No. 25-7598

ORIGINAL

In the

Supreme Court of the United States

DAVID HOBART PAYNE, M.D.,

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

PETITION FOR A WRIT OF CERTIORARI

DAVID HOBART PAYNE, M.D.
Petitioner Pro Se
9 Parma
Irvine, California 92602
(714) 271-9112
drdavidpayne@gmail.com
Dated: May 5, 2026

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1346 honest-services fraud may rest on a theory that managed-care physicians are fiduciaries to their patients, where the United States persuaded this Court to adopt the contrary position in *Pegram v. Herdrich*, 530 U.S. 211 (2000), and the contradiction was undisclosed at every level of the proceedings below.

2. Whether *Pegram*'s holding that fiduciary doctrine "translates into no rule readily applicable to HMO decisions or those of any other variety of medical practice," 530 U.S. at 233, forecloses § 1346 fiduciary liability for physicians operating within California's constitutionally closed Workers' Compensation Medical Provider Network — and whether the Ninth Circuit's contrary holding in *United States v. Solakyan*, 119 F.4th 575 (9th Cir. 2024), conflicts with the Sixth Circuit *en banc* in *Jackson v. Sedgwick Claims Management Services, Inc.*, 731 F.3d 556 (6th Cir. 2013).

3. Whether the Tenth Amendment, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), permit federal courts to impose common-law fiduciary duties on physicians within California's Workers' Compensation system — a system the State, by sovereign constitutional act under Article XIV, § 4, has expressly cleared of common-law content for over a century.

4. Whether the Fifth Amendment Grand Jury Clause, the Sixth Amendment right to jury determination of every offense element, and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), forbid (a) trying a defendant on a theory the grand jury did not return; (b) instructing the jury on a state-law Travel Act predicate without including the operative statutory exception that the defendant's conduct satisfied; and (c) applying a 2024 judicial expansion of § 1346 retroactively to 2008–2013 conduct.

PARTIES TO THE PROCEEDINGS

Petitioner David Hobart Payne, M.D., was the defendant in the district court and the appellant in the court of appeals. Respondent United States of America was the plaintiff in the district court and the appellee in the court of appeals.

RELATED PROCEEDINGS

- *United States v. David Hobart Payne, M.D.*, No. 8:17-cr-00053-JLS (C.D. Cal.) (judgment of conviction; Hon. Josephine L. Staton).

- *United States v. David Hobart Payne, M.D.*, No. 23-1592 (9th Cir.) (judgment April 8, 2025; rehearing and rehearing en banc denied February 6, 2026; mandate February 17, 2026).
- *State Compensation Insurance Fund v. Drobot, et al.*, No. CV 13-00956-AG (CWX) (C.D. Cal.) (related civil RICO action; Petitioner not a party).

TABLE OF AUTHORITIES

Cases

Stirone v. United States, 361 U.S. 212 (1960)

Sullivan v. Louisiana, 508 U.S. 275 (1993)

Taylor v. Superior Court, 47 Cal. 2d 148 (1956)

Unruh v. Truck Insurance Exchange, 7 Cal. 3d 616 (1972)

Vacanti v. State Compensation Ins. Fund, 24 Cal. 4th 800 (2001)

Western Indemnity Co. v. Pillsbury, 170 Cal. 686 (1915)

Constitutional Provisions

U.S. Const. amend. V; U.S. Const. amend. VI; U.S. Const. amend. X; Cal. Const. art. XIV, § 4

Federal Statutes

15 U.S.C. § 1012(b); 18 U.S.C. § 371; 18 U.S.C. § 1343; 18 U.S.C. § 1346; 18 U.S.C. § 1952(a)(3); 28 U.S.C. § 1254(1)

State Statutes

Cal. Bus. & Prof. Code § 650; Cal. Civ. Code § 1798.82; Cal. Corp. Code § 13400 et seq.; Cal. Ins. Code § 750; Cal. Lab. Code §§ 139.3, 3751, 4062(b), 4600, 4603.2, 4610, 4610.5, 4616, 5300, 5307.27, 5708; Workmen's Compensation, Insurance and Safety Act of 1913 (Boynton Act), Stats. 1913, ch. 176

Rules

Sup. Ct. R. 13.3; Sup. Ct. R. 14; Sup. Ct. R. 33.1

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Hobart Payne, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The federal courts below sustained the prosecution of a California Workers' Compensation physician under 18 U.S.C. § 1346 on a theory that contradicts seven separate sources of authority: the California Constitution, which removed the common law from the WC system 113 years ago; the United States Constitution's reservation of state sovereignty; the federal Health Maintenance Organization Act of 1973; the Rehnquist Court's unanimous decision in *Pegram v. Herdrich*, 530 U.S. 211 (2000); the position the United States itself advanced to this Court in *Pegram*; the California Labor Code, which constitutionally imported the HMO managed-care architecture into the WC system; and the express statutory safe-harbors of Cal. Bus. & Prof. Code § 650(b) that protect the conduct charged. The questions presented are whether such a prosecution can stand.

The Ninth Circuit's memorandum disposition affirming Petitioner's conviction is reproduced at App. A. The order denying panel rehearing and rehearing en banc is reproduced at App. B. The District Court's judgment of conviction is reproduced at App. C.

JURISDICTION

The Ninth Circuit entered judgment on April 8, 2025. App. A. Panel rehearing and rehearing en banc were denied on February 6, 2026. App. B. The mandate issued February 17, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition is timely under Sup. Ct. R. 13.3.

Petitioner was granted leave to proceed *in forma pauperis* by the United States Court of Appeals for the Ninth Circuit in *United States v. Payne*, No. 23-1592, by Order of August 11, 2023 (DktEntry 9.1). App. B-1. Pursuant to Sup. Ct. R. 39.1, Petitioner proceeds in this Court *in forma pauperis* as a matter of course, and no further affidavit is required.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions — including U.S. Const. amends. V, VI, and X; Cal. Const. art. XIV, § 4; 18 U.S.C. §§ 1343, 1346, 1952; 15 U.S.C. § 1012(b); Cal. Bus. & Prof. Code § 650; and Cal. Lab. Code §§ 139.3, 4600, 4603.2, 4610, 4610.5, 4616, 5708 — are reproduced at App. D.

STATEMENT OF THE CASE

A. The Constitutional and Statutory Framework. California's Workers' Compensation system was created in 1913 by the Workmen's Compensation, Insurance and Safety Act, Stats. 1913, ch. 176 (the "Boynton Act"), pursuant to plenary authority under Article XIV, § 4 of the California Constitution. This Court upheld state-level WC schemes as exercises of state sovereignty in *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917), recognizing each State's authority to construct its own workers' compensation system displacing common-law tort remedies. The California Supreme Court contemporaneously upheld California's system in

Western Indemnity Co. v. Pillsbury, 170 Cal. 686 (1915), describing the change as "radical, not to say revolutionary," *id.* at 692–93, and holding that the common-law tort framework had been displaced. The Legislature codified the categorical exclusion of common-law content from WC adjudication in Cal. Lab. Code § 5708. The Workers' Compensation Appeals Board ("WCAB") is the constitutional administrative tribunal vested with comprehensive jurisdiction, "binding upon all departments of the State government." Cal. Const. art. XIV, § 4; *Hustedt v. WCAB*, 30 Cal. 3d 329, 343 (1981).

