APPENDIX A

MEMORANDUM DISPOSITION

United States Court of Appeals for the Ninth Circuit

Filed April 8, 2025

APPENDIX A

MEMORANDUM DISPOSITION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

***United States v. David Hobart Payne*, No. 23-1592 (9th Cir.), Filed April 8, 2025**
The following Memorandum Disposition was filed by the Ninth Circuit on April 8, 2025, affirming Petitioner's conviction. The disposition is designated **NOT FOR PUBLICATION** under Ninth Circuit Rule 36-3. Reproduced verbatim:

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NOT FOR PUBLICATION

FILED APR 8 2025 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DAVID HOBART PAYNE, Defendant - Appellant.

No. 23-1592 D.C. No. 8:17-cr-00053-JLS-1

MEMORANDUM*

Appeal from the United States District Court for the Central District of California
Josephine L. Staton, District Judge, Presiding

Submitted March 28, 2025** Pasadena, California

Before: TASHIMA, NGUYEN, and MENDOZA, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3. ** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2). —

Defendant-Appellant David Payne ("Payne") appeals his jury conviction for conspiracy and substantive violations of the honest-services fraud statute, 18 U.S.C. § 371 (Conspiracy) and §§ 1343, 1346 (Wire Fraud Involving Deprivation of Honest Services), and for using an interstate facility in aid of unlawful activity under the Travel Act, 18 U.S.C. § 1952(a). On appeal, Payne challenges the sufficiency of the indictment on three grounds: (1) the scope of the honest-services fraud statute does not extend to physician-patient relationships; (2) honest-services fraud requires that the defendant cause or intend to cause some kind of tangible harm to the fraud victim, which the indictment did not allege; and (3) the Travel Act counts fail to state an offense because the California state offenses underlying the Travel Act counts are overbroad. With regard to the first and second grounds, Payne challenges the jury instructions as well.

We have jurisdiction under 28 U.S.C. § 1291. Preserved objections to jury instructions on the grounds that the instructions misstate or omit an element of the charged offense are reviewed de novo. *United States v. Anderson*, 741 F.3d 938, 945 (9th Cir. 2013). Absent an objection to the jury instruction, the court reviews for plain error. *Id.* Pre-trial challenges to the sufficiency of an indictment are reviewed de novo. *United States v. Qazi*, 975 F.3d 989, 992 (9th Cir. 2020). For challenges to the indictment made post-trial, plain error applies. *Id.* **We affirm.**

1. Payne's argument that his indictment was legally defective because the honest-services fraud statute does not extend to doctor-patient relationships is foreclosed by *United States v. Solakyan*, 119 F.4th 575 (9th Cir. 2024). In *Solakyan*, we considered whether the physician-patient relationship fell within our definition of a fiduciary relationship and held that it "squarely" does. *Id.* at 585. "[H]onest-services mail fraud, as proscribed by 18 U.S.C. §§ 1341 and 1346, encompasses bribery and kickback schemes that deprive patients of their intangible right to the honest services of their physicians."[1] *Id.* Accordingly, the indictment was sufficient, and the district court properly instructed the jury.

2. Payne's argument that honest-services fraud requires that the defendant cause or intend to cause some kind of tangible harm to the fraud victim is likewise squarely foreclosed by *Solakyan*. *Id.* at 587. There we held that "actual or intended tangible harm is not an element of honest-services fraud." *Id.* Thus, the indictment was sufficient, and the district court properly instructed the jury. Accordingly, Payne has not established any error, much less plain error, in his prosecution for honest-services wire fraud under §§ 1343 and 1346. **3.** Lastly, Payne challenges the sufficiency of the indictment on a third ground: the Travel Act counts are categorically overbroad and thus require dismissal. In his view, to serve as Travel Act predicates, the California bribery statutes must be categorical matches for generic bribery, but California's bribery statutes are too broad to serve as Travel Act predicates because generic bribery requires a finding of corrupt intent, which is absent from California's bribery statutes. Contrary to Payne's contention, the generic definition of bribery does not include an element of corrupt intent, and this Court recently held in *United States v. Shen Zhen New World I, LLC*, 115 F.4th 1167, 1185 (9th Cir. 2024), that the Travel Act's underlying state predicate offenses need not be categorical matches for generic bribery. Surveying the law as it existed in 1961, we conclude that generic bribery does not include an element of corrupt intent. *Id.* at 1183 ("The generic definition of bribery in 1961 thus controls what the Travel Act proscribes."); *United*

States v. Garcia-Jimenez, 807 F.3d 1079, 1084 (9th Cir. 2015) ("A court applying categorical analysis ordinarily surveys a number of sources—including state statutes, the Model Penal Code, federal law, and criminal law treatises—to establish the federal generic definition of a crime."). Turning to the second flaw in Payne's argument, *Shen Zhen* held that "[e]ven if broader, state law violations can serve as predicates under the Travel Act if the jury convicted the defendant based on elements that conformed to the generic definition of the crime." 115 F.4th at 1185. Thus, because the California statutes that Payne was convicted under include elements that conform to the generic definition of bribery, the indictment is sufficient.

