No. 08-1394

IN THE

Supreme Court of the United States

JEFFREY K. SKILLING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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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.

PARTIES TO THE PROCEEDING

Petitioner is Jeffrey K. Skilling, defendant-appellant below. Additional defendants in the district court, who were not parties in the court of appeals and are not parties here, were Kenneth L. Lay and Richard A. Causey.

Respondent is the United States of America, appellee below.

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Farrell, *USA Today*, Feb. 6, 2006, at Money 2B 15

Hueston, *Behind the Scenes of the Enron Trial*, 44 Am. Crim. L. Rev. 197 (2007) 2

Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity*, 40 Am. U.L. Rev. 665 (1991) 32

Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 L. & Hum. Behav. 409 (1990) 32

Minow & Cate, *Who Is An Impartial Juror in an Age of Mass Media?*, 40 Am. U.L. Rev. 631 (1991) 32

Studebaker et al., *Pretrial Publicity*, 3 Psychol. Pub. Pol'y & L. 428 (1997) 32

Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 Psychol. Reps. 1299 (1975) 31

Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 L. & Hum. Behav. 73 (2002) 31

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 554 F.3d 529. The relevant opinions of the U.S. District Court for the Southern District of Texas are unpublished.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The Fifth Circuit entered judgment on January 6, 2009. A petition for rehearing was denied on February 10, 2009. The petition for a writ of certiorari was filed on May 11, 2009 and granted on October 13, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are reprinted in the Statutory Appendix.

STATEMENT

A. Factual Background And Trial

In 2001, the seventh-largest company in America, Enron Corp., went bankrupt in a matter of weeks. PA2a.[1] The bankruptcy was catastrophic for Houston, where the company was based, and it elicited

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[1] Citations forms are "R" and "SR" (Fifth Circuit record and supplemental record); "PA" (petition appendix); "JA" (Joint Appendix); "SA" (Supplemental Joint Appendix); "JKS" (Skilling's Motion to Supplement the Record on Appeal); "JQ" (juror questionnaires); "GB" (Government merits briefs); "C.A. Br." (appellate briefs).

immediate calls for retribution. The President specially convened an "Enron Task Force" to find criminal wrongdoing.

1. *The Government Develops And Prosecutes Its Honest-Services Fraud Theory*

Petitioner Jeffrey Skilling was a longtime Enron executive, serving as its President and COO for several years before assuming the position of CEO from February to August 2001. *Id.* He was indicted in 2004 along with Enron Chairman and CEO Ken Lay and Enron CAO Richard Causey. PA18a. The cornerstone of the indictment was the conspiracy count, which alleged an overarching conspiracy to commit wire or securities fraud. *Id.* The remaining counts—securities fraud, making false statements to Enron's auditors, and insider trading—alleged conduct flowing from that conspiracy. *Id.*; JA322a-357a.

The Government took time to settle on what crimes, if any, occurred at Enron, R:13292—other than secret looting by company CFO Andrew Fastow. Critically, Skilling was in no way implicated in Fastow's theft, R:21622-27, 21685, and the Government has never suggested that Skilling shifted or used company funds for his own personal purposes. Prosecutors later admitted that the case against Skilling was plagued by "fundamental weaknesses," because he "took steps seemingly inconsistent with criminal intent," there were "no 'smoking gun' documents," and prosecutors relied heavily on cooperating witnesses who had "marginal credibility." Hueston, *Behind the Scenes of the Enron Trial*, 44 Am. Crim. L. Rev. 197, 197-98, 201 (2007).

