No. 25-447

IN THE
Supreme Court of the United States

MARK SCHENA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition demonstrates the need for this Court to clarify the scope of the Eliminating Kickbacks in Recovery Act (EKRA), 18 U.S.C. § 220. None of the government's arguments supports the Ninth Circuit's holding that payments to marketers who persuade doctors to independently make referrals constitute illegal kickbacks under EKRA. Tellingly, the government does not defend the Ninth Circuit's holding that some sort of additional, unspecified "wrongful" conduct is necessary for an EKRA conviction. Pet. App. 14a. While that holding has no basis in the statutory text, it would impose at least some limit on the statute's scope (albeit an uncertain one). Without such a limit, *any* incentive payments for advertising could lead to a felony conviction and 10 years' imprisonment—a result that would upend the healthcare industry. That cannot have been Congress' intent.

Nor can the government reconcile the Ninth Circuit's holding with the contrary decisions of the Fifth and Seventh Circuits. The government emphasizes that these latter decisions addressed the Anti-Kickback Statute on which EKRA was modeled. But the Ninth Circuit itself recognized the two statutes should be interpreted in the same manner. And the government's attempts to distinguish these cases on their facts fail: while these courts held payments to parties who "unduly influence" referral decisions may constitute kickbacks, they made clear that payments to marketers who attempt to *persuade* these referral decisionmakers do not qualify.

The government's sole identified vehicle problem—that this petition is purportedly interlocutory—is insubstantial. The Ninth Circuit remanded only for a determination of the restitution award imposed for entirely different convictions. This Court routinely grants certiorari despite such further proceedings, which are irrelevant to the significant legal question this petition presents.

ARGUMENT

I. THE GOVERNMENT CANNOT DEFEND THE NINTH CIRCUIT'S READING

1. The government's broad interpretation of EKRA—which abandons even the Ninth Circuit's amorphous limits on the statute's reach—confirms this Court's intervention is necessary. EKRA imposes harsh criminal penalties on anyone who "pays or offers any remuneration (including any kickback, bribe, or rebate) . . . to induce a referral of an individual." 18 U.S.C. § 220(a)(2)(A). As the statutory text makes clear, Congress intended to punish "the paradigmatic cases of bribes and kickbacks" (*Skilling v. United States*, 561 U.S. 358, 411 (2010))—in which the "remuneration" itself "induce[s]" the referral. 18 U.S.C. § 220(a)(2)(A).

The government nevertheless insists EKRA covers any scenario in which a payment is made to someone "to generate a referral 'by persuasion or influence.'" BIO 8 (citation omitted). That reading is inconsistent with EKRA's plain language: such payments do not "induce" referrals, but rather induce the payments' recipient to try to persuade someone *else* to make referrals. And nothing about payments

for persuasive marketing implicates Congress' concern that referrals should be based on independent judgment if the referrer receives no remuneration at all. Pet. 13.

Under the government's interpretation, *any* payment for traditional advertising and marketing would seemingly be an unlawful kickback. Paying a designer to create a product flyer that ultimately influences a doctor to make a referral could, for example, result in 10 years' imprisonment. *See* BIO 8.

Indeed, the government does not acknowledge—let alone defend—the Ninth Circuit's attempt to limit such expansive liability, which rested on the court's conclusion that "the term 'induce' connotes not mere causation, but wrongful causation." Pet. App. 14a. The government characterizes the decision below as holding that "a payment to a marketing intermediary requires sufficient evidence that its purpose was to induce referrals rather than simply to compensate marketing efforts." BIO 5-6. Not only is that not what the Ninth Circuit held (*see* Pet. App. 13a-14a), it would also impose no limit on EKRA. *All* marketing efforts are ultimately intended to induce referrals, so a payment "to compensate marketing efforts" would also necessarily be a payment whose "purpose was to induce referrals." BIO 5-6.

The government's refusal to embrace the Ninth Circuit's conclusion that EKRA instead requires some sort of undefined "wrongful inducement" (Pet. App. 13a) is understandable. *See* Pet. 17-20. Here, the "wrongful" conduct was "mislead[ing]" marketing.

Pet. App. 17a-18a. But Schena would not have violated EKRA by making false statements to referring physicians (though he might violate other statutes). He should not come within EKRA's prohibition simply because he paid marketers to make those statements on his behalf.

