.C. 220(a)(2) (emphases added); see *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008) (noting breadth of "any"); see also *Diaz* v. *United States*, 602 U.S. 526, 536 (2024) (observing that "a word's meaning is informed by its surrounding context" and a "crucial part of that context is the other words in the sentence"). And statutory history confirms that Section 220(a)(2)(A) covers remuneration paid to intermediaries who induce a referral from a doctor.

As initially proposed, and among other differences, that provision was limited to remuneration paid "directly or covertly, in cash or in kind, to * * * *a person* in exchange for *the person referring* an individual." S. 3254, 115th Cong., 2d Sess. 2 (2018) (emphases added); see 164 Cong. Rec. S5108 (daily ed. July 19, 2018)

(introducing bill). The removal of "a person" and "the person," see 18 U.S.C. 220(a)(2)(A), eliminated any ambiguity as to whether the statute could apply to remunerations paid to those who do not actually refer patients. See *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

3. Petitioner's contrary arguments lack merit.

Petitioner asserts (Pet. 13), for example, that the EKRA's description of remuneration as including "kickback[s]" and "bribe[s]" means that the recipient of the payment must be the same person who referred the patient because of the common meaning of those words. But even if "remuneration" were limited to "bribe[s]" and "kickback[s]"—rather than "any remuneration," "*including*" those forms—the meaning of those words is not limited in the way petitioner asserts. 18 U.S.C. 220(a)(2)(A) (emphasis added). It is not uncommon for prohibition of such payments to include payments made to intermediaries. Cf. *Skilling* v. *United States*, 561 U.S. 358, 412 (2010) (explaining that prohibition on bribes and kickbacks in the honest-services fraud statute, 18 U.S.C. 1346, "draws content" from other federal statutes "proscribing * * * similar crimes"). Several bribery statutes, for example, apply where the payment is made to *anyone*, so long as it is made with the intent to influence someone in a position of trust. *E.g.*, 18 U.S.C. 215(a) (prohibiting corruptly giving "anything of value to *any person*, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution") (emphasis added); 18

U.S.C. 666(a)(2) (federal-programs bribery statute with similar wording).

When Congress has intended to limit criminal liability for payments made only to certain recipients, it has done so expressly. For example, a "kickback" prohibited under 41 U.S.C. 8702 is defined as anything of value "provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract." 41 U.S.C. 8701(2). If petitioner were correct that the word "kickback" inherently requires that the recipient be the person from whom the specified treatment is sought, then that limitation would be largely, if not entirely, unnecessary. And the EKRA itself includes no such limitation in Section 220(a)(2)(A), but instead uses the term "kickback" only as one type of "remuneration" that is prohibited.

Petitioner errs in seeking support (Pet. 13-14) for his position in 18 U.S.C. 220(a)(1), which prohibits "solicit[ing] or receiv[ing] any remuneration (including any kickback, bribe, or rebate) * * * in return for referring a patient." Petitioner views Section 220(a)(1) as applying only to people who can themselves refer patients, and suggests that Section 220(a)(2) must be viewed similarly. Even assuming that the different statutory text must be read identically, petitioner's premise is incorrect, as the plain language of Section 220(a)(1) could apply, for example, to a person who receives a payment and essentially controls a referral, even if he or she is not the medical provider.

In fact, one of the marketers paid by petitioner pleaded guilty to conspiring to violate, *inter alia*, Section 220(a), in a scheme where the marketer, not the

medical provider, was the one receiving the payments. See Pet. App. 4a; see also *United States* v. *Jablonski*, No. 21-cr-213, D. Ct. Doc. 1, at 7-8 (N.D. Cal. May 25, 2021); *Jablonski*, D. Ct. Doc. 37, at 1 (Dec. 13, 2023). Petitioner asserts that if "Congress intended to prohibit payments to * * * third parties," it would have specified that the recipient of the kickback was "'someone who induces a referral.'" Pet. 15 (emphasis omitted). But the natural meaning of the relevant text—"pays or offers any remuneration * * * to induce a referral," 18 U.S.C. 220(a)(2)(A)—includes payments to someone who induces a referral.