California's WC system is structured as a statutory HMO for industrial injuries. The Legislature did not merely remove the common law; it constitutionally imported the HMO managed-care architecture in its place. The defining HMO cost-saving structures expressly detailed by Justice Souter in *Pegram* are present: the Medical Provider Network (§ 4616) is a closed-network treatment model; utilization review (§ 4610) is the prospective authorization mechanism; independent medical review (§ 4610.5) is the appeal mechanism; the Medical Treatment Utilization Schedule (§ 5307.27) sets approved treatments; the Official Medical Fee Schedule ("OMFS") (§ 4603.2) sets fees; the patient cannot pay (§ 3751); the carrier-administered Plan controls every consequential decision. The architecture satisfies every structural element this Court identified as defining an HMO in *Pegram v. Herdrich*, 530 U.S. 211, 218–22 (2000). *Pegram*'s protections apply *a fortiori*.

B. Petitioner's Practice and the Conduct Charged. Petitioner is a California-licensed orthopedic spine surgeon. He practices through David H. Payne, M.D., Inc. (Cal. Sec. of State No. C2456005, formed Jan. 15, 2003), a California professional corporation, and through Industrial Orthopedics. Between 2008 and 2013, Petitioner provided spinal surgical services to injured workers within California's WC system. His selection as a Primary Treating Physician was effected through Cal. Lab. Code § 4600 election letters drafted, signed, and sent by applicant attorneys representing the patients. His treatment recommendations were subject to UR. His fees were governed by OMFS. His professional corporation entered into service-related contractual relationships with Pacific Hospital of Long Beach. Petitioner additionally provided over $850,000 in charity surgical care to underserved patients whose treatment authorization had been denied. Petitioner is a salaried employee of his professional corporation; no money from Pacific Hospital came to Petitioner personally; bank accounts were never co-mingled; Petitioner's income did not change across the conduct period.

C. The Indictment, Trial, and Conviction. A grand jury returned a First Superseding Indictment in April 2018 charging Petitioner with conspiracy under 18 U.S.C. § 371 (Count One), honest-services wire fraud under 18 U.S.C. §§ 1343, 1346 (Counts Two and Three), and Travel Act offenses under 18 U.S.C. § 1952(a)(3) (Counts Four and Five). The Travel Act counts identified Cal. Bus. & Prof. Code § 650 and Cal. Ins. Code § 750 as state-law predicates. App. F. The District Court (Hon. Josephine L. Staton) presided over an eight-day jury trial commencing February 22, 2023. The Government conceded in its opening statement that Petitioner never consummated any deal with confidential informant Paul Randall. App. H at Tr. 98. The Court

instructed the jury that "the defendant owed a fiduciary duty to his patients," Court's Instruction No. 20, and instructed only on Cal. Bus. & Prof. Code § 650(a) — the prohibition — without instructing on § 650(b) — the operative *exceptions*. Court's Instruction No. 29; App. E. The jury convicted on all counts. Petitioner was sentenced to thirty-three months' imprisonment.

D. The Direct Appeal. The Ninth Circuit affirmed in *United States v. Payne*, No. 23-1592 (9th Cir. Apr. 8, 2025), relying on *United States v. Solakyan*, 119 F.4th 575 (9th Cir. 2024) — decided September 2024, eleven years after the latest conduct charged. *Solakyan* held that California WC MPN physicians "fall[] squarely within *Milovanovic*'s definition of a fiduciary relationship" and that fiduciary status is "a fact-based determination" for the jury. *Id.* at 585, 586. Panel rehearing and rehearing en banc were denied February 6, 2026. App. B. **E. Preservation and Why This Court May Reach the Questions Presented.** Trial counsel preserved one of the questions presented at the trial level. On January 3, 2022, defense counsel objected to the Government's proposed redaction of the First Superseding Indictment on the ground that the late-stage amendment was a prejudicial variance. Doc. 107 at 2; App. F-1. The Government conceded in that motion two material errors in the Indictment: that the wires alleged in Counts Two through Five did not pass through the Federal Reserve Bank in Dallas as alleged, and that the $16,597.44 check identified in Counts Three and Five was deposited into a different Wells Fargo account than the one alleged. The trial court granted the redaction over the defense objection and permitted the case to proceed on a redacted Indictment. The *Stirone* constructive-amendment question presented at Question Presented IV(a) and Reason VI, Section B, was preserved at the trial level.

The remaining questions presented were not raised in the District Court or on direct appeal. Trial counsel did not request the Cal. Bus. & Prof. Code § 650(b) instruction; did not develop the SB 1386 / data-breach defense to the Randall recording; did not introduce the $850,000 charity-care evidence; and did not raise the constitutional, *Pegram*-based, or *Vacanti*-based arguments presented here. Appellate counsel did not raise any of these arguments. The questions are nonetheless properly before this Court: the omission of an essential statutory exception that defines whether the conduct was unlawful at all is structural Sixth Amendment error, *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995); a federal court's exercise of authority overriding a State's constitutional displacement of common-law content is a structural defect counsel cannot waive by inaction, *cf. United States v. Cotton*, 535 U.S. 625, 630 (2002); and the *Bouie/Lanier* retroactivity question presented at Question Presented IV(c) was not foreseeable at the time of the conduct charged because the controlling decision (*Solakyan*) had not yet been issued.

REASONS FOR GRANTING THE PETITION

REASON I

***Pegram v. Herdrich* Forecloses the §1346 Fiduciary Predicate Within California's Constitutionally Closed Workers' Compensation System; *Solakyan*'s Use of *Milovanovic* Rewrote a State Constitution the Ninth Circuit Had No Authority to Rewrite.**

California has, by sovereign constitutional act under Article XIV, § 4, vested the Legislature with plenary power to create a "complete" system of workers' compensation. The common law was expressly removed from California's Workers' Compensation system by sovereign constitutional act under Article XIV, § 4 and the Boynton Act of 1913 — 113 years ago. Cal. Lab. Code § 5708 codifies its categorical exclusion. *Mathews v. Workmen's Comp. Appeals Bd.*, 6 Cal. 3d 719, 729 (1972). **The HMO managed-care architecture was constitutionally imported into California's WC system in 2003 — three years *after* this Court decided *Pegram* — through the Labor Code's utilization, treatment-standards, fee, and network provisions. The Labor Code is the "Plan."** Every analysis below proceeds from that constitutional foundation.

A. The Truncation Principle and the Drobot Demonstrative

In *Pegram v. Herdrich*, 530 U.S. 211 (2000), this Court held — unanimously, through Justice Souter — that managed-care physicians making mixed eligibility-and-treatment decisions are not fiduciaries. The Court located fiduciary status in the Plan, not the physician, and grounded its analysis in common-law trust doctrine. *Id.* at 222–26. That engine cannot run on California soil. The displacement traces to *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 692–93, 696 (1915) (the change is **"radical, not to say revolutionary"**; **"[a] person has no property, no vested interest, in any rule of the common law"**) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877)). *Pegram*'s engine fails to defeat fiduciary status here because it never starts.