Although the government avoids this "wrongful inducement" theory, it repeats the Ninth Circuit's statement that there must be "more" than a percentage-based marketing arrangement to run afoul of EKRA. BIO 11 (quoting Pet. App. 16a). Yet like the Ninth Circuit, the government leaves uncertain what "more" could suffice. Pet. 18-19. And the government's reading would seemingly provide *no* such limit because any payments to marketers would be payments "to induce a referral" "by persuasion or influence." BIO 8 (quotation marks omitted). EKRA's statutory safe harbor may, as the government asserts, protect those who fully restructure their compensation systems to avoid any sort of incentive payments. BIO 11; *see* 18 U.S.C. § 220(a)(2)(B). But that is little comfort: companies should not be forced to alter their lawful conduct to avoid the threat of draconian criminal penalties simply for paying for advertising. Pet. 20.

2. None of the government's remaining arguments support its reading of EKRA. The government emphasizes EKRA applies to "*any* remuneration" and "*any* kickback, bribe, or rebate." BIO 8. But "any" in these phrases modifies the type of remuneration involved—i.e., any sort payment, compensation, benefit, or enrichment in exchange for a referral. *See Dean v. United States*, 556 U.S. 568, 573 (2009) (modifiers apply to their "nearby" nouns

and verbs, not all words in the statute). That does not mean EKRA criminalizes remuneration paid to "any" *person* who has some role in bringing about another party's referral. *Contra* BIO 8.

The government likewise cannot square its reading with EKRA's parallel provision penalizing "solicit[ing] or receiv[ing]" a kickback, which makes clear that the remuneration must be "in return for referring a patient." 18 U.S.C. § 220(a)(1); *see* Pet. 13-14. The government argues this language could apply "to a person who receives a payment and essentially controls a referral, even if he or she is not the medical provider." BIO 10. That does the government little good: marketers who attempt to *persuade* the individuals who control referrals do not themselves control referrals. Nor can the government salvage its contention by pointing to the fact that one marketer in this case (who also faced additional charges) pleaded guilty to receiving a kickback. *See* BIO 10. This guilty plea does nothing to establish that EKRA applies either to marketers or those who pay them. Instead, it at most illustrates how the government will be able to use the Ninth Circuit's interpretation of EKRA as a cudgel, coercing guilty pleas for conduct Congress never intended to criminalize.

The government's citation of other criminal bribery statutes showcases how it may use the Ninth Circuit's ruling to expand that power. *See* BIO 9-10 (citing 18 U.S.C. §§ 215(a), 666(a)(2)). While these statutes use broader language than EKRA, the government identifies no decision to date interpreting them to prohibit payments to all individuals, like third-party advertisers, who attempt to "influence someone in a position of trust." BIO 9. If, however,

the Ninth Circuit's decision is left standing, the government may insist on such an expansive reading. If EKRA kickbacks need not be paid to parties who actually make referrals, then certainly the bribes that these statutes contemplate need not be paid to actual decisionmakers, either. And "as this Court has said time and again"—in the bribery context in particular—"the Court 'cannot construe a criminal statute on the assumption that the Government will use it responsibly.'" *Snyder v. United States*, 603 U.S 1, 17 (2024).

Finally, the government invokes EKRA's legislative history, arguing that unexplained changes to the statute's first draft demonstrate that Congress intentionally expanded EKRA to encompass payments to marketers and other third parties. BIO 8. But to be considered, legislative history must provide "clear evidence of congressional intent." *Delaware v. Pennsylvania*, 598 U.S. 115, 138 (2023). The history the government invokes provides no such clear evidence. The government notes that EKRA's original draft prohibited kickback payments to "a person in exchange for the person referring an individual" to a provider. BIO 8 (quoting S. 3254, 115th Cong., 2d Sess. 2 (2018)). The government cites nothing in the legislative history, however, even hinting that Congress then dropped the references to "person" in order to expand EKRA's reach to include payments to intermediaries. Rather, the change can be explained as an effort to shorten and simplify the cumbersome first draft, which prohibited kickbacks made by various "recovery home[s]," and "clinical treatment facilit[ies]" to those who might make referrals "to that recovery home or clinical treatment

facility." S. 3254, 115th Cong., 2d Sess. (July 19, 2018).[1] The final version omits these specific references to persons and entities and simply prohibits payments made "to induce a referral" from a referring person or entity. 18 U.S.C. § 220(a)(2). That change does not demonstrate Congress intended to criminalize payments for any purportedly wrongful act that ultimately *leads* to a referral, as the Ninth Circuit held.