Skilling challenged the Government's case at every turn, presenting evidence showing, for exam-

ple, that the subject transactions and business decisions were lawful, the risks were fully vetted by outside advisors and Enron's Board, his alleged misstatements were accurate, and all relevant information was disclosed to investors. Pet. C.A. Br. 24-58. The Government responded by emphasizing its theory of honest-services fraud—as opposed to securities or money-or-property wire fraud—as the basis for the alleged fraud conspiracy. It told the jury that this case was "not about what caused the bankruptcy of Enron," R:36449, or even about "greed," R:37006-07, 37065. Rather, prosecutors argued, Skilling took inappropriate measures to maintain or improve Enron's stock price, in violation of his fiduciary duties. R: 14784, 14799-800.[2] The allegedly improper actions included business decisions that ostensibly exposed Enron to an irresponsible level of long-term risk in exchange for short-term stock-price benefits. JA1044a, 1046a, 1047a. In closing argument, the Government declared that Skilling and Lay committed honest-services fraud because they violated a duty to Enron's "employees"—one prosecutors described as "a duty of good faith and honest services, a duty to be truthful, and a duty to do their job … and do it appropriately." R:37065.

The Government argued that Skilling committed every alleged act of misconduct with the specific intent to advance Enron's interests—by increasing re-

[2] JA1052a-53a ("we're here to decide" whether Skilling "breached [his] duties and obligations to [Enron's] shareholders and employees"); R:21224-25 ("fiduciary responsibility"); R:32262-64 (duty of "honesty, candor, and fairness"); R:36568 ("duty" of "honest services"); R:37013-14, 37043 (duties of "loyalty, "honesty," "honest services"); *accord* 14751, 14757-58, 14784, 15864-67, 22769-70, 37065.

ported earnings, maintaining an investment-grade credit rating, and improving the price of Enron's stock. JA275a-76a, 282a-83a, 286a-88a. Government witnesses agreed that Skilling was utterly dedicated and loyal to Enron. JA1048a ("had the best interests of Enron in mind" and was "fighting for [his] company"), JA1042a ("a true believer in Enron"), *id.* ("very committed to the company"), JA1047a-48a ("[r]eally dedicated to the company"). Indeed, Skilling *declined* $50 million in guaranteed compensation shortly before the alleged conspiracy began, to set an example for management, R:28481-86, and offered to invest $70 million of his own funds—effectively his entire net worth—to keep the company operating when it was on the brink of collapse in late 2001. R:28238-43. In the Fifth Circuit's words, "Enron created a goal of meeting certain earnings projections," and Skilling's actions were intended to achieve that goal. PA27a.

The Government did not argue on appeal or at the certiorari stage that Skilling sought private gain at the expense of Enron. To the contrary, its consistent position in this case has been that the evidence needed only to show—and did only show—"a material violation of a fiduciary duty that defendants owed to Enron and its shareholders." R:41327-28.

2. *The Widespread Impact Of Enron's Collapse On Houston Prejudices The Community*

As the trial approached, it became clear that the seismic effect of Enron's collapse on Houston—frequently compared by residents to the September 11 attacks, SR3:544-46—eliminated any possibility that Skilling could receive a fair trial there. Thousands of Houstonians had lost their jobs and retire-

ment savings. JA1147a-51a; SR3:1445-48, 1899-900. The bankruptcy caused a severe economic downturn in the city generally, with businesses ranging from hotels to barbershops to the city's largest law firm suffering enormous losses. JA1287a-91a; SR3:864-65, 933-37, 1201, 1205, 1219-23, 1229-31, 1243-47, 1258-61, 1267-69. One in three Houstonians reported that they personally knew someone harmed by Enron's collapse. JA376a; R:2701. The Government itself described the *entire community of Houston* as a "victim" of Skilling's alleged crimes. R:42161. Five judges on the Fifth Circuit recused themselves from this case. Remarkably, connections to Enron ran so deep that the entire local U.S. Attorney's Office in Houston recused itself from the investigation. SR3:608-12.

The devastating impact of Enron's collapse on Houston was reflected in the nonstop media coverage, which included blistering daily attacks on the executives—principally Skilling and Lay—deemed responsible for Enron's demise. Between 2001 and 2004, when Skilling was indicted, the *Houston Chronicle* ran nearly 100 stories just about victims of Enron's collapse. R:2995-97; SR3:2114. The coverage is summarized and exemplified at PA141a-58a, but can be fully understood only by reviewing the briefs and exhibits filed below.