AFFIRMED.

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[1] Although Payne was charged and convicted for wire fraud under 18 U.S.C. § 1343, *Solakyan*'s holding is equally applicable to him, as "[i]t is well settled that cases construing the mail fraud and wire fraud statutes are applicable to either." *United States v. Green*, 592 F.3d 1057, 1063 n.3 (9th Cir. 2010) (citation omitted); see also *United States v. Manion*, 339 F.3d 1153, 1156 (9th Cir. 2003) (per curiam) (noting that the elements of wire and mail fraud are the same).

Petitioner's Annotation

This four-page Memorandum Disposition is the entirety of the Ninth Circuit's engagement with Petitioner's appeal. Three observations material to the questions presented:

(i) The disposition expressly relies on *Solakyan*. The panel held Petitioner's first two grounds were "foreclosed by" *Solakyan*. *Solakyan* was decided **September 30, 2024** — eleven years after the latest conduct charged in this case (May 2008 through October 2013). The retroactive application of *Solakyan*'s 2024 expansion of *Milovanovic* to 2008–2013 conduct is the subject of Question Presented IV(c) and Reason VI, Section A (the *Bouie/Lanier* temporal mismatch).

(ii) The disposition relies on *Shen Zhen New World I* — also decided in 2024. The panel rejected Petitioner's Travel Act overbreadth argument by relying on *United States v. Shen Zhen New World I, LLC*, 115 F.4th 1167 (9th Cir. 2024) — another decision postdating the conduct charged. The retroactivity problem extends to the Travel Act counts as well.

(iii) The disposition does not engage *Pegram*, California's constitutional displacement of common-law fiduciary doctrine, *Vacanti*, or the omission of the § 650(b) jury instruction. The questions presented in this Petition were not addressed by the Ninth Circuit panel. The panel relied entirely on *Solakyan* and *Shen Zhen* and treated the appeal as foreclosed without engaging the constitutional, federalism, capacity, candor, or due-process issues this Petition raises.

APPENDIX A-1

OPINION

United States v. Solakyan, 119 F.4th 575 (9th Cir. 2024)

Filed September 30, 2024

APPENDIX A-1

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

***UNITED STATES v. SOLAKYAN*, 119 F.4th 575 (9th Cir. 2024)**
This appendix reproduces the dispositive portions of the Ninth Circuit's published opinion in *United States v. Solakyan*, 119 F.4th 575 (9th Cir. Sept. 30, 2024), which the panel below relied upon as the controlling precedent for affirming Petitioner's conviction. The full opinion is published at 119 F.4th 575 and is available at https://cdn.ca9.uscourts.gov/datastore/opinions/2024/09/30/22-50023.pdf.

Solakyan is currently before this Court on a separate petition for a writ of certiorari, *Solakyan v. United States*, No. 24-1066 (filed April 7, 2025), presenting overlapping but distinct questions regarding the tangible-harm requirement for honest-services fraud in private-sector cases. Petitioner's questions presented are doctrinally distinct: this Petition challenges the application of *Solakyan* to retroactive convictions arising in California's constitutionally closed Workers' Compensation system.

Caption
FOR PUBLICATION UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAM SARKIS SOLAKYAN, Defendant-Appellant. No. 22-50023 D.C. No. 3:18-cr-04163-BAS-1 Appeal from the United States District Court for the Southern District of California Cynthia A. Bashant, District Judge, Presiding Argued and Submitted October 17, 2023 Pasadena, California Filed September 30, 2024 Before: A. Wallace Tashima, Daniel P. Collins, and Gabriel P. Sanchez, Circuit Judges. Opinion by Judge Sanchez

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Summary (Court Staff)
The panel (1) affirmed Sam Sarkis Solakyan's conviction for (a) conspiracy to commit honest-services mail fraud and health-care fraud and (b) honest-services mail fraud and aiding and abetting; (2) vacated the district court's restitution order; and (3) remanded for further proceedings, in a case arising from a workers' compensation fraud that generated $263 million in claims.

Solakyan, the owner and operator of multiple medical-imaging companies, routed unsuspecting patients from complicit physicians and medical schedulers to his companies for superfluous magnetic resonance imagery ("MRI") scans and other medical services.