The demonstrative is Michael Drobot. Drobot pleaded guilty to §1346 honest-services fraud. He was not Petitioner's patients' fiduciary — he owed no common-law duty (removed) and no § 139.3 duty (inpatient hospital relationships are outside § 139.3's enumerated services). **Drobot pleaded guilty to a crime he could not legally have committed in this system.** Petitioner was convicted of conspiring to commit that impossible crime — with a kingpin who, in his parallel third-party action, named twenty individuals and entities but did not name Petitioner. App. G.

B. *Pegram*'s Reasoning Binds Beyond ERISA

Four *Pegram* passages state binding propositions independent of ERISA. *Cohens v. Virginia*, 19 U.S. 264, 399–400 (1821). **First**, the universal-rationing principle: "no HMO organization could survive without some incentive connecting physician reward with treatment rationing." 530 U.S. at 220. **Second**, the "any other variety" clause: "this translates into no rule readily applicable to HMO decisions or those of *any other variety of medical practice*." *Id.* at 233. California's WC MPN is precisely such a variant. **Third**, the wholesale-attack foreclosure: such liability "would be nothing less than elimination of the for-profit HMO." *Id.* at 234. **Fourth**, the malpractice-collapse problem: treating mixed decisions as fiduciary breaches converts ordinary medical practice into federal litigation. *Id.* at 235. *Solakyan* converts those same decisions into federal felonies. The *Solakyan* panel did not engage these passages; *Solakyan*'s ERISA-cabining at 119 F.4th 588 was *per incuriam*.

C. Plan-as-Fiduciary; Attorney-as-Fiduciary; Materiality Untested

Pegram defined a "plan" as **"a scheme decided upon in advance . . . [comprising] a set of rules that define the rights of a beneficiary and provide for their enforcement."** 530 U.S. at 223. The Labor Code is exactly that. **The Labor Code is the Plan, and the Plan is the fiduciary.**

The personal fiduciary on the legal interface is the applicant attorney. *Neel v. Magana*, 6 Cal. 3d 176 (1971). The attorney drafts and signs the § 4600 election letter. The patient does not. Many WC claimants do not read English. The attorney knows the system, the doctors, and the hospital affiliations. **Patients did not choose Petitioner; their attorneys did, with full knowledge.**

Materiality must be tested against the actual decision-maker. *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Neder v. United States*, 527 U.S. 1, 16 (1999). The actual decision-maker for selection of Petitioner was the attorney. **The Government called no applicant attorney to testify.** Materiality on the only decision-maker who actually mattered was never tested.

D. The Six-Element Functional Capacity Test

Fiduciary status depends on capacity, not title. *United States v. Margiotta*, 688 F.2d 108, 125 (2d Cir. 1982); *United States v. Kensington Hospital*, 760 F. Supp. 1120, 1133 (E.D. Pa. 1991). Six elements measure capacity: superior knowledge; authority and discretion; statutory acknowledgment; constitutional ability to perform; contractual ability to perform; constructive ability to perform without economic self-destruction. The attorney satisfies all six. The MPN physician satisfies none. The decisive element is constructive: a physician who acted on independent fiduciary loyalty — disregarding UR, ignoring MTUS, billing outside OMFS — would be removed from the MPN under § 4616(a)(4), would have liens rejected, and would face professional discipline. **He would not be paid.** A duty that cannot be performed without economic destruction is illusory. *Cf. Pegram*, 530 U.S. at 220. ### E. *Milovanovic* Cannot Reach Petitioner

E.1. The "trust" illusion. The Ninth Circuit's expansion of §1346 to MPN physicians rests on a single rhetorical move: the invocation of *trust*. *United States v. Milovanovic*, 678 F.3d 713, 723–24 (9th Cir. 2012) (en banc), defined the informal fiduciary as one in "a trusting relationship in which one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise." *Solakyan* repeated the move: doctor-patient relationships fall within *Milovanovic* because patients trust physicians. 119 F.4th at 585. **That entire chain is illusory in this context.** Trust without operative capacity is meaningless. Trust without reliance is doctrinally empty. Reliance is the heart of fiduciary doctrine — and reliance requires that trust be the operative cause of conduct. In California's WC MPN system, no reliance flows through the physician because the system is designed so that reliance *cannot* flow through him. UR overrides physician recommendations. IMR overrides UR. The WCAB ultimately decides. The patient's reliance interface is the attorney, who navigates the system, talks to adjusters, and appears before the WCAB. **Trust cannot be conferred by title.** The only

context in which Petitioner could have generated legally cognizable trust was when he stepped outside the WC system entirely and provided over $850,000 in charity surgical care. That conduct was not the conduct the indictment reached, because charity care produces no kickback predicate.

E.2. The constitutional directive forbids what the federal courts did. Article XIV, § 4 declares: **"The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation . . . binding upon all departments of the State government."** Cal. Const. art. XIV, § 4 (quoted in full at *Hustedt*, 30 Cal. 3d at 343). Section 5708 codifies the displacement: WCAB hearings **"shall not be bound by the common law."** Federal courts applying state-law predicates are bound through *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), and the Tenth Amendment. **Neither the District Court nor the Ninth Circuit had constitutional authority to override that command.**

E.3. The Labor Code lacuna is a constitutional choice. The Legislature occupied disclosure with § 139.3, utilization with § 4610, appeal with § 4610.5, treatment standards with § 5307.27, fees with § 4603.2, and network participation with § 4616. **It did not create a provider fiduciary duty — express or implied.** That omission is a constitutional act. No court can supply by common-law importation what the Constitution has expelled.

E.4. *Milovanovic*'s engine is the common law. *Milovanovic* drew its informal-fiduciary doctrine from common-law trust cases. 678 F.3d at 723–24. Common-law fiduciary doctrine has not been operative in California's WC field for one hundred and thirteen years. **Milovanovic's engine cannot run here.**

E.5. The categorical inversion. *Milovanovic* had everything; Petitioner has nothing. Milovanovic held the credential, controlled the certification process, exercised independent discretion, and was the oversight rather than subject to it. Washington's licensing scheme conferred authority on him. Petitioner has no constitutional authority (Article XIV § 4 vests it in the Legislature), no statutory authority (the Labor Code creates none), no contractual authority (the MPN contract forbids it), and no constructive authority (deviation produces non-payment). *Milovanovic* operated outside any controlling plan; he *was* the controlling actor. Petitioner operates inside a constitutionally-mandated Plan that controls every aspect of the relationship — and under *Pegram*, the Plan is the fiduciary. **Subjection to the Plan is the constitutional opposite of being the fiduciary the Plan creates.** *Milovanovic* was a fiduciary because Washington's law allowed him to be one. Petitioner could not be a fiduciary because California's Constitution prevented it.

E.6. *Solakyan*'s use of *Milovanovic* was *per incuriam* and constitutionally unauthorized. *Solakyan* applied *Milovanovic* without engaging *Pegram*'s "any other variety of medical practice" language, without engaging California's constitutional expulsion of the common law, without engaging *Vacanti*'s holding that regulatory codes do not create gateways through

exclusivity (24 Cal. 4th 800, 818, 820–21 (2001)), and without engaging *Kensington*'s functional-capacity test. The bridge will not hold weight.