What follows is a sampling of the searing media attacks. One column in the *Houston Chronicle*, entitled "Your Tar and Feathers Ready? Mine Are," demanded a "witch hunt." JA1172a. Houstonians maintained that Skilling and Lay had "stole[n] money from investors," "ripped off their stockholders for billions," and "destroyed a great corporation." SR3:522-30, 690-706. Skilling and Lay were com-

pared to Al Qaeda, Hitler, Satan, child molesters, rapists, embezzlers, and terrorists and encouraged to "go to jail" and "to hell." JA1152a-57a, 1165a-71a, 1202a-17a, 1397a-99a; SR3:705-06. Some suggested they should face "the old time Code of the West." SR3:854. A local rap song (entitled "Drop the S Off Skilling") threatened Skilling's murder. JA1419a-23a. Polling showed that Houstonians routinely labeled Skilling a "pig," "snake," "crook," "thief," "fraud," "asshole," "criminal," "bastard," "scoundrel," "liar," "weasel," "economic terrorist," "evil," "deceitful," "dishonest," "greedy," "devious," "lecherous," "despicable," "equivalent [to] an axe murderer," and a man who had "no conscience," "stole from employees," and "swindled a lot of people." JA379a-82a, 417a-492a. Skilling's picture was "used as a dartboard" and placed on "Wanted" posters next to Osama bin Laden. JA1163a; SR3:847. When Skilling was indicted, the *Chronicle* proclaimed: "Most Agree: Indictment Overdue." JA1393a-96a. The paper's negative coverage extended to articles on sports, education, music, and more. JA1373a-78a, 1386a-89a, 1411a-12a; SR3:805-43; R:38388, 38927, 39209, 39212, 39653, 39831.

Skilling was pronounced guilty throughout Houston long before trial. His claims of innocence were rejected as "ludicrous," "not credible," "distasteful," a "doofus defense," "smoke screen," and "fantasy world." JA1169a-71a, 1400a-05a; SR3:566-68, 602-06; R:12066-67. Prosecutors fueled the blaze, giving press conferences and interviews denouncing Skilling as a "corporate crook" who "must be brought to justice" and announcing they would seize Skilling's assets and provide them to Enron's victims. R:1452-53, 2645-46, 12592-94; SR3:1551-77. Civil cases

against Skilling flooded the local courthouse and were publicly applauded by the media and prosecutors. JA1455a; R:12078, 12460-62, 14236; SR3:3224-25. Houstonians proclaimed Skilling "guilty as sin," and argued "he needs to pay the price," go to "jail for 20 years," and "be hanged." JA379a-82a, 417a-92a. A *Government poll* found that almost 60% of Houstonians believed Skilling and Lay were guilty. R:4055, 4107-12.

After the Government's Arthur Andersen conviction was reversed by this Court and another Enron trial resulted in no convictions, Houstonians sought their retribution from Skilling and Lay. The *Chronicle* described their trial as the "Big One," the "showdown," and the "main event," JA1866A; SR3:1711-12, 1936; R:40002, declaring: "From the beginning, the Enron Task Force has had one true measure of success: Lay and Skilling in a cold steel cage." JA1457a-60a. "After more than four years of waiting, of allowing the hurt and anger and resentment to churn aside," Skilling's conviction would finally bring closure to Houston. R:39904, 39946-47.

3. *The Court Refuses To Change Venue And Conducts A Truncated Voir Dire Of A Biased Jury Venire*

Skilling moved to change venue, invoking the Fifth and Sixth Amendments of the Constitution, Federal Criminal Rule 21, and the court's general supervisory powers. R:2595-2678. The motion was denied without hearing. R:4433-56. Skilling renewed his motion just before trial, after receiving juror questionnaire responses that revealed animus pervading the venire, and after his co-defendant Causey—who had been featured in the question-

naires—pled guilty to great local fanfare, strongly reinforcing potential juror bias (as the Fifth Circuit recognized). R:12036-83; PA57a. His motion was again denied without hearing. R:14115-16.