> Reviewing for plain error Solakyan's claim that his indictment was legally defective because the honest-services fraud statute does not extend to doctor-patient relationships, the panel held that honest-services mail fraud, as proscribed by 18 U.S.C. §§ 1341 and 1346, encompasses bribery and kickback schemes that deprive patients of their intangible right to the honest services of their physicians.

Section I — Factual Background of the Case

Solakyan was the senior executive or owner of several companies that operated medical diagnostic-screening facilities throughout California. From 2012 to 2016, Solakyan conspired with medical schedulers Carlos Arguello and Fermin Iglesias, who operated a company called MedEx Solutions ("MedEx"), to locate and direct patients to his companies for medically unnecessary MRIs. Arguello targeted uninsured, mostly undocumented, and non-English-speaking claimants who were generally unfamiliar with the state workers' compensation and health-care systems. Iglesias steered those patients to co-conspiring physicians, such as Dr. Steven Rigler, who agreed to generate orders for MRIs and other medical services and allowed MedEx to route those orders to providers. These providers included Solakyan's companies, which in turn paid bribes and kickbacks to Dr. Rigler, Iglesias, and Arguello.

On September 25, 2018, the Government filed a 12-count indictment charging Solakyan in Count 1 with conspiracy to commit honest-services mail fraud and health-care fraud in violation of 18 U.S.C. §§ 1341, 1346, 1347, and 1349; and in Counts 2 through 12 with honest-services mail fraud and aiding and abetting in violation of 18 U.S.C. §§ 1341, 1346, and 2.

*Solakyan was the senior executive of multiple **outpatient diagnostic-imaging** companies. Cal. Lab. Code § 139.3 expressly enumerates "diagnostic imaging goods or services" as services to which the disclosure regime applies. Solakyan therefore owed a § 139.3 statutory duty.*

Section II — Statutory Framework

Congress enacted the mail fraud statute, 18 U.S.C. § 1341, in 1872 "with the purpose of prohibiting use of the mails in furtherance of 'any scheme or artifice to defraud.'" *United States v. Milovanovic*, 678 F.3d 713, 720 (9th Cir. 2012) (en banc).

In 1987, the Supreme Court in *McNally v. United States* "rejected the entire concept of honest-services fraud and held that the mail fraud statute was 'limited in scope to the protection of property rights.'" *Percoco v. United States*, 598 U.S. 319, 327 (2023) (quoting *McNally*, 483 U.S. at 360).

> Congress "responded swiftly" the following year by enacting 18 U.S.C. § 1346 . . . In *Skilling*, the Supreme Court rejected the claim that 18 U.S.C. § 1346 was unconstitutionally vague and held that "§ 1346 covers the 'core' of pre-*McNally* honest-services case law and [does] not apply to 'all intangible rights of honest services whatever they might be thought to be.'" *Percoco*, 598 U.S. at 328 (quoting *Skilling*, 561 U.S. at 404–05). The Court defined the "core" cases as those "involv[ing] fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Skilling*, 561 U.S. at 404.

Section III.A — The Dispositive Holding (the Holding Reviewed in This Petition)
For the first time on appeal, Solakyan claims that his indictment was legally defective because the honest-services fraud statute does not extend to doctor-patient relationships. . . . Because Solakyan failed to properly raise below his contention that § 1346 does not apply to doctor-patient relationships, **we review that claim for plain error**.

The panel reviewed the threshold question — whether § 1346 fiduciary status extends to doctor-patient relationships — for ***plain error only****. The Ninth Circuit's substantive holding therefore rests on a "no clearly established error" standard, not on a de novo determination that physicians are § 1346 fiduciaries.*

In *Milovanovic*, we addressed whether breach of a fiduciary duty was a required element of honest-services mail fraud . . . . We held that "a fiduciary duty for the purposes of the Mail Fraud Statute is not limited to a formal 'fiduciary' relationship well-known in the law, but also extends to 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." [*Milovanovic*, 678 F.3d] at 724.

We now hold that under Skilling and Milovanovic, honest-services mail fraud, as proscribed by 18 U.S.C. §§ 1341 and 1346, encompasses bribery and kickback schemes that deprive patients of their intangible right to the honest services of their physicians.

The physician-patient relationship falls squarely within this definition of a fiduciary relationship. Few relationships rely on a greater degree of trust and confidence than the one between a patient and his or her physician. In a typical physician-patient relationship, the physician "is required to act for the benefit of [the patient] on all matters within the scope of their relationship," see id. at 722 (quoting *Fiduciary*, Black's Law Dictionary (9th ed. 2009)), using his or her specialized knowledge, expertise, and judgment to guide patients through health-care options, obtain their informed consent, and provide or facilitate treatment. Patients place a special confidence and trust in their doctors to provide medical advice that is solely in the patient's best interest and is free of any undisclosed personal or financial conflicts.

