No. 24-1066

In the Supreme Court of the United States

SAM SARKIS SOLAKYAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346, based on a workers' compensation bribery scheme, required proof not only of a "scheme to deprive another of the intangible right of honest services," 18 U.S.C. 1346, but also an additional element that he describes as "contemplated harm," Pet. i.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 119 F.4th 575.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2024. A petition for rehearing was denied on January 22, 2025 (Pet. App. 37a). The petition for a writ of certiorari was filed on April 7, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiring to commit honest-services mail fraud and health care fraud, in violation of 18 U.S.C. 1349; and 11 counts of honest-

services mail fraud, in violation of 18 U.S.C. 2, 1341, and 1346. Am. Judgment 1. The court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release, and ordered him to pay $27,937,175 in restitution. *Id.* at 2-3. The court of appeals affirmed petitioner's conviction but vacated the restitution order and remanded for further proceedings. Pet. App. 1a-36a.

1. Petitioner owned and operated medical-imaging companies. See Pet. App. 2a. From 2012 to 2016, petitioner and two medical schedulers at a company called MedEx Solutions engaged in a workers' compensation bribery scheme—"one of the largest * * * ever uncovered" in San Diego County. *Id.* at 2a-3a.

In that scheme, the MedEx schedulers targeted uninsured, non-English-speaking workers who were unfamiliar with the workers' compensation and healthcare systems. See Pet. App. 3a-4a. The schedulers steered those patients to co-conspirator doctors, who agreed to generate orders for medically unnecessary services, including unnecessary magnetic resonance imagery (MRI) scans. See *id.* at 4a.

The schedulers routed those orders to petitioners' companies, and the companies in turn paid bribes and kickbacks to the doctors and schedulers. See Pet. App. 4a. The scheme's operation generated $263 million in workers' compensation claims. See *id.* at 2a.

2. A federal grand jury indicted petitioner on one count of conspiring to commit honest-services mail fraud and health care fraud, in violation of 18 U.S.C. 1349, and 11 counts of honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. Indictment 1-15.

Petitioner moved to dismiss the honest-services-fraud counts on the theory that the indictment

deficiently omitted an allegation that the fraud scheme contemplated a tangible loss to the patients. See D. Ct. Doc. 59-1, at 2, 9-10 (Aug. 21, 2019). The district court denied that motion. See C.A. E.R. 234-236, 249-250. Petitioner later asked the court to instruct the jury that it could find him guilty of honest-services fraud only if the government proved that "the individuals named in each count suffered economic harm." D. Ct. Doc. 175, at 6 (June 26, 2021). The court declined to give that instruction. See C.A. E.R. 824, 852-853.

A jury found petitioner guilty on all counts. Am. Judgment 1. The district court sentenced him to 60 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3. The court also ordered petitioner to pay $27,937,175 in restitution. *Id.* at 6.

3. The court of appeals affirmed petitioner's convictions, vacated the restitution order, and remanded the case for further proceedings. Pet. App. 1a-36a.

The court of appeals rejected petitioner's contention that the district court had been required to instruct the jury that it could find him guilty of honest-services fraud only if the government proved that the patients receiving unnecessary medical services had suffered "tangible harm." See Pet. App. 14a-21a. Declining to rely on a nearly three-decade-old Eighth Circuit decision that petitioner cited to support a contrary view, see *id.* at 17a (citing *United States* v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997)), the court explained that "actual or intended harm is not an element of honest-services fraud." *Id.* at 14a. It observed that the honest-services-fraud statute punishes "a scheme or artifice to deprive another of the *intangible* right of honest services." *Id.* at 19a (quoting 18 U.S.C. 1346).

The court of appeals emphasized that the text therefore "does not require tangible harm; indeed, it provides for the opposite." Pet. App. 19a. The court considered it "contradictory to require the government to show actual or intended *tangible* harm when the crime being prosecuted is defined as causing or intending to cause *intangible* harm." *Id.* at 20a (citation omitted). And the Court noted that petitioner's interpretation "would render [the honest-services-fraud statute] superfluous," "for fraudulent schemes that cause victims tangible harm such as the loss of money or property are already covered by mail or wire fraud statutes." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-20) that, to obtain a conviction for honest-services fraud, the government must prove that the fraudulent scheme contemplated harm to the victims over and above the deprivation "of the intangible right of honest services," 18 U.S. 1346, required by the statutory text. As a threshold matter, the petition for a writ of certiorari is interlocutory, which alone provides a sufficient reason to deny it. In any event, the court of appeals correctly rejected petitioner's contention, and its decision does not conflict with any decision of this Court or implicate any circuit conflict that warrants this Court's review. This case also would be a poor vehicle for resolving the question presented. The Court should deny the petition.

