No. 08-1394

In The Supreme Court of the United States

JEFFREY K. SKILLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, and, if not, whether § 1346 is unconstitutionally vague.

2. When a presumption of jury prejudice arises because of the widespread community impact of the defendant's alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, AND RULES

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization of more than 11,500 attorneys, in addition to more than 28,000 affiliate members from all fifty states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, NACDL files a number of amicus curiae briefs each year, addressing a wide variety of criminal justice issues.

NACDL believes that the questions presented here have great significance to the criminal justice

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of NACDL's intention to file this amicus brief ten days before the due date. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

system. The first question, concerning the scope of the honest services fraud statute, offers the Court an opportunity to address constitutional and statutory issues that have produced chaos in the courts of appeals. NACDL recently submitted an amicus brief supporting review of a related honest services question in *Sorich v. United States*, 129 S. Ct. 1308 (2009). We again urge the Court to resolve the multifaceted circuit split that plagues 18 U.S.C. § 1346.

The second question, on which NACDL submitted an amicus brief in the court of appeals, goes to the heart of the Sixth Amendment right to an impartial jury. Because the court of appeals' decision on that question represents a dangerous departure from this Court's decisions protecting that right, NACDL urges review. NACDL's Amicus Curiae Committee requested and authorized undersigned counsel to file this brief.

ARGUMENT

I. THE COURT SHOULD TAKE THIS CASE AS A COMPANION CASE TO *BLACK* TO ADDRESS THE DISARRAY IN HONEST SERVICES CASES.

For years federal courts have decried the "amorphous and open-ended nature" of the honest services statute. *United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007). The courts have struggled to read limiting principles into the opaque text of 18 U.S.C. § 1346. Just a few months ago, Justice Scalia observed that

"[w]ithout some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). And recently the Court granted the writ in *Black v. United States*, No. 08-876, which involves the interpretation of § 1346 where, as here, a private individual is prosecuted for breaching a duty of honest services owed to his employer.

Justice Scalia's dissent in *Sorich* and the grant in *Black* signal that the time has come to resolve the confusion that engulfs the honest services statute. Three principal points require resolution. Most fundamentally, the Court must determine whether courts have the power to engraft limiting principles—none of which has any strong textual basis—on the vague language of § 1346. If federal judges lack that power, then the Court must decide whether the honest services statute, shorn of judge-created limiting principles, is void for vagueness. And if the Court concludes that judges *may* read an extra-textual limitation into § 1346, then it must determine the content of that limiting principle.

To ensure a coherent approach to § 1346, the Court should address these issues together. This case, together with *Black*, presents the ideal vehicle for resolving comprehensively the confusion that has

plagued honest services prosecutions of private individuals for the past two decades.

1. The search for an interpretive principle to cabin the "amorphous and open-ended" language of § 1346 raises a threshold question: whether a federal court may properly read into the statute *any* of the limiting principles the courts of appeals have adopted.

This Court has held that "[l]egislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). The search for limits on the broad text of § 1346, however, amounts to little more than forbidden judicial legislation. As Judge Jacobs has observed, "[T]he splintering among the circuits demonstrates [that] section 1346 effectively imposes upon courts a role they cannot perform. When courts undertake to engage in legislative drafting, the process takes decades and the work is performed by unelected officials without the requisite skills or expertise; and as the statutory meaning is invented and accreted, prosecutors are unconstrained and people go to jail for inchoate offenses." *United States v. Rybicki*, 354 F.3d 124, 164 (2d at Cir. 2003) (en banc) (Jacobs, J., dissenting); *see, e.g., United States v. Brumley*, 116 F.3d 728, 736 (5th Cir. 1997) (en banc) (Jolly, J., dissenting) (accusing the majority of "assum[ing] a role somewhere between a philosopher king and a legislator to create its own definitions of the terms of a criminal statute").

The effort by courts to infuse meaning into § 1346 collides as well with the principle that "there

is no federal common law of crimes." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994); *see, e.g., United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812). As this Court has made clear, "[F]ederal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyer's Cooperative*, 532 U.S. 483, 490 (2001). Leaving courts to devise limiting principles for § 1346 unguided by the statutory text (or even by any meaningful legislative history) cannot be distinguished from common law crime definition. *See, e.g., Sorich*, 129 S. Ct. at 1310 ("There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct.") (Scalia, J., dissenting from denial of certiorari).