Whether a particular doctor-patient relationship gives rise to a fiduciary duty is a "fact-based determination" to be made by a properly instructed jury. Id. at 723.

The Ninth Circuit's holding rests on three propositions, each of which is the subject of the Petition:

(i) "Patients place a special confidence and trust in their doctors" — but in California's constitutionally closed Workers' Compensation system, patients place reliance on their applicant attorneys, not on the physicians whom the attorneys select. See Petition Reason I, Section E.1 (the trust illusion).

(ii) The "fiduciary" definition is grounded in Black's Law Dictionary's general formulation — but the panel did not engage California's constitutional displacement of common-law fiduciary doctrine within the WC field. See Petition Reason I, Section E.2; Reason II.

(iii) Whether fiduciary status exists is "a fact-based determination" — but this conclusion is itself a confession that fiduciary status is not "beyond dispute" within the Skilling core. See Petition Reason I, Section F.

Section III.A — The Panel's Per Incuriam Treatment of *Pegram* (the Critical Passage)

The following passage is the entirety of the Ninth Circuit's engagement with *Pegram v. Herdrich* and *In re Gergely* on the fiduciary question. Petitioner respectfully submits that the panel's treatment is *per incuriam* and is the central legal error this Petition asks this Court to correct.

Solakyan contends that § 1346 is meant to apply only when the "existence of a fiduciary relationship" is "beyond dispute," see *Skilling*, 483 U.S. at 407 n.41, and he identifies certain federal and state court cases that have declined to recognize a fiduciary duty arising from the doctor-patient relationship. See *In re Gergely*, 110 F.3d 1448, 1450–51 (9th Cir. 1997) (interpreting "fiduciary" in the Bankruptcy Code); ***Pegram v. Herdrich*, 530 U.S. 211, 231 (2000) (interpreting "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA")).** He contends that Congress did not intend for an expansive or inconsistent application of § 1346 by sweeping in cases involving physician-patient relationships.

We are not persuaded. *In re Gergely* addressed the meaning of "fiduciary" within a section of the Bankruptcy Code, and we specifically noted that "[t]he broad, general definition of fiduciary—a relationship involving confidence, trust, and good faith—is inapplicable." 110 F.3d at 1450 (citation omitted). ***Pegram* similarly dealt with a**

specialized definition of "fiduciary" within the meaning of ERISA, as "someone acting in the capacity of manager, administrator, or financial advisor to" an employee welfare benefit plan. 530 U.S. at 222. Neither case demonstrates that the district court committed "clear or obvious error" in instructing the jury on the general definition of fiduciary duty articulated in *Milovanovic* to determine if a comparable trusting relationship arose in the physician-patient interactions in this case.

Footnote 3 — The Ninth Circuit's Importation of California Common-Law Disclosure Doctrine

[3] California law also provides that physicians have a fiduciary duty to their patients to disclose all information material to the patient's health, whether medical or economic, that might affect a physician's professional judgment. See, e.g., *Cobbs v. Grant*, 502 P.2d 1, 11 (Cal. 1972) ("[T]he patient's right of self-decision is the measure of the physician's duty to reveal."); *Moore v. Regents of Univ. of California*, 793 P.2d 479, 483 (Cal. 1990) ("[A] physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment . . . .").

The panel's footnote 3 imports California common-law fiduciary disclosure doctrine — Cobbs v. Grant (1972) and Moore v. Regents (1990) — and applies it within California's Workers' Compensation system. Both cases are common-law tort decisions. Neither addresses the WC system. Both rest on common-law content that California's Constitution, by sovereign act under Article XIV, § 4, has expelled from the WC field for over a century. The panel's reliance on these common-law cases to manufacture a fiduciary duty within the WC field is precisely the constitutional error this Petition asks this Court to correct. See Petition Reason I, Section E; Reason II.

Section III.B — The Milovanovic Six-Element Framework

The panel reaffirmed that *Milovanovic* sets the limiting framework for § 1346 prosecutions:

In *Milovanovic*, we articulated the following "six limitations to the conduct susceptible to prosecution under the otherwise broad reach of the Mail Fraud Statute" and § 1346: (1) there must be a legally based enforceable right to the service at issue; (2) the value of the particular service must depend on honest performance, free from fraud or deception; (3) deprivation of those services must be in breach of a formal or informal fiduciary duty; (4) the defendant must possess a specific intent to defraud; (5) the defendant must misrepresent or conceal a material fact; and (6) participants must use the "mails or wires" to further the scheme. *Milovanovic*, 678 F.3d at 726 (cleaned up).