1. The decision that petitioner asks this Court to review is interlocutory. The court of appeals affirmed petitioner's convictions, vacated the district court's restitution order, and remanded the case for further proceedings. See Pet. App. 35a-36a. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe*

Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J.). This Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 4-55 n.72 (11th ed. 2019).

That practice promotes judicial economy. Here, it would enable petitioner to raise his current claims, along with any other claims that may arise on remand, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case presents no occasion for this Court to depart from its usual practice.

2. In any event, petitioner errs in arguing that, to obtain a conviction for honest-services fraud, the government must prove that the fraudulent scheme contemplated harm to the victims over and above the deprivation of the right to honest services.

a. The mail-fraud statute makes it unlawful to use the mail to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the statute extended to schemes to deprive the public of the right to the honest services of government officials, or to deprive a private employer or principal of the right to the honest services of an employee or agent. See *id.* at 355; *id.* at 362-364 (Stevens, J., dissenting).

In *McNally*, this Court rejected that theory, holding that the mail-fraud statute, as it then existed, reached only schemes to deprive victims of money or property. See 483 U.S. at 356-360. Soon afterward, however, Congress enacted the honest-services-fraud statute, which defines the term "'scheme or artifice to defraud'" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. In *Skilling* v. *United States*, 561 U.S. 358 (2010), this Court interpreted that statute to encompass "only bribery and kickback schemes." *Id.* at 368.

Accordingly, to obtain a conviction for honest-services mail fraud, the government must prove that (1) the defendant engaged in a scheme to violate a duty through bribes or kickbacks, see *Skilling*, 561 U.S. at 407-409; (2) the defendant acted with the intent to defraud, see *Durland* v. *United States*, 161 U.S. 306, 313-314 (1896); (3) the deception concerned a material fact, see *Neder* v. *United States*, 527 U.S. 1, 22-25 (1999); and (4) the mail was used in furtherance of the fraudulent scheme, see 18 U.S.C. 1341.

The jury instructions in this case embodied all four of those elements. They required proof of a scheme to deprive patients of their right to the honest services of their doctors through bribes or kickbacks, committed with the intent to defraud, involving material representations or omissions, and involving the use of the mail. See C.A. E.R. 213.

b. Contrary to petitioner's contention (Pet. 9), the honest-services-fraud statute does not require additional proof that the fraudulent scheme "contemplated some kind of harm" to the victims (Pet. 9), beyond "depriv[ation] * * * of the right to honest services," 18 U.S.C. 1346. The statutory text of the honest-services

statute—which states that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services," *ibid.*—nowhere imposes any such "contemplated harm" requirement.

This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). The statute, moreover, specifically refers to "a scheme or artifice to deprive another of the *intangible* right of honest services." 18 U.S.C. 1346 (emphasis added). It would be illogical to interpret a statute that focuses on intangible harm to require proof of tangible harm—as petitioner's interpretation would do. See Pet. App. 19a; Pet. 7 n.3 (acknowledging that petitioner's current formulation of the proposed additional element is equivalent to a "'tangible' harm" element).

The statute's history and design underscore that the statute does not include such a countertextual element. The "undoubted aim" of the honest-services-fraud statute was "to reverse *McNally*," in which this Court had read the mail-fraud statute "'as limited in scope to the protection of property rights.'" *Skilling*, 561 U.S. at 402, 410 (citation omitted). A tangible-harm requirement would reintroduce a variant of the very restriction that the honest-services-fraud statute was designed to eliminate. Fraudulent schemes that contemplate tangible harm will typically, if not invariably, involve "deprivation of money or property," *McNally*, 483 U.S. at 358, and thus would be unlawful even if Congress had not enacted the honest-services statute. See Pet. App. 20a; see, *e.g.*, *Kelly* v. *United States*, 590 U.S. 391, 401-402 (2020) (recognizing that failure to adequately perform

service contracts can support prosecution for property fraud).