2. If the Court concludes that interpreting § 1346 to include a clear limiting principle amounts to impermissible judicial legislation or common law crime definition, it should decide whether the statute, without judicially created limits, must be held unconstitutionally vague under the Due Process Clause. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008).

Section 1346 without a clear limiting principle violates due process under the *Williams* standard.

Courts have recognized that the statute "depends for its constitutionality on the clarity divined from a jumble of disparate cases." *Brown*, 459 F.3d at 523; *see, e.g., Rybicki*, 354 F.3d at 135-38 (looking to case law to determine the meaning of § 1346 because neither its language nor the "sparse" legislative history provides adequate guidance). But the "disparate cases" that purportedly give the statute "clarity" reflect the limiting principles that courts have read into the opaque language of § 1346. It is doubtful that even *with* those limiting principles the statute can survive a vagueness challenge. But if those limits may not be engrafted on the statutory language, then § 1346 surely "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion); *see, e.g., Williams*, 128 S. Ct. at 1845; *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). As Justice Scalia observed, "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari).

3. If the Court concludes that federal judges may read limitations into § 1346, then it must select the appropriate limiting principle for honest services prosecutions of private individuals. This case and *Black* together provide an ideal framework for that issue. *Black* asks whether a private individual must contemplate economic or other property harm to the private party—typically an

employer—to whom honest services are owed. In *Black*, involving agreements that did no harm to the company but conferred an undisclosed tax benefit on the officer, there was private gain but no contemplated harm to the employer. In this case, Skilling, like Black, did not contemplate harm to Enron; he indisputably intended to advance the company's interests. The difference between the two cases is that Skilling *also* did not intend private gain as cases such as *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007), interpret that phrase. Thus, while *Black* permits the Court to determine whether contemplated harm to the employer is necessary to sustain a conviction under § 1346, Skilling's case permits the Court to determine whether private gain to the defendant is necessary (or sufficient) under the honest services statute, regardless of whether there is contemplated harm to the employer. *See McNally v. United States*, 483 U.S. 350, 355 (1987) (describing honest services fraud as "misuse[] of . . . office for private gain"). The "private gain" principle that Skilling espouses has the potential virtue of being applicable in both private individual and public official honest services cases, thus bridging the existing interpretive gap between the two categories of cases.

4. In our view, it is crucial that the Court resolve these issues together. Addressing some aspects of the problem but leaving others unresolved will merely invite further disarray. Federal prosecutors use the honest services statute thousands of times each year to criminalize a breathtaking range of private and official conduct. Not since 1987, when this Court solved a similar

problem in *McNally*, has such confusion reigned in the lower federal courts over the interpretation of a federal criminal statute. By granting certiorari in this case and considering it in tandem with *Black* (and possibly a public official honest services case), the Court can either place the matter back in Congress' hands, for enactment of better-defined legislation that meets constitutional standards, or construct a limiting principle that will at least ensure uniform interpretation of the statute nationwide.[2]

II. THE COURT SHOULD GRANT THE WRIT TO PROTECT THE SIXTH AMENDMENT RIGHT TO AN UNBIASED JURY.

This case presents a second issue of extraordinary importance to the criminal justice system: whether voir dire can rebut the presumption of prejudice that arises from intense community hostility toward the defendant coupled with pervasive adverse publicity. The clear split in the circuits on this question makes it certworthy without more. But the remarkable facts of this case make it particularly deserving of the Court's

[2] It is not uncommon for this Court to grant the writ in companion cases that address closely related aspects of a single question. For example, the Court recently decided companion cases that explore the ramifications of *United States v. Booker*, 543 U.S. 220 (2005). *See Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007). Similarly, the Court decided companion cases to address its evolving Confrontation Clause jurisprudence in the wake of *Crawford v. Washington*, 541 U.S. 36 (2004). *See Davis v. Washington*, 547 U.S. 813 (2006); *Hammon v. Indiana*, 547 U.S. 813 (2006). Here as well it would be appropriate to grant the writ in companion honest services cases to resolve the full range of issues that the statute presents.

attention. If the presumption of prejudice can be rebutted under these circumstances, as the court of appeals held, then it is a dead letter. Future courts faced with widespread community hostility toward a defendant will compare their circumstances to these, find them less egregious, and conclude without further analysis that a perfunctory voir dire is sufficient to ensure a jury that meets constitutional standards. This case thus represents more than an injustice perpetrated upon a single defendant; it presents a direct threat to the sanctity of the jury trial right enshrined in the Sixth Amendment.