F. *Skilling*'s Core and *Lew*'s Structural Severance

Skilling v. United States, 561 U.S. 358 (2010), saved §1346 by confining it to the bribery-and-kickback core where fiduciary status was "usually beyond dispute." *Id.* at 407 n.41, 408–11. ***Solakyan*'s holding that fiduciary status is "a fact-based determination" for the jury, 119 F.4th at 586, is doctrinally wrong.** Fiduciary status is a question of *law* — not a question of fact. *Kensington Hospital*, 760 F. Supp. at 1132–33. Where, as here, California's Constitution has expressly removed the common law that supplies fiduciary doctrine, no jury is constitutionally permitted to *find* a fiduciary duty California has constitutionally extinguished. The very submission of fiduciary status to a lay jury — what *Solakyan* sanctions — confirms that *Skilling*'s "usually beyond dispute" core is breached. The vagueness problem *Skilling* solved returns. The rule of lenity, *Cleveland v. United States*, 531 U.S. 12, 25 (2000), and the fair-warning doctrine, *United States v. Lanier*, 520 U.S. 259, 266 (1997), forbid the result *Solakyan* reached.

Ninth Circuit precedent adds a structural defect that severs the §1346 chain regardless of whether harm is characterized as actual or intangible. *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989), held that "the intent of the scheme must be to obtain money or property from the one who is deceived." Convergence of deceived party and source of property is required. The Government's theory was that Petitioner deceived *patients*. Patients were not the source of money — they paid no portion of Petitioner's professional fees. Cal. Lab. Code § 3751. The carriers (and OMFS) were the source. The deceived party and the source of property are different parties. *Lew* severs the chain at the structural level — and does so whether the alleged loss is actual money (none was paid by patients) or intangible honest services (no fiduciary duty existed; no inducement flowed; no reliance attached). On any framing, the structure fails. ### G. *Solakyan* Categorically Distinguishable

Petitioner is not Solakyan. The two cases stand on opposite sides of every material line.

***Solakyan*'s posture:** outpatient diagnostic imaging facility owner. Cal. Lab. Code § 139.3 expressly enumerates "diagnostic imaging" and "outpatient surgery." Solakyan owed a § 139.3 duty and breached it. **Solakyan took cash. Solakyan paid cash.** 119 F.4th at 580–82.

Petitioner's posture: salaried employee of a California professional corporation, providing inpatient orthopedic surgical care. Section 139.3 does not enumerate inpatient hospital relationships or physician referrals to inpatient facilities. The Legislature, exercising plenary Article XIV § 4 authority, affirmatively chose what to include and what to exclude. **The omission is purposeful and constitutional.** No common-law disclosure duty under *Moore v. Regents*, 51 Cal. 3d 120 (1990), can be imported to fill the gap, because the common law was expressly removed. **Petitioner took nothing.** No evidence at trial linked Petitioner to one dollar in personal receipt. Bank accounts were never co-mingled. Petitioner's income did not change

across the conduct period. The Government conceded on Day 1 of trial: **"the evidence will show that the defendant is negotiating a separate bribe deal with Paul Randall on that recording. And that deal ultimately doesn't go through."** App. H at Tr. 98.

The categorical inversion is doctrinal as well as factual. *Solakyan* operated outside any constitutionally-imposed Plan; Petitioner operated entirely within California's constitutionally-mandated Plan. *Solakyan* was a paying party in a cash-and-kickback structure of his own design; Petitioner was a service provider within a Plan whose every consequential decision — authorization, treatment standards, fees, network participation — was allocated to other actors. **Solakyan had every fiduciary capacity element. Petitioner has none.** Reasons I.D and IV.A.

Petitioner's recorded conversation with Randall served a *statutory duty*. Cal. Civ. Code § 1798.82 (SB 1386) required Petitioner, upon learning that approximately fifty patients' identities had been compromised, to investigate the breach. Drobot testified that Randall had stolen from Pacific Hospital. Randall later stole tens of thousands of identities in a multi-hundred-million-dollar fraud while continuing as a government informant. Petitioner sought to thwart that. The Government characterized SB 1386–compliant conduct as criminal intent.

H. Cert Is Warranted

The conflict is direct: *Pegram* holds managed-care physician decisions translate "into no rule readily applicable" beyond ERISA, 530 U.S. at 233; *Solakyan* holds the opposite. Both cannot be true. The Sixth Circuit *en banc* has held federal racketeering statutes do not reach the WC field. *Jackson v. Sedgwick*, 731 F.3d at 569. The federalism stakes govern California's eighteen million workers and thousands of MPN physicians. The vagueness stakes return §1346 to the unbounded statute *Skilling* held cannot stand. **The Court should grant review.**

REASON II

California's WC System Rests on a Sovereign Constitutional Grant Federal Honest-Services and Travel Act Prosecutions May Not Override.

Cal. Const. art. XIV, § 4 vests the Legislature with plenary power. Section 5708 codifies its categorical exclusion. **The common law was expressly removed 113 years ago; the HMO architecture was constitutionally imported in its place 100 years later — and 3 years after this Court decided *Pegram*.** The federal courts cannot reach into a constitutional state system to impose duties the State has constitutionally expelled.

A. Article XIV, § 4 Is Plenary, Binding, and Continuously Reaffirmed

Article XIV, § 4 vests the Legislature with **"plenary power, unlimited by any provision of this Constitution,"** and declares the system **"binding upon all departments of the State government."** Cal. Const. art. XIV, § 4. The grant is plenary and unlimited. California courts have characterized it as conferring "complete, absolute, and unqualified power." *Bautista v. State of California*, 201 Cal. App. 4th 716, 727 (2011).

The Boynton Act of 1913 exercised that power. Section 22: **"All proceedings . . . shall be instituted before the commission, and not elsewhere."** Stats. 1913, ch. 176, § 22. Section 90: **"All acts or parts of acts inconsistent with this act are hereby repealed."** *Id.* § 90. The displacement is continuous. *Western Indemnity*, 170 Cal. at 696 (no vested interest in common law); *Mathews*, 6 Cal. 3d at 729 (**"plenary power, unlimited by common law rules"**); *Smith v. WCAB*, 46 Cal. 4th 272 (2009).

B. *Vacanti* Forecloses Regulatory-Code Gateways Around Exclusivity

The Government's Travel Act predicate — Cal. Bus. & Prof. Code § 650 — is not a Labor Code provision. It is a regulatory provision drawn from outside the WC field. *Vacanti v. State Compensation Ins. Fund*, 24 Cal. 4th 800 (2001), forbids the importation. *Vacanti* anchored the architecture in Article XIV, § 4: "Pursuant to this authority, the Legislature enacted the WCA — a comprehensive statutory scheme . . . ." *Id.* at 810. The Court held that "the workers' compensation system encompasses all disputes over coverage and payment." *Id.* at 818. The Court extended exclusivity to "injuries arising out of and in the course of the workers' compensation claims process," *id.* at 815, and held that "lien claimants 'derive from' the rights of injured employees. Therefore, plaintiffs stand in the place of the employees with respect to claims for workers' compensation benefits." *Id.* at 816.