c. The Court's decision in *Skilling* likewise reinforces an interpretation that remains within the four corners of the statutory text. There, the Court explained that, in an honest-services fraud case, "the offender profit[s]" but "the betrayed party [often] suffer[s] no deprivation of money or property." 561 U.S. at 400. For example, "if a city mayor (the offender) accept[s] a bribe from a third party in exchange for awarding that party a city contract, yet th[at] contract w[as] the same as any that could have been negotiated at arm's length, the city (the betrayed party) * * * suffer[s] no tangible loss." *Ibid.* Even so, the city suffers "actionable harm"—the injury to its "right to the offender's 'honest services.'" *Ibid.*

Petitioner seeks (Pet. 10) to overcome that portion of *Skilling* by limiting *Skilling*'s discussion to "public sector" cases, and distinguishing "private sector" cases like his. But nothing in the statutory text distinguishes between the public and private sectors. Petitioner posits (Pet. 13-14) that a betrayed party has a greater "right" to "honest services" in interacting with a public entity than a private one. But it is difficult to see why that would be so, aside from some amorphous right to good government—which the statute does not encompass. See, *e.g.*, *Ciminelli* v. *United States*, 598 U.S. 306, 316 (2023) ("[F]ederal prosecutors may not use property fraud statutes to set standards of * * * good government for local and state officials") (citation omitted). And *Skilling* itself was a private-sector case, see 561 U.S. at 368-369; its inclusion of a discussion of public-sector cases in defining the scope of the right to honest services is therefore telling.

Furthermore, even beyond *Skilling*, this Court has repeatedly refused to interpret the federal fraud statutes to contain atextual harm requirements. For example, in *Carpenter* v. *United States*, 484 U.S. 19 (1987), the Court held that a reporter had defrauded a newspaper of its property by leaking its confidential information, regardless of whether his scheme caused "a monetary loss." *Id.* at 26. In *Shaw* v. *United States*, 580 U.S. 63 (2016), the Court affirmed a conviction for bank fraud even though no bank "suffered any monetary loss," observing that "the statute, while insisting upon 'a scheme to defraud,' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Id.* at 67.

And most recently, in *Kousisis* v. *United States*, 145 S. Ct. 1382 (2025), the Court held that the wire-fraud statute reaches a scheme to fraudulently induce a victim to enter into a contract, even if the defendant did not cause or intend to cause "economic loss." *Id.* at 1392; see *id.* at 1395 ("The common law did not establish a generally applicable rule that all fraud plaintiffs must plead and prove economic loss, so we will not read such a requirement into the wire fraud statute."); *id.* at 1394 n.5 ("reject[ing] that pecuniary loss is an element of fraud"). The Court's consistent refusal to engraft an atextual harm requirement on the fraud statutes is incompatible with petitioner's argument here. The honest-services statute simply extends the scope of federal fraud beyond more traditional property interests to encompass "the intangible right to honest services"; it does not impose a loss requirement that is otherwise foreign to the fraud statutes.

d. Petitioner errs in arguing (Pet. 21) that, "[b]efore *McNally*, the Courts of Appeals uniformly held that in

private sector honest-services cases, the government must prove that the defendant's scheme contemplated some harm to the ostensible victim" beyond the deprivation of the right to honest services through bribes or kickbacks.[1] Nearly all the cases that petitioner cites (Pet. 26) simply do not address that issue. In most of the cases, the court of appeals stated that the government must prove that the fraudulent scheme contemplated some form of harm, but recognized (or did not rule out) that the deprivation of the right to honest services or the violation of certain duties (such as the duty to disclose) could itself qualify as a sufficient harm.[2] In one case, the Second Circuit declined to extend the

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[1] Petitioner errs in suggesting (Pet. 27) that the government argued otherwise in *Black* v. *United States*, 561 U.S. 465 (2010). See Gov't Br. at 34, *Black*, *supra* (No. 08-876) ("In sum, the pre-*McNally* cases do not suggest that honest-services fraud has an independent element of harm (let alone economic harm). Instead, those cases support the presumption that Congress intended honest services fraud, like other mail fraud to include the traditional element of materiality, which embodies a related concept to contemplated harm.").