The court of appeals' decision acknowledges the extraordinary hostility that Houston and its citizens displayed toward Skilling and his codefendant, Kenneth Lay. App. 56a-59a. The petition provides further detail. Pet. 5-10. Apart from Oklahoma City following the attack on the Murrah Federal Building, there has likely never been a community that so strongly and uniformly viewed itself as the victim of the offenses to be tried. And, apart from Oklahoma City, there has likely never been a community that so strongly and uniformly *hated* the defendants. Here, as in the Oklahoma City bombing case, the effects of Enron's bankruptcy on the Houston community "are so profound and pervasive that no detailed discussion of the evidence is necessary." *United States v. McVeigh*, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996).

This Court has made clear that in such extraordinary cases, even the most meticulous jury selection process cannot ensure an unbiased panel. The jurors' assertions that they can put aside their

feelings and beliefs and perform their duty fairly—no matter how sincere—simply "should not be believed." *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991); *see, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963). As this Court observed, "No doubt each juror was sincere when he said he would be fair and impartial . . . but the psychological impact of requiring such a declaration before one's peers is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

Here, as in the Oklahoma City case, the Constitution required the district court to transfer venue and then conduct a rigorous voir dire of prospective jurors from the new venue. Given the sheer loathing for Skilling and Lay that the collapse of Enron engendered in Houston, only with both of those protections—change of venue and thorough voir dire—could there be any confidence that the defendants would face the unbiased jury to which the Constitution entitled them.

Remarkably, the district court provided *neither* protection. Faced with overwhelming evidence that Houston was suffused with hostility toward Skilling and Lay, the court cursorily rejected Skilling's motions to transfer venue. The court then declared that voir dire would last no more than a day. It insisted on conducting voir dire itself, with only the most perfunctory follow-up questioning by counsel. It ignored unmistakable indications of bias in the potential jurors' questionnaires. It persistently asked leading questions of potential jurors—questions ("can you nevertheless be fair and

impartial?") designed to mask, rather than expose, bias. It signaled clearly to hesitant jurors the answers that it sought—affirming the jurors' ability to be fair and impartial—during voir dire. Even when grounds to strike potential jurors for cause became apparent, the court often denied challenges. *See* Pet. 10-11 (describing voir dire and jury selection); Brief of Defendant-Appellant Jeffrey K. Skilling at 157-71 (same). And the court granted Skilling and Lay a meager two additional peremptory challenges (for a total of twelve combined challenges), and then denied repeated requests for additional peremptories as jury selection unfolded. All told, the district court imposed a voir dire process that took only five hours and screened forty-six jurors—only eight more than minimum required.

The district court's conduct of jury selection—from the denial of the motions to transfer venue without a hearing to the brief and superficial voir dire to the rulings on challenges for cause to the denial of additional peremptory challenges—represents a shocking triumph of efficiency over fairness. The court of appeals' characterization of what happened here as "exemplary *voir dire*" (App. 62a), simply ignores the concrete reality of what occurred. The Fifth Circuit's conclusion that the district court's perfunctory examination of potential jurors suffices to rebut the presumption of prejudice, if allowed to stand, spells the end of this Court's recognition, in cases such as *Rideau* and *Sheppard,* that community hostility and pervasive adverse publicity render voir dire ineffective in rooting out bias.

If the bedrock constitutional right to "indifferent" jurors[3] means anything, it means that Skilling should not have been tried in Houston before jurors selected in less than a day with only cursory examination, a number of whom had unequivocally expressed harshly negative opinions of the defendants on their questionnaires. We thus urge the Court to grant the writ on this question, resolve the circuit split, and reaffirm that once a presumption of prejudice arises from extreme community hostility or pervasive hostile publicity, it cannot be rebutted through voir dire.

[3] *Sheppard*, 384 U.S. at 362.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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