II. THE GOVERNMENT CANNOT DIMINISH THE CONFLICT THE NINTH CIRCUIT'S DECISION CREATES

1. The government cannot reconcile the Ninth Circuit's holding with the contrary decisions of the Fifth and Seventh Circuits that have rejected the proposition that payments to mere marketing intermediaries constitute illegal kickbacks. *E.g.*, *United States v. Sorensen*, 134 F.4th 493, 500-01 (7th Cir. 2025); *United States v. Miles*, 360 F.3d 472, 480 (5th Cir. 2004). To be sure, these decisions interpreted the Anti-Kickback Statute, which Congress enacted to address kickbacks reimbursed through federal programs. BIO 11-12, 15; *see* 42 U.S.C. § 1320a-7b(b)(2)(A). But the government glosses over the fact that Congress modeled EKRA on the Anti-Kickback Statute, intending it to extend to kickbacks reimbursed by private insurance. Cong. Rec. S6467-02, S6473 (daily ed. Oct. 3, 2018); Pet. App. 6a.

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[1] Available at: https://www.congress.gov/bill/115th-congress/senate-bill/3254/text.

And the Ninth Circuit expressly grounded its interpretation of EKRA in these out-of-circuit decisions interpreting the "analogous provision in the Anti-Kickback Statute," holding its reading of EKRA was "in accord." Pet. App. 11a. The opinion here will therefore control in future Ninth Circuit Anti-Kickback Statute cases (as the government will presumably argue). If the Ninth Circuit's interpretation of EKRA departs from the interpretations of the parallel Anti-Kickback Statute to which the Ninth Circuit purported to adhere—and it does—that split warrants this Court's attention.

2. The government's attempts to diminish the extent of this departure fail. With respect to the Seventh Circuit's decision in *Sorensen*, the government observes that the court there recognized that payments to individuals who "leverage[] fluid, informal power and influence over healthcare decisions" can constitute kickbacks. BIO 12 (quoting *Sorensen*, 134 F.4th at 500 (quotation marks omitted)). The government insists that, consistent with that holding, the Ninth Circuit here found that the marketers Schena paid exercised such "'undue influence.'" BIO 13 (quoting Pet. App. 18a).

But in referring to those with "informal power and influence," the Seventh Circuit limited the universe of potential kickback recipients to those "*decisionmakers* in positions" to "leverage" such power "over healthcare decisions." *Sorensen*, 134 F.4th at 500-01 (emphasis added).[2] If payments went to other

[2] The government's other cited Seventh Circuit decisions affirmed convictions where payments were made to the relevant decisionmakers, not someone who influenced the

individuals without the authority to effectively make referrals, then a defendant would not have acted with the requisite "intent to induce referrals *from the payee*." *Id*. at 500 (emphasis added). The Seventh Circuit thus rejected the proposition that payments to marketers for "aggressive advertising efforts" could qualify because such marketers "were not even positioned . . . to exert such influence." *Id.* at 501-02.

Although the Ninth Circuit did, as the government emphasizes (BIO 12), likewise use the word "influence," it reached the opposite result. Unlike the Seventh Circuit, the Ninth Circuit did not focus on whether the marketers Schena paid were positioned to effectively decide where to make referrals. Instead, the Ninth Circuit held it sufficed that these marketers could persuade those decisionmakers: the purported "undue influence" here was the marketers' alleged misrepresentations. Pet. App. 18a. The government overstates the record in asserting these "marketers 'effectively "controlled" which lab a sample would be sent to.'" BIO 14 (citing Pet. App. 18a). In the sentence the government cites, the Ninth Circuit mentioned the testimony of only one of the marketers, who himself acknowledged he had no role in physicians' referral decisions. Pet. 8.

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decisionmakers. *See United States v. George*, 900 F.3d 405, 411 (7th Cir. 2018) (defendant "received remuneration for referring individuals . . . for the provision of home health services that would be covered under Medicare"); *United States v. Polin*, 194 F.3d 863, 866 (7th Cir. 1999) (defendants paid representative whose referral recommendations were never overruled in fourteen years and physicians' approval was a mere "formality or rubber stamping").

If, in fact, the evidence here demonstrated that marketers had dictated referrals, the Ninth Circuit's extended discussion of whether EKRA encompasses payments to third parties who do not make referrals would have been superfluous. *But see* Pet. App. 8a-12a. Because the evidence did not support that conclusion, the Ninth Circuit relied instead on evidence of the falsity of these marketing efforts. Pet. App. 18a. It affirmed Schena's EKRA convictions not because the marketers effectively controlled referral decisions—as the Seventh Circuit would require—but because the marketers used false information to convince the physicians who did.