The narrow "stepped out" exception, *id.* at 820, was not invoked or adjudicated. A physician's selection of a fully-authorized facility within the MPN architecture is the paradigm of in-process conduct. The Government chose § 650 as the Travel Act predicate because the Labor Code itself contains no anti-kickback provision applicable to in-MPN inpatient hospital arrangements. Faced with that gap, the Government reached outside the Labor Code. *Vacanti* forbids that move.

The Government's § 371 conspiracy charge does not escape *Vacanti*. This is not a RICO prosecution; it is § 371 conspiracy plus §§ 1343/1346 honest-services and § 1952 Travel Act. *Vacanti* defined the narrow exceptions to WC exclusivity by reference to *Shoemaker v. Myers*, 52 Cal. 3d 1 (1990), and *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992) (public-policy violation), and to *Unruh v. Truck Insurance Exchange*, 7 Cal. 3d 616 (1972), and *Fermino v. Fedco*, 7 Cal. 4th 701 (1994) (dual-actor harm). 24 Cal. 4th at 811–14. A bare § 371 conspiracy among in-process WC actors satisfies neither test: it does not violate a *Tameny / Shoemaker* fundamental public policy independent of the WC bargain itself, and it does not create the dual-persona harm *Unruh* and *Fermino* require for the carrier-as-tortfeasor exception. The Government invoked exceptions it never analyzed and never satisfied.

C. The Sixth Circuit *En Banc* Stands With This Court's Federalism Precedents

The Sixth Circuit, sitting *en banc*, has squarely held: "RICO is not the proper remedy for injuries resulting from the denial of workers' compensation benefits, even if the denial is fraudulent." *Jackson v. Sedgwick*, 731 F.3d at 569. The Ninth Circuit's posture is the inverse — treating California's constitutional WC system as a stage on which federal honest-services and Travel Act prosecutions proceed without federalism engagement. **That is a square circuit conflict.**

This Court's federalism precedents point uniformly the same way. *New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1917) (upholding state WC statutes as exercises of state sovereignty); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715 (1985) ("regulation of health and safety matters is primarily, and historically, a matter of local concern"); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Erie*, 304 U.S. at 78. *Pegram* itself declined to use ERISA fiduciary doctrine to federalize state-law medical practice. 530 U.S. at 235. The reasoning applies *a fortiori* in §1346 prosecutions premised on a state *constitutional* grant.

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), supplies a complementary statutory floor: federal statutes do not override state insurance regulation absent specific congressional intent. Sections 1346 and 1952 do not "specifically relate to" insurance regulation. California's WC system is, in substantial part, state-mandated workers' compensation insurance.

The federalism principle cuts both ways. The California Supreme Court has held — over federal objection — that state WC protections extend to all workers, including those whose employment status would, under federal law, exclude them. *Salas v. Sierra Chemical Co.*, 59 Cal. 4th 407 (2014) (state employment protections apply regardless of federal immigration status, with limited remedy carve-outs). Federal law cannot *export* federal exclusions out of California's WC system any more than it can *import* common-law content into California's WC system. Both would override the State's plenary constitutional authority. The federal courts below did the second; they would never be permitted to do the first.

D. Federalism Stakes; Cert Warranted

California's WC system covers approximately eighteen million workers and processes more than six hundred thousand claims annually. The federalism stakes extend beyond California. **Approximately twenty-five States operate workers' compensation systems backed by State Compensation Insurance Funds — including Ohio, Washington, North Dakota, Wyoming, West Virginia (monopoly state-fund jurisdictions); New York, Pennsylvania, Maryland, Colorado, Texas, Utah, Idaho, Montana, Arizona, Hawaii, Kentucky, Louisiana, Maine, Minnesota, Missouri, New Mexico, Oklahoma, Oregon, Rhode Island (competitive state-fund jurisdictions); and others.** Each State has, by its own sovereign constitutional or statutory act, displaced the common law and built a managed-care WC architecture analogous to California's. After *Solakyan*, every physician practicing in every state-fund or constitutionally-displacing WC jurisdiction faces §1346 fiduciary exposure for conduct each State's law authorized — on a "fact-based determination" consigned to lay juries. *Pegram* itself was not a California decision. This Court's holding that fiduciary doctrine "translates into no rule readily applicable to HMO decisions or those of any other variety of medical practice," 530 U.S. at 233, was a *national* declaration about managed-care physicians. *Solakyan*'s contradiction creates §1346 exposure inconsistent with this Court's own precedent across every state-fund and constitutionally-displacing WC jurisdiction in the country. The doctrinal asymmetry is structural: insurance carriers invoke *Pegram*'s Plan-as-Fiduciary holding as a *shield* against fiduciary liability for their own coverage decisions, while *Solakyan* converts the same doctrine into a

sword against the physicians who deliver care within the carrier-administered Plan. The Plan is the fiduciary; the physician is not — *until* the prosecutor charges the physician, at which point the same architecture supposedly transmutes him into one. That sword-and-shield asymmetry cannot survive *Pegram* or this Court's federalism precedents. *Bond v. United States*, 572 U.S. 844, 858 (2014); *Cleveland*, 531 U.S. 12; *McDonnell*, 579 U.S. 550, 575 (2016). **The Court should grant review.**

REASON III

The WCAB Has the Constitutional Ministerial Duty to Make Jurisdictional Determinations First; The Federal Court Adjudicated Without That Determination Ever Being Made.

California's constitutional architecture is enforced by a sequencing rule the federal court below ignored.

A. The *Scott* / *Taylor* Sequencing Rule

In *Scott v. Industrial Accident Comm'n*, 46 Cal. 2d 76 (1956), the California Supreme Court held: "the only point of concurrent jurisdiction of the two tribunals appears to be jurisdiction to determine jurisdiction; jurisdiction once determined will be exclusive, not concurrent." *Id.* at 83. The first-invoked tribunal retains jurisdiction. *Id.* at 81.

Eight months later, *Taylor v. Superior Court*, 47 Cal. 2d 148 (1956), restated the rule: "the question of which shall have exclusive jurisdiction shall be determined by the tribunal whose jurisdiction was first invoked, and proceedings in the [second] tribunal . . . will . . . be halted by prohibition until final determination." *Id.* at 149–50. The second tribunal "should not try the case until the [first tribunal] has made a final determination." *Id.* at 151. The duty to inquire is the *tribunal's*, not the parties'. *Id.* at 150–51.

B. *Hollingsworth* Reaffirms the Mandatory Bilateral Rule

The California Court of Appeal reaffirmed *Scott* and *Taylor* in *Hollingsworth v. Superior Court*, 37 Cal. App. 5th 927 (2019). "Pursuant to constitutional mandate, the Legislature has vested the [WCAB] with exclusive jurisdiction over claims for workers' compensation benefits. . . . The only point of concurrent jurisdiction of the two tribunals is jurisdiction to determine jurisdiction; jurisdiction once determined is exclusive, not concurrent." *Id.* at 930–31 (quoting *La Jolla Beach & Tennis Club v. Indus. Indem. Co.*, 9 Cal. 4th 27, 35 (1994)). The court applied the rule bilaterally: "the trial court erred by deferring to the WCAB to determine jurisdiction" and "the WCAB erred by proceeding without deference to the superior court." *Id.* at 931. Practical convenience does not suspend the rule: "We decline to disregard clear Supreme Court precedent simply because the trial court avoided the potential for inconsistent rulings." *Id.* at 936.