The juror questionnaires revealed the breadth and depth of prejudice—potential and actual—throughout the Houston community. Of the 283 Houstonians who responded, 86% had heard of or read about Enron-related cases; 80% expressed anger, negative views of Skilling and Lay, or negative opinions about the role they played in Enron's collapse; 60% had an unfavorable opinion about the cause of Enron's bankruptcy (almost always "greed," "accounting fraud," "lie[s]," and "criminal" and "illegal activities"); 47% said they, their family, or friends had some connection to Enron or its bankruptcy; 40% openly admitted that they could not be fair or might not be able to consider the evidence impartially; and 40% had an opinion about Skilling's and Lay's guilt. R:12052-64, 12375-89; Dkt-618 Apps. B, N, Q, R (sealed).

When asked in the questionnaires to express themselves in their own words, prospective jurors did so with venom. Enron "gave Houston a black eye," "tarnished the [city's] image," "betrayed" Houstonians, and was "a stigma" and "an embarrassment." Dkt-618 Apps. N, O. Skilling was "the devil," a "sleaze," a "greedy executive[]," "totally unethical and criminal," "the biggest liar on the face of the earth," "a high class crook" "without a moral compass" who "took everything he could" and "would lie to his own mother if it would further his own cause." R:12056-57, Dkt-618 Apps. J, N, O, Q, S. Jurors wrote that Skilling "was at the center of the financial schemes," "responsible for [the] collapse," "knew

about the accounting problems," "initiated, designed, and authorized …illegal actions," and "defraud[ed] Enron employees and investors." Dkt-618 Apps. Q, R. He was "guilty as hell," "guilty—criminally and morally," "guilty without any doubt," and "guilty as sin—come on now." *Id.* He and Lay should "be stripped of all their assets," "pay back every cent," "spend the rest of their lives in jail," "be reduced to having to beg on the corner and live under a bridge," "hang," "serve many years in prison," "be prosecuted to the maximum." Dkt-618 Apps. K, Q-S. According to the uncontested testimony of a leading jury-behavior expert, only 18 of the 283 questionnaires did *not* raise doubts about the jurors' ability to be fair. JA785a-93a, 800a-10a; R:39905-07.

The Government stipulated to striking 42% of the pool without voir dire. R:11890-93, 13593-98. But those it insisted on retaining included many with obvious biases. JA817a ("they knew exactly what they were doing"), JA894a ("they stole money"), JQ-61 & JA929a-34a ("angry"; collapse caused by "criminal" behavior); JQ-74, JA948a-53a & R:14602 ("angry"; "[t]here is never enough money for the higher-ups so they have to steal it"); JQ-76 & JA967a-68a (Skilling "guilty of knowing what was happening to the company, but did nothing to let the employees know"). One came to voir dire and openly demanded vengeance: "I would dearly love to sit on this jury. I would love to claim responsibility, at least 1/12 of the responsibility, for putting these sons of bitches away for the rest of their lives." JA819a-20a. The district court tacitly recognized—and *reinforced*—the extent of the bias, announcing to jurors that the collapse was "a major event in this area" and that "it would take courage" for them to acquit. JA956a-57a.

Skilling sought extensive, non-public, individualized voir dire to try to screen out all the potentially biased jurors—especially in light of the questionnaire responses exposing specific prejudices. R:12067-74. But the court took the opposite tack, holding voir dire before throngs of reporters in a ceremonial courtroom, limiting it to *just five hours*,[3] and twice chastising defense counsel for asking too many questions about potential prejudice because the court had prohibited "individual voir dire." JA878a-79a, 966a; R:11050-54, 11803-08. Just 46 people were questioned—eight more than the minimum necessary—and only for a few minutes each. Only seven were struck for cause, with one excused for hardship. JA894a-95a, 897a, 947a-48a, 960a, 989a, 1006a, 1008a-09a.