3. The government's efforts to dismiss the relevant Fifth Circuit decisions likewise lack merit. That court has stated there is no freestanding "relevant decisionmaker" requirement. BIO 13; *see United States v. Shoemaker*, 746 F.3d 614, 629 (5th Cir. 2014). But the Fifth Circuit has consistently treated the identity and role of the payee as evidence of the defendant's *intent* to induce referrals from the payee, and it has rejected liability based solely on payments to third parties who seek to convince physicians to make referrals. *E.g., Shoemaker*, 746 F.3d at 629 (explaining "public relations firm that did not unduly influence doctors through its advertising services[] could not have been paid with the requisite corrupt intent"); *Miles*, 360 F.3d at 480 (no illegal kickback where payments "were not made to the relevant decisionmaker as an inducement or kickback for sending patients").

Thus, for example, the government attempts to distinguish *United States v. Marchetti*, 96 F.4th 818 (5th Cir. 2024), as resting on the conclusion that there

was "insufficient evidence that the defendant impermissibly influenced those who make healthcare decisions." BIO 13 (quotation marks omitted). Yet it ignores *why* the court deemed the evidence insufficient. In *Marchetti*, the government had shown that payments were made to a distributor who "had relationships with, access to, and influence over doctors." 96 F.4th at 827. The Fifth Circuit held that payments to an individual with this sort of "influence" were not enough, observing: "What are advertisers hired to do anyway?" *Id.* The Ninth Circuit reached the opposite conclusion. Pet. App. 18a.

United States v. Cockerell, 140 F.4th 213 (5th Cir. 2025), on which the government relies (BIO 13-14), confirms this split. There, the defendant, a marketer, was convicted for his involvement in a conspiracy to "'improperly influence[] physician[s]" to make referrals by "sending them on lavish vacations" and providing other material benefits. *Cockerell*, 140 F.4th at 220. In other words, the case involved classic kickbacks. The Fifth Circuit thus distinguished its decisions in *Marchetti* and *Miles* on the ground that there the relevant third parties "did not prevent physicians from independently choosing whether to authorize care," whereas the "lavish vacations and offerings of investment in management services organizations are evidence of such impermissible influence." *Id.* That is the critical distinction the Ninth Circuit elided here. *Supra* pp. 9-10.

4. Although Schena may not contend the First and Eleventh Circuits' decisions are in "square conflict" with the Ninth Circuit's (BIO 14), these decisions upheld kickback convictions *because* the defendants paid money to the referring party.

Guilfoile v. Shields, 913 F.3d 178, 183-84, 192 (1st Cir. 2019); *United States v. Vernon*, 723 F.3d 1234, 1253 (11th Cir. 2013). They thus stand in significant tension with the Ninth Circuit's holding that no such payments are required. Pet. 26. The government offers no meaningful response. BIO 14-15.

III. THE GOVERNMENT IDENTIFIES NO VEHICLE PROBLEM

Finally, the government contends the Court should deny this petition as interlocutory, asserting it would be more efficient for Schena to raise this EKRA issue in a subsequent appeal that may never come. BIO 7-8. The sole issue on which the Ninth Circuit remanded—the redetermination of restitution (if any) for Schena's separate securities-fraud convictions (Pet. App. 26a-27a)—has no bearing on Shena's EKRA convictions, which are now final.

As the government has previously recognized, this Court often "reviews interlocutory decisions that turn on the resolution of important legal issues." Gov't Cert. Reply Br. 5, *Azar v. Garza*, 584 U.S. 726 (2018) (No. 17-654). That is all the more true where, as here, nothing that happens in the lower courts could affect this Court's review of the question presented. This Court has not hesitated to grant certiorari to consider the validity of criminal convictions that are final, even if the circuit court has vacated and remanded on other issues. *See, e.g.*, *Van Buren v. United States*, 593 U.S. 374, 380 n.1 (2021); *Smith v. United States*, 568 U.S. 106, 108-09 & n.1 (2013).

Schena stands convicted of multiple EKRA violations, and the Ninth Circuit's decision affirming those convictions resolved a critical question of statutory interpretation that will have significant implications for countless criminal defendants going forward. The government identifies no good reason for this Court's consideration of this important legal question to await the district court's redetermination of Schena's restitution on an unrelated count, which may or may not lead to a subsequent appeal of that award.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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