[2] See *United States* v. *Weiss*, 752 F.2d 777, 784 (2d Cir.), cert. denied, 474 U.S. 944 (1985); *United States* v. *Siegel*, 717 F.2d 9, 14 (2d Cir. 1983); *United States* v. *Newman*, 664 F.2d 12, 19 (2d Cir. 1981); *United States* v. *Bronston*, 658 F.2d 920, 926 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Von Barta*, 635 F.2d 999, 1005 n.14 (2d Cir. 1980), cert. denied, 456 U.S. 915 (1982); *United States* v. *Curry*, 681 F.2d 406, 410-411 (5th Cir. 1982); *United States* v. *Ballard*, 663 F.2d 534, 540-541 (5th Cir. Unit B 1981), modified on reh'g, 680 F.2d 532 (5th Cir. Unit B 1982); *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, 464 U.S. 939 (1983); *United States* v. *Bryza*, 522 F.2d 414, 422 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *George*, 477 F.2d 508, 513 (7th Cir.), cert. denied, 414 U.S. 827 (1973); *United States* v. *Conner*, 752 F.2d 566, 572 (11th Cir.), cert. denied, 474 U.S. 821 (1985).

honest-services theory to a case that did not involve bribes or kickbacks. See *United States* v. *Dixon*, 536 F.2d 1388, 1400-1401 (1976). And in another case, the defendant argued that the government was required to prove that the fraudulent scheme had caused "a loss" to the victim, but the Fourth Circuit determined that the defendant had not "adequately raised the issue" below. *United States* v. *Venneri*, 736 F.2d 995, 996 n.**, cert. denied, 469 U.S. 1035 (1984).

Only one court of appeals, the D.C. Circuit, clearly adopted petitioner's proposed harm requirement before *McNally*. See *United States* v. *Lemire*, 720 F.2d 1327, 1337 (1983), cert. denied, 467 U.S. 1226 (1984). In that court's view, the honest-services theory required the government to prove that "the defendant might reasonably have contemplated some concrete business harm to his employer." *Ibid.* The court acknowledged that "this formulation may differ in some respects from that of other courts." *Ibid.* Congress cannot be deemed to have implicitly adopted a single lower court decision—itself an outlier—as a definitive exposition of honest-services fraud. See *Kousisis*, 145 S. Ct. at 1392 ("When Congress uses a term with origins in the common law, we generally presume that the term 'brings the old soil with it.' * * * This old-soil principle applies, however, only to the extent that a common-law term has 'accumulated a settled meaning.'") (brackets and citations omitted); *id.* at 1395 ("The old-soil principle does not apply in the absence of a well-settled rule.").

3. Petitioner notes (Pet. 9-17) that, after *McNally* and before *Skilling*, courts of appeals disagreed about whether an honest-services fraud conviction in certain private-sector fraud cases required proof that the scheme contemplated harm to the victim. Petitioner

observes (Pet. 3-4) that this Court granted certiorari to resolve that conflict in *Black* v. *United States*, 561 U.S. 465 (2010), but did not decide the issue because it reversed the judgment on other grounds. Because *Skilling* obviated that circuit conflict, however, that issue does not now warrant this Court's review. See Shapiro § 4.4(c), at 4-16 ("A conflict will not necessarily result in the grant of certiorari if the issue is no longer a live one.").

a. Before *Skilling*, the courts of appeals differed in their articulation of the materiality element of honest-services fraud in private-sector employment cases. Some courts concluded that an omission or misrepresentation is material only if it has a reasonable potential for causing some form of harm to the employer. See *United States* v. *Rybicki*, 354 F.3d 124, 145-146 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004); *United States* v. *Gray*, 96 F.3d 769, 774-775 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Cochran*, 109 F.3d 660, 667-668 & n.3 (10th Cir. 1997). Courts adopted that test to address the concern that the honest-services doctrine would otherwise "lack substantive limits in the private sector." *United States* v. *Frost*, 125 F.3d 346, 369 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998). Such courts often articulated the requirement in cases, like *Black*, that charged honest-services fraud based on an employee's self-dealing or failure to disclose information. See *Black*, 561 U.S. at 468-469; *Frost*, 125 F.3d at 367-368.