Finally, petitioner's claims (Pet. 17-20) of expansive liability under the Ninth Circuit's interpretation are unfounded. The court of appeals emphasized that "the mere fact of a percentage-based marketing arrangement, without more," would not violate the statute. Pet. App. 16a. It also stressed that the question whether payments to marketing agents are to "induce" a referral is a factual question that turns on the "specific circumstances" and evidence in a given case. *Id.* at 17a. And the court highlighted that the statute's safe-harbor provision, which precludes liability for certain types of payments, provides guidance for "companies and marketing agents seeking to steer clear of [the] EKRA." *Ibid.* (citing 18 U.S.C. 220(b)(2)).

4. Petitioner is incorrect in asserting (Pet. 20-26) that the court of appeals' decision implicates a conflict in the courts of appeals. No other court of appeals has addressed the question presented. Petitioner's assertion instead rests (Pet. 20) on a claim of a conflict between the decision below and decisions of other circuits addressing a different statute: the Anti-Kickback Statute (AKS), 42 U.S.C. 1320a-7b. Those decisions cannot

and do not create a circuit conflict on the proper interpretation of the EKRA. Unlike the EKRA provision, the AKS provision at issue prohibits kickbacks paid "to any person to induce *such person* * * * to refer an individual." 42 U.S.C. 1320a-7b(b)(2)(A) (emphasis added).[1] And the two statutes were also enacted at different times to address distinct wrongs. See Pet. App. 6a.

Even if there were a requirement that the statutes march in complete lockstep, the decisions identified by petitioner do not embrace his view that payments to intermediaries are automatically excluded, or that another court of appeals would have reached a different result on the record here. As the court of appeals in this case observed, the decision below is "*in accord with* the circuits that have interpreted [the] analogous provision in the Anti-Kickback Statute." Pet. App. 11a (emphasis added). Indeed, the court discussed and cited cases from the Fifth and Seventh Circuits, see *id.* at 11a-12a, 14a-16a—the very circuits that petitioner claims are in conflict, Pet. 21-25.

In *United States* v. *Sorensen*, 134 F.4th 493 (2025), for example, the Seventh Circuit emphasized its "'focus on intent, not titles or formal authority,'" *id.* at 500 (quoting *United States* v. *Shoemaker*, 746 F.3d 614, 629-630 (5th Cir. 2014)), and recognized that that the AKS can reach "non-physicians" who "'leverage[] fluid, informal power and influence' over healthcare decisions," *ibid.* (citation omitted); see *United States* v. *George*, 900

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[1] The AKS also prohibits the offer or payment of remuneration to induce a person to "arrange for or recommend purchasing" of federally reimbursed health care items or services. 42 U.S.C. 1320a-7b(b)(2)(B). That language, absent from the EKRA, can also apply to intermediaries in certain circumstances.

F.3d 405, 411-412 (7th Cir. 2018) (affirming convictions of nonphysician payee); *United States* v. *Polin*, 194 F.3d 863, 864, 866-867 (7th Cir. 1999) (affirming conviction for payments to sales representative participating in patient arrangements). And in finding the evidence in *Sorensen* itself to be "insufficient," 134 F.4th at 496, it observed, *inter alia*, that the nonphysicians paid there did not "unduly influence the doctors' decisions," *id.* at 501 (citation omitted). That reasoning is not a rejection of the approach in the decision below, which found such "undue influence" in the record of this case. Pet. App. 18a.