C. The WCAB Was the First-Invoked, Continuously-Exercising Tribunal

Every patient whose treatment formed the predicate of the prosecution had filed a WC claim. Each was assigned an ADJ number. Each was treated through the MPN architecture under §

4616. Each treatment was authorized through UR. Each fee was billed under OMFS. The WCAB's jurisdiction was continuously exercised. *Vacanti*, 24 Cal. 4th at 815.

Under *Scott*, *Taylor*, and *Hollingsworth*, the WCAB had the constitutional ministerial duty to make any jurisdictional determination first. The federal district court — applying state-law predicates under *Erie* — had the duty to defer until that determination was made. **No WCAB proceeding determined that Petitioner's MPN-treatment-and-referral conduct fell outside the compensation bargain.** The federal court did not stay proceedings, did not seek a *Vacanti* analysis, did not perform an independent jurisdictional inquiry. Every overt act in the indictment was an act within the compensation bargain. *See* App. F.

D. *Vacanti* Confirms Provider Standing Within the Bargain

Vacanti held — squarely and unanimously — that medical providers stand in the employees' shoes within the bargain. 24 Cal. 4th at 816 ("WCAB has exclusive jurisdiction over all claims for compensation against an employer or insurance carrier involving medical, surgical and hospital treatment to injured employees"). The narrow "stepped out" exception does not apply: a physician's selection of a fully-authorized MPN facility for surgery on patients whose claims were authorized through the system's own processes is the paradigm of in-process conduct.

E. *Beverly Hills Multispecialty Group* Confirms Providers' Due-Process Rights Within the Bargain

The California Court of Appeal has squarely held that medical providers within the WC system possess full due-process rights — the rights the WCAB never afforded Petitioner before federal prosecution proceeded. *Beverly Hills Multispecialty Group, Inc. v. WCAB*, 26 Cal. App. 4th 789 (1994). In a consolidated proceeding involving fraud allegations against a provider group, the Court of Appeal held that providers were denied due process when they did not receive notice of fraud allegations, defense reports were not served, and cross-examination and objections were curtailed. *Id.* at 792, 803–04. The Court annulled all WCAB decisions. *Id.* at 807.

The Court grounded its holding in the constitutional priority of due process: although Article XIV § 4 prizes expedition, **"the right to due process is paramount to the goal of conducting workers' compensation proceedings expeditiously."** *Id.* at 803. **"Denial of a fair trial to a lien claimant is reversible per se."** *Id.* at 804. *Vacanti* expressly relied on *Beverly Hills*. 24 Cal. 4th at 816.

The federal proceeding inverts this rule. The fraud theory was a *new issue* — a dispute "arising out of or incidental to" the compensation bargain that the WCAB had constitutional jurisdiction to adjudicate first. No notice, no hearing, no appellate review. The federal prosecution proceeded as though *Beverly Hills*, *Vacanti*, *Scott*, *Taylor*, and *Hollingsworth* did not exist.

F. Cert Warranted

The Ninth Circuit's posture conflicts with seventy years of California Supreme Court jurisprudence and with this Court's *Erie* doctrine. The recurrence is certain. **The Court should grant review.**

REASON IV

The Fiduciary Predicate Is Illusory: Petitioner Lacked Every Capacity Element That Fiduciary Doctrine Requires.

California's WC system is constitutionally a statutory HMO; common law was removed.

A. Functional Capacity Is the Test, and It Is Categorically Absent

Federal courts have long held that fiduciary status cannot be unilaterally imposed. *Margiotta*, 688 F.2d at 125; *Kensington Hospital*, 760 F. Supp. at 1133 (dismissing fiduciary-duty-based fraud counts where physicians lacked "the power and control sufficient to find a fiduciary relationship"); *City of Harrisburg v. Bradford Trust Co.*, 621 F. Supp. 463, 473 (M.D. Pa. 1985). *Pegram* applies the same functional test in the ERISA context. 530 U.S. at 222–24.

Petitioner satisfies none:

- **Authority and control:** Absent. The MPN physician does not select himself: the attorney does (§ 4600). The physician does not control authorization (§ 4610), review (§ 4610.5), spinal-surgery determinations (§ 4062(b)), or fees (§ 4603.2). California's WC system reserves the presumption of correctness not for the treating physician but for the MTUS (§ 4604.5) and the UR/IMR physicians who serve as agents of the carrier. The treating physician's recommendation is the *starting point* of the system's review process, not its dispositive determination.

- **Statutory acknowledgment of physician fiduciary status:** Absent. The Labor Code does not assign physicians fiduciary status. *Vacanti*, 24 Cal. 4th at 816 (providers are lien-claimant participants whose rights "derive from" employees' rights). Section 139.3 is a disclosure statute, not a fiduciary statute.

- **Constitutional ability:** Absent. Article XIV, § 4 vests plenary authority in the Legislature; § 5708 categorically excludes common law.

- **Contractual ability:** Absent. The MPN provider contract under § 4616 contractually requires deference to UR, adherence to MTUS, and submission to credentialing and removal.

- **Constructive ability:** Absent and dispositive. A physician acting on a *Moore*-style loyalty duty would suffer removal, lien rejection, and discipline. **He would not be paid.**

A duty that cannot be performed without economic destruction is illusory. *Cf. Pegram*, 530 U.S. at 220.

B. The Applicant Attorney Is the Personal Fiduciary the Architecture Recognizes

The attorney satisfies all six capacity elements: WC-specialty knowledge; decisional authority through the § 4600 letter, QME selection, AME negotiation, UR objection, and IMR initiation; statutory acknowledgment under *Neel*, 6 Cal. 3d 176, and §§ 4906, 5710, 5801; contractual obligation via retainer; and constructive reward — compensation under §§ 4906, 5801 rises with successful advocacy. **The Government called no applicant attorney to testify.** Materiality under *Gaudin*, 515 U.S. at 509, was tested against the wrong decision-maker.

C. *Chiarella* Forecloses Liability for "Mere Silence" Without a Duty to Disclose

In *Chiarella v. United States*, 445 U.S. 222 (1980), this Court held that fraud liability premised on nondisclosure requires a duty to disclose. *Id.* at 235 ("[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak"). The Court rejected the Government's "constructive insider" theory. *Id.* at 230. *Chiarella* applies *a fortiori* to §1346 honest-services fraud premised on a physician's alleged failure to disclose. Petitioner owed no common-law duty (the common law was expressly removed). Petitioner owed no § 139.3 duty (inpatient hospital relationships are outside its enumerated services). Petitioner owed no constitutional or statutory duty (the Legislature, exercising plenary Article XIV § 4 authority, declined to create one). The Government cannot manufacture by indictment a disclosure duty California has constitutionally declined to impose.