In *Skilling*, however, this Court held that the honest-services statute does not reach mere self-dealing or failure to disclose information and is instead limited to "cases of bribes and kickbacks." 561 U.S. at 411. That holding eliminates both the possibility that every employee transgression will amount to fraud and the

associated need to engraft an atextual harm requirement to narrow the statute's scope. See, *e.g.*, *United States* v. *Nayak*, 769 F.3d 978, 982 (7th Cir. 2014) (holding, after *Skilling*, that "the government does not need to show tangible harm to a victim in an honest-services fraud case").

b. Petitioner does identify any court of appeals that has issued a post-*Skilling* published opinion—let alone a reasoned one—that reaches a result dependent on the proposition that the government must show that the fraudulent scheme contemplated harm to the victim in order to convict a defendant of honest-services fraud. Petitioner's reliance (Pet. 11, 13) on *Rizk* v. *United States*, No. 22-3834, 2023 WL 5275505 (6th Cir. Feb. 27, 2023), cert. denied, 144 S. Ct. 184 (2023); *United States* v. *Kidd*, 963 F.3d 742 (8th Cir. 2020); and *United States* v. *Woods*, 978 F.3d 554 (8th Cir. 2020), is misplaced.

In *Rizk*, a prisoner who had pleaded guilty to honest-services fraud filed a motion under 28 U.S.C. 2255 to vacate his sentence; the district court denied his motion as untimely; and the Sixth Circuit denied a certificate of appealability. See 2023 WL 5275505, at *1, *4. The Sixth Circuit had no occasion to reevaluate its pre-*Skilling* case law concerning the substantive meaning of the honest-services-fraud statute. In *Kidd*, the defendant was not charged with honest-services fraud; instead, he defrauded third-party insurers. See 963 F.3d at 747. And the court in any event did not hold that the honest-services-fraud statute requires proof that the fraudulent scheme contemplated a harm beyond the deprivation of the right of honest services. Finally, in *Woods*, petitioner simply quotes a small portion of a parenthetical that the court included in a citation to show that "[t]he offense of honest services wire fraud

does not * * * require proof of consummation of the scheme." 978 F.3d at 568.

In none of those decisions did the court of appeals grant relief, let alone based on the position that petitioner advances here. See *Woods*, 978 F.3d 554 (affirming convictions); *Kidd*, 963 F.3d at 753 (same); *Rizk*, 2023 WL 5275505, at *4 (denying certificate of appealability). And given the absence of any post-*Skilling* conflict in the courts of appeals, this Court's review is not warranted at this time. At a minimum, the Court should allow the question presented to percolate further in light of its recent decision in *Kousisis*, where the Court rejected the proposition that "pecuniary loss is an element of fraud." 145 S. Ct. at 1394 n.5.

4. At all events, this case would be a poor vehicle to address the question presented. Petitioner asked the district court to instruct the jury that the government was required to prove that "the individuals named in each count suffered economic harm." D. Ct. Doc. 175, at 6. Petitioner now argues (Pet. 9), however, that the government need prove only that the fraudulent scheme "contemplated" harm, not that the scheme succeeded and that the victim actually "suffered" harm. He also now argues (Pet. 27) that the government need not prove "economic" harm, but instead only that the scheme contemplated "some kind of harm," which "can take many forms other than the deprivation of money or property." The mismatch between the instruction that petitioner sought below and the arguments that he presses here makes this case an unsuitable vehicle for reviewing those arguments. This Court's ordinary practice precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation

omitted). There is no reason to deviate from that practice in this case.

The facts of this case, moreover, satisfy the new standard that petitioner proposes. Petitioner's scheme involved referring patients for medically unnecessary services; for instance, doctors ordered MRI scans for multiple different body parts regardless of the injury the patients had sustained. See, *e.g.*, C.A. Supp. E.R. 827, 1007-1010, 1024-1025, 1036-1037. The government proved at trial that such practices cause both medical and dignitary harm to patients. Subjecting patients to clinically unnecessary MRIs can cause physical harm, generate false negatives or false positives, waste time, cause anxiety, and lead to supplemental procedures that pose their own risk of harm. See C.A. E.R. 810-814; C.A. Supp. E.R. 779, 781-784, 813-815. Petitioner's claim accordingly would not succeed even under the countertextual position he now advances. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not sit to "decide abstract questions of law * * * which, if decided either way, affect no right" of the litigants); Shapiro § 4.4(f), at 4-18 ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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