The Fifth Circuit's caselaw is likewise consistent with the decision below. See Pet App. 11a-12a, 14a-16a. Petitioner primarily relies (Pet. 22-23) on *United States* v. *Miles*, 360 F.3d 472 (5th Cir. 2004), but the Fifth Circuit has subsequently explained that it "did not hold in *Miles* that a payee with 'relevant decisionmaker' status is an independent, substantive requirement of the statute" and that "[s]uch a novel move would be tantamount to re-writing the statutory text," *Shoemaker*, 746 F.3d at 629. Petitioner also refers (Pet. 24-25) to *United States* v. *Marchetti*, 96 F.4th 818 (2024), but that was simply a case in which the Fifth Circuit found insufficient evidence that the "defendant impermissibly influenced 'those who make healthcare decisions on behalf of patients,'" *United States* v. *Cockerell*, 140 F.4th 213, 220 (5th Cir. 2025) (distinguishing *Marchetti* and *Miles*) (citation omitted); see *Marchetti*, 96 F.4th at 826 ("We read our caselaw as a whole to say that the identity of the payee, while not essential, speaks to the intent of the payer."). And in a recent case, the Fifth Circuit *affirmed* the AKS convictions of a "marketer" on a record that was "'replete with evidence that' * * * 'the

marketers improperly influenced physicians.'" *Cockerell*, 140 F.4th at 216, 220; see *id.* at 220 n.6 (distinguishing facts from the mere "advertising" at issue in the Seventh Circuit's decision in *Sorensen*, 134 F.4th 493).

Petitioner's effort (Pet. 22-23) to analogize the facts in his case to the advertising in *Sorensen*, 134 F.4th 493, and *Miles*, 360 F.3d 472, is unsound. *Sorensen* "involved truly public advertisements and patient consent," *Cockerell*, 140 F.4th at 220 n.6, and *Miles* involved a public relations firm supplying "'promotional materials'" and "occasionally 'plates of cookies to doctors' offices,'" *id.* at 220. In contrast, as the decision below explained, the trial evidence here showed that petitioner "directed his marketers to mislead and deceive doctors" and to "target doctors that were less knowledgeable about allergies" with false claims about his laboratory's tests. Pet. App. 18a. And the trial evidence further included testimony that the marketers "effectively 'controlled' which lab a sample would be sent to." *Ibid.*

Petitioner does not assert a "square conflict" between the decision below and decisions of the First and Eleventh Circuits. Pet. 26. And the decisions that he cites do not demonstrate a conflict. The First Circuit's decision in *Guilfoile* v. *Shields*, 913 F.3d 178 (2019), involved an employee's claim of retaliation under the False Claims Act and recognized that the scheme at issue was "in the heartland of what the [Anti-Kickback Statute] is intended to prevent" because it involved "the use of payments to improperly influence decisions on the provision of health care." *Id.* at 192-193; see *id.* at 182. And in *United States* v. *Vernon*, 723 F.3d 1234 (2013), the Eleventh Circuit recognized that "the plain language of the [AKS] is not limited to payments to

physicians who prescribe medication," but instead "speaks broadly to 'whoever knowingly and willfully . . . pays any remuneration' to '*any person* to induce such person . . . to refer an individual,'" and affirmed the conviction of a defendant for payments to a nonphysician patient advocate. *Id.* at 1254 (quoting 42 U.S.C. 1320a-7b(b)(2)(A)) (emphasis added by court); see *id.* at 1254-1255 (favorably discussing *Polin*, 194 F.3d 863).[2]

5. In all events, any review of the question presented would be premature. As discussed above, no other court of appeals has addressed the question presented. To the extent that petitioner is predicting a conflict between the court of appeals' interpretation of the EKRA here and how other circuits may interpret it in the future, there is currently no such conflict. Furthermore, the EKRA is a relatively recent statute, enacted only in 2018. See Pub. L. No. 115-271, 132 Stat. 3894. And the decision below here is narrowly limited to facts like those in this case. See Pet. App. 17a-18a; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10.

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[2] Petitioner also cites (Pet. 25 n.4) an unpublished Sixth Circuit case, which he says conflicts with the decision below. But in that decision, which involved an employee's claim that her employer terminated her in violation of the False Claims Act, the court determined that the plaintiff "presented no evidence to suggest a connection between the gifts and the * * * referrals." See *Jones-McNamara* v. *Holzer Health Sys.*, 630 Fed. Appx. 394, 402 (6th Cir. 2015); see *id.* at 394-395. In any event, an unpublished decision cannot create a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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