D. *Solakyan*'s Jury-Question Framing Is Doctrinally Wrong; Fiduciary Status Is a Legal Determination

Solakyan held that fiduciary status is "a fact-based determination" for the jury. 119 F.4th at 586. That holding is doctrinally wrong. *Kensington Hospital* is emphatic that fiduciary status is a *legal* determination — not a jury question — when the regulatory architecture systematically removes the elements fiduciary doctrine requires. 760 F. Supp. at 1132–33 (dismissing fiduciary-based fraud counts as a matter of law where physicians lacked "the power and control sufficient to find a fiduciary relationship"). Where, as here, an entire class of regulated professionals operates under uniform regulatory architecture that constitutionally and systematically removes capacity, the proper resolution is categorical legal determination by the court, not case-by-case jury submission. *Solakyan*'s contrary submission to lay juries makes fiduciary status — the *Skilling* core element supposed to be "usually beyond dispute" — into the very question lay juries are asked to resolve. **The Court should grant review.**

REASON V

The DOJ Has Taken Diametrically Opposite Positions on Physician Fiduciary Status; Judicial Estoppel and the Candor Doctrines Forbid the Inconsistency.

Against California's constitutional WC architecture, the United States has taken two squarely contradictory positions on whether managed-care physicians are fiduciaries.

A. The Position the United States Took in *Pegram*

The Solicitor General filed an amicus brief in *Pegram*. The Court's unanimous holding — that mixed eligibility-and-treatment decisions by managed-care physicians are not fiduciary acts under ERISA — aligned with the position the United States advanced. 530 U.S. at 222–24, 233. The Court extended the reasoning: "this translates into no rule readily applicable to HMO decisions or those of any other variety of medical practice." *Id.* at 233.

B. The Position the United States Now Takes Against Petitioner

The Indictment alleged Petitioner, as a physician within California's WC MPN — a managed-care architecture *Pegram* described as a "variety of medical practice" — owed his patients a fiduciary duty whose breach supports §1346 liability. Indictment ¶¶ 15–16. The District Court so instructed: "the defendant owed a fiduciary duty to his patients." Instruction No. 20. The Ninth Circuit affirmed under *Solakyan*, which did not engage *Pegram* on the fiduciary question. The conduct — physician decision-making within cost-containment managed care — is the same; the characterization is opposite; the change is driven by prosecutorial preference.

C. Judicial Estoppel Forbids the Reversal

New Hampshire v. Maine, 532 U.S. 742 (2001): "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter . . . assume a contrary position." *Id.* at 749. Three factors guide application: inconsistency, prior success, and unfair detriment. *Id.* at 750–51. Each is satisfied: the positions are inconsistent on the central legal question; the *Pegram* Court adopted the United States' position unanimously; and Petitioner — and every physician whose 2008–2013 conduct was governed by *Pegram* — bears the concrete detriment of a thirty-three-month sentence for conduct that conformed to a regulatory architecture the United States had publicly endorsed as non-fiduciary. This Court has recognized estoppel against the government in appropriate circumstances. *Heckler v. Community Health Servs.*, 467 U.S. 51, 60–61 (1984).

D. *Loper Bright* Forecloses Deference

In *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), this Court held federal courts owe no deference to executive interpretation of ambiguous statutes. The Court determines the best reading. That principle applies *a fortiori* in the criminal context, where lenity supplies a thumb on the scale for the defendant. *Skilling*, 561 U.S. at 410–11; *Cleveland*, 531 U.S. at 25. The Government's progressive expansion of §1346 receives no deference. The United States' 2000 *Pegram* position is, at minimum, strong evidence of the statutory landscape.

E. Cert Warranted

May the United States, having persuaded this Court in 2000 that managed-care physicians do not occupy fiduciary roles, now prosecute them for honest-services fraud on the contrary position without engaging the inconsistency? *Loper Bright* and lenity say no on the merits. *New Hampshire v. Maine* and *Berger v. United States*, 295 U.S. 78, 88 (1935), say no on the equities. **The Court should grant review.**

REASON VI

The Prosecution Violated Three Independent Due-Process and Fifth Amendment Protections.

The federal courts below convicted Petitioner of conduct not foreseeably criminal, on charges the grand jury did not return, under a Travel Act predicate the jury was not permitted to evaluate completely.

A. The *Bouie/Lanier* Temporal Mismatch

Due process requires fair warning. *Lanier*, 520 U.S. 259, 266 (1997), grounds the requirement in vagueness, lenity, and the rule against retroactive judicial expansion. *Bouie v. City of Columbia*, 378 U.S. 347 (1964), forbids retroactive application of an unforeseeable expansion.

The conduct charged occurred 2008–2013. *Solakyan* — the decision that first applied *Milovanovic* to California WC MPN physicians — was decided **September 2024**. At the time of the conduct, no published Ninth Circuit decision held that WC MPN physicians owed §1346 fiduciary duties. *Milovanovic* itself was a court-interpreter case in a state-licensing context. The controlling Supreme Court precedent — *Pegram* — pointed the other way. **Solakyan is itself the unforeseeable expansion *Bouie* forbids.** That §1346 requires breach of *fiduciary duty* as predicate, *Skilling*, 561 U.S. at 408–09, means alternative state-law violations cannot cure the §1346-specific fair-warning failure. ### B. The Indictment Was Constructively Amended; The Variance Was Preserved at the Trial Level

The Fifth Amendment Grand Jury Clause forbids material amendment of an indictment except by resubmission. *Stirone v. United States*, 361 U.S. 212, 215–18 (1960). Constructive amendment is structural error. *United States v. Hartz*, 458 F.3d 1011, 1020 (9th Cir. 2006); *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002). **The variance objection in this case was preserved.**

1. The preserved objection. On February 22, 2022 — exactly one year before trial commenced — the Government filed a Motion to Redact the First Superseding Indictment for Use at Trial. App. F-1. The Government conceded two material errors in the Indictment. *First*, the Indictment falsely alleged that the interstate wires in Counts Two through Five passed through the Federal Reserve Bank in Dallas, Texas; the Government's own investigation revealed the wires went to Minnesota and then to New York, not Dallas. *Second*, the Indictment falsely alleged that the $16,597.44 check identified in Counts Three and Five was deposited into "PAYNE'S Wells

Fargo bank account ending in 1122"; the Government's own sworn declaration confirmed the deposit was to a different account ending in 5513. Doc. 107 at 3, 11; McNally Decl. ¶ 3. The Government characterized its own allegations as facts that "probably should not have [been] included in the first place." *Id.* at 4.

Defense counsel objected. The Government's own motion documents the objection: "The defense objects to the redaction on the grounds that an amendment at this late stage, where the trial was approximately a week away, is a prejudicial variance. The defense indicated that it would be unable to conduct a sufficient investigation or effectively ascertain the extent to which the government's variance inhibits its ability to prove its case beyond a reasonable doubt." Doc. 107 at 2; App. F-1. The trial court granted the redaction over the defense objection. The variance issue was preserved.

2. The Indictment's internal contradictions remain. Counts Two–Five alleged transfers to "PAYNE'S Wells Fargo bank account ending in 1122," a personal account. App. F. The conspiracy count and Overt Acts 9, 10, 12, 14–17, 22 — incorporated under ¶¶ 22, 26 — alleged that the same payments went to corporate entities (Industrial Orthopedics or David H. Payne, MD, Inc., a California professional corporation under Cal. Corp. Code § 13400 et seq.). The same transactions cannot simultaneously be transfers to both. One theory was constructively amended.