Petitioner's Petition argues that limitation (3) — "breach of a formal or informal fiduciary duty" — is structurally absent in California's constitutionally closed WC *system because the Legislature, exercising plenary Article XIV § 4 authority, did not create a provider fiduciary duty (express or implied) within the Labor Code. The Government cannot invoke a Milovanovic-derived "informal fiduciary" theory to manufacture a duty California's Constitution has expelled. See Petition Reason I, Section E.*

Petitioner's Annotation: Why Solakyan Is *Per Incuriam* and Categorically Distinguishable

The *Solakyan* panel's holding rests on three doctrinal failures, each of which the Petition asks this Court to correct:

1. The panel's dismissal of *Pegram* is *per incuriam*. The panel disposed of *Pegram* in a single sentence by characterizing it as "specialized" to ERISA. 119 F.4th at 588. The panel did not engage *Pegram*'s holding that the Court's reasoning extends to "any other variety of medical practice," 530 U.S. at 233 — language that on its face captures California's WC MPN architecture. The panel did not engage *Pegram*'s structural reasoning about cost-containment incentives in managed care, *id.* at 220. The panel did not engage *Pegram*'s wholesale-attack foreclosure, *id.* at 234, or its malpractice-collapse principle, *id.* at 235.

2. The panel did not engage California's constitutional displacement of the common law. The panel imported California common-law fiduciary doctrine from *Cobbs v. Grant* and *Moore v. Regents* — both pure common-law tort decisions outside the WC field — into a system that California's Constitution has expressly cleared of common-law content for over a century. Cal. Const. art. XIV, § 4; Cal. Lab. Code § 5708; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686 (1915); *Mathews v. WCAB*, 6 Cal. 3d 719, 729 (1972). The Ninth Circuit was not constitutionally privileged to do this.

3. The panel did not engage *Vacanti*. The panel did not engage *Vacanti v. State Compensation Insurance Fund*, 24 Cal. 4th 800 (2001), which forecloses regulatory-code gateways through California's WC exclusivity. *Id.* at 818, 820–21. The Ninth Circuit's importation of regulatory and common-law content into the WC field violated *Vacanti* on its face.

4. Solakyan is categorically distinguishable from Petitioner.

Factor	Solakyan	Petitioner
Service type	Outpatient diagnostic imaging	Inpatient orthopedic surgery
§ 139.3 coverage	Yes — "diagnostic imaging" expressly	No — inpatient hospital

Factor	Solakyan	Petitioner
	enumerated	relationships not enumerated
§ 139.3 disclosure duty	Yes (breached)	No (none owed)
Cash payments	Yes (hand-delivered envelopes per opinion)	No (only inter-corporate payments)
Financial structure	Personal payments to MRI company owner	Salaried employee of professional corporation
Money to defendant personally	Yes	No (project record confirms; bank accounts never co-mingled)
Patients	Uninsured, undocumented, non-English-speaking	Selected by applicant attorneys via § 4600 letters
Standard of review on the fiduciary question	Plain error (defendant did not preserve)	Same procedural posture, but converted by panel into binding precedent here

This Appendix is referenced at Petition Reason I, Section A (truncation principle); Reason I, Section B (Pegram's binding reasoning); Reason I, Section E (Milovanovic destruction); Reason I, Section G (Solakyan categorically distinguishable); and Reason II (constitutional foundation).

APPENDIX B

ORDER DENYING REHEARING EN BANC

United States Court of Appeals for the Ninth Circuit

Filed February 6, 2026

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR PANEL REHEARING AND REHEARING EN BANC

***United States v. David Hobart Payne*, No. 23-1592 (9th Cir.), Filed February 6, 2026**
The following Order was filed by the Ninth Circuit on February 6, 2026, denying Petitioner's timely petition for panel rehearing and rehearing en banc. The Order is reproduced verbatim from the Ninth Circuit's docket entry.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED FEB 6 2026 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee,

DAVID HOBART PAYNE, Defendant-Appellant.

No. 23-1592 D.C. No. 8:17-cr-00053-JLS-1

ORDER

Before: TASHIMA, NGUYEN, and MENDOZA, Circuit Judges.

Judge Nguyen and Judge Mendoza have voted to deny the petition for panel rehearing and rehearing en banc, and Judge Tashima so recommends. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and rehearing en banc, Dkt. No. 90, is DENIED.

Additional material from this filing is available in the Clerk's Office.