3. The temporal architecture compounds the defect. The conspiracy theory alleged that the IPM agreement induced Petitioner's referrals. Indictment ¶ 18(h)–(i). The IPM agreement was signed July 21, 2008. Indictment Overt Act 6. **But Overt Act 3 alleges Petitioner performed spinal surgery on patient A.H. on June 18, 2008 — five weeks *before* the IPM contract existed.** Surgeries that preceded the contract cannot have been induced by it. The structural impossibility extended beyond Overt Act 3. Cal. Lab. Code § 4062(b) imposed a mandatory spinal-surgery second-opinion procedure that, in practice, queued every spinal surgery for an average of one year — often substantially longer — between the treating surgeon's recommendation and the operating room. Every patient Petitioner operated upon at Pacific Hospital between 2008 and 2013 had, by statutory necessity, had the surgery requested months to years before the operative date — typically before the IPM arrangement was contemplated. The inducement theory is foreclosed by California's own statutory architecture: surgeries the Labor Code required to be queued through a multi-month administrative process cannot have been "induced" by a contract whose existence postdated the queue.

4. Convergence with legal impossibility. When *Stirone* is combined with the legal impossibility from Reasons I–II, the prosecution faces both legal and factual impossibility. **Drobot pleaded guilty to a §1346 crime he could not legally commit; named twenty individuals and entities as Third-Party Defendants, including five who later testified against Petitioner; and did not name Petitioner.** App. G.

5. The Government cannot have it both ways. The Government's Motion to Redact rested on the doctrine that material details in an indictment may be excised when the Government cannot

prove them, on the theory that they constitute "surplusage." Doc. 107 at 4–7 (citing *United States v. Miller*, 471 U.S. 130 (1985)). The Government cannot invoke the surplusage doctrine to excise *some* indictment defects while resisting the application of *Stirone* to the structural variance defects that remain.

C. The Travel Act Counts Suppressed the § 650(b) Exceptions

The Travel Act requires a valid state-law predicate. *United States v. Nardello*, 393 U.S. 286, 296 (1969); *Perrin v. United States*, 444 U.S. 37, 50 (1979). The District Court instructed only on § 650(a) — the prohibition. App. E. The Court did not instruct on **§ 650(b)**, which provides:

"The payment or receipt of consideration for services other than the referral of patients which is based on a percentage of gross revenue or similar type of contractual arrangement shall not be unlawful if the consideration is commensurate with the value of the services furnished or with the fair rental value of any premises or equipment leased or provided by the recipient to the payer."

The Sixth Amendment guarantees jury determination of every element. *Gaudin*, 515 U.S. at 522–23. Where a statutory exception defines what the statute does *not* prohibit, the trial court must so instruct where evidence supports application. *Mathews v. United States*, 485 U.S. 58, 63 (1988).

Petitioner's relationship with Pacific Hospital fell within multiple § 650(b) safe harbors, each independently dispositive. **First**, the arrangements were *service contracts* between a provider and an inpatient facility — payments based on services rendered, not on the referral of patients. § 650(b) expressly permits compensation paid for services. **Second**, Petitioner provided **over $850,000 in charity surgical care** to underserved patients — care provided without expectation of payment, an independent express exception within § 650's text. **Third**, the consideration paid was "consideration for services other than the referral of patients" — the textual safe-harbor language of § 650(b) itself. The jury was never told *any* of these exceptions existed. A "specific intent to violate § 650" cannot be found beyond a reasonable doubt by a jury that does not know what § 650 forbids and what it permits.

The Travel Act predicate fails on a second ground: regulatory codes drawn from outside the Labor Code cannot lawfully circumvent California's constitutional WC exclusivity. *Vacanti*, 24 Cal. 4th at 818, 820–21. *Vacanti* itself rejected this very technique: the carriers there sought to invoke Cal. Ins. Code §§ 1871–1873 to maintain claims outside the WCAB, and the California Supreme Court held that non-Labor-Code regulatory provisions cannot serve as gateways through exclusivity. *Id.* The Government's invocation of Cal. Bus. & Prof. Code § 650 and Cal. Ins. Code § 750 here is the same technique under a different code section, and it fails for the same constitutional reason. The predicate fails on a third ground specific to Cal. Ins. Code § 750. By its plain text, § 750 applies to "any person . . . who engages in the practice of processing, presenting, or negotiating claims, including claims under policies of insurance" — i.e., the

claims-handling and adjuster industry, not physicians delivering medical care. Petitioner is not in the business of "processing, presenting, or negotiating claims." Court's Instruction No. 29 quoted § 750 verbatim and yet directed the jury to apply it to a physician. App. E. The state-law predicate's text excludes the very class to which the District Court applied it.

D. Cert Warranted

Each defect is independently sufficient for reversal. The DOJ has prosecuted multiple WC physicians on the *Solakyan* theory for pre-2024 conduct; each faces the temporal-mismatch problem. The *Stirone* question is recurrent in §1346 prosecutions where the Government's theory shifts mid-prosecution. The Travel Act § 650(b) question — particularly the suppression of multiple express statutory exceptions the conduct satisfied — goes to the structural integrity of state-law predicates in federal Travel Act prosecutions. **The Court should grant review.**

CONCLUSION

The federal prosecution of Petitioner contradicted multiple constitutional and statutory authorities, none of which the courts below addressed.

It contradicted **the California Constitution**, which under Article XIV, § 4 vested the Legislature with plenary, unlimited power to create a "complete" workers' compensation system, and which constitutionally removed the common law from that system 113 years ago.

It contradicted **the United States Constitution** — the Tenth Amendment's reservation of state sovereignty, the Fifth Amendment Grand Jury Clause, the Sixth Amendment right to jury determination of every offense element, and the Due Process Clauses of the Fifth and Fourteenth Amendments.

It contradicted **the federal Health Maintenance Organization Act of 1973**, which Congress enacted to structure and encourage managed-care delivery. **The Rehnquist Court's unanimous decision in *Pegram v. Herdrich***, 530 U.S. 211, 232–235 (2000), authored by Justice Souter, held that the HMO Act's structure cannot coexist with imposing patient fiduciary duties on managed-care physicians. The DOJ's §1346 theory imposes precisely that incompatible duty.

It contradicted **this Court's own holding in *Pegram*** that fiduciary doctrine "translates into no rule readily applicable to HMO decisions or those of any other variety of medical practice." *Id.* at 233.

It contradicted **the position the United States itself advanced** to the Rehnquist Court in *Pegram* — a contradiction the Government did not disclose at the trial court, before the Ninth Circuit, or before this Court.

It contradicted **the California Labor Code**, which by sovereign legislative act has constitutionally imported the HMO managed-care architecture and allocated all decisional authority to the Workers' Compensation Appeals Board.

It contradicted **the express statutory exceptions of Cal. Bus. & Prof. Code § 650(b)** — service-contract, charity-care, and services-not-referrals safe harbors — each of which Petitioner satisfied and none of which the jury was permitted to consider.

The petition rests on conduct authorized by California's Constitution, sanctioned by the Rehnquist Court in *Pegram*, structurally protected by Congress's own HMO Act, and within California's express statutory safe-harbors. **The federal prosecution rests on no valid predicate in any legal theory under United States law.**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID HOBART PAYNE, M.D.

Petitioner Pro Se

9 Parma, Irvine, California 92602

714-271-9112

drdavidpayne@gmail.com

Dated: May 5, 2026