Most of the court's questions were conclusory and high-level, and failed adequately to probe jurors' true feelings. Many jurors were merely asked how they get their news and what they "remembered" from Enron-related publicity. If they did not specify anything inflammatory, that was the end of the inquiry. JA844a-53a, 860a-61a, 889a-91a, 944a-45a, 988a. In some cases, the court failed to ask about clearly troubling questionnaire responses. JQ-4 (Enron's collapse caused by "widespread greed," Enron "fool[ed] people"), JA843a-47a; JQ-61 (Enron's collapse "criminal"), JA928a-34a. Sometimes the court asked but got no answer. JA991a-92a (no answer to question about "corporate greed" causing collapse).

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[3] *Cf.*, *e.g.*, *U.S. v. McVeigh*, 143 F.3d 1166, 1181-84 (10th Cir. 1998) (18-day voir dire *after venue transfer* and screening questionnaires); *U.S. v. Campa*, 459 F.3d 1121, 1147 (11th Cir. 2006) (en banc) (seven days; questionnaire); *see also* Pet. C.A. Reply 109-10.

Skilling was repeatedly forced to use peremptory challenges on prospective jurors who plainly should have been struck for cause, as in the case of jurors who reported that Enron's collapse cost them money (JA880a; JQ-101), and one who stated that Skilling was guilty because of what she had "seen on TV and … in the 'Wall Street Journal,'" and that given "the amount of money involved and the amount of people that were affected … it just doesn't seem possible that somebody didn't know something." JA998a-1001a; JQ-101.

At the Government's urging, the district court consistently took prospective jurors at their word once they claimed they could be fair, no matter what other indications of bias were present. JA886a (GOVERNMENT: "Your Honor, we have to take her at her word…. [S]he said earlier what her opinions were, and that based upon the law, they've changed. That's what we ask of our jurors." COURT: "I agree. [The defense motion for cause] is denied."), 924a-25a, 934a. For example, Juror 75 assured the court that she could presume innocence and hold the Government to its burden, notwithstanding flagrantly prejudicial questionnaire responses. JQ-75 ("crooked executives, cooked books, and the employees paid the price"). Her promise of fairness was enough to satisfy the court. When defense counsel followed up, the juror admitted that she had "already decided" there was fraud at Enron, that part of the burden was "already resolved," and that defendants would have a difficult time changing her mind. Even then the court struggled to rehabilitate her, before finally acquiescing in her dismissal. JA953a-60a. Similarly, Juror 29 said Enron cost her $50-60,000 in her 401(k) and that a friend who worked for Enron got

laid off and lost savings. On her questionnaire, she wrote Skilling was "guilty," and "not an honest man." JQ-29. At voir dire, she said Skilling was "dishonest," "arrogant," and "intimidated people," and there was "corruption" at Enron. Even the court noted, "[y]ou sound like you've already assumed that they're guilty." She responded "at one time" she did, but "I don't now," because "I think I can set that aside." Incomprehensibly, the defendants' cause challenge was denied. JA880a-86a, 1018a.

Many jurors responded directly to signaling that a public statement of "fairness" was expected of them, despite having reported doubts about their ability to be fair. For instance, Juror 101's questionnaire responses contained numerous troubling statements, including her admission that she was "unsure" she could be fair. At voir dire, the court asked if she could decide the case based on the evidence, and all she could muster was "possibly." The court then told her "[w]hat we want are people who can base their decision on the facts that they hear in the courtroom," and asked again: "[W]ill you be able to base your decision on what you hear in court?" This time, she upgraded her response to "probably." The court pressed a third time: "[C]an you in your heart of hearts assure us that you will base your decision on what you hear in this courtroom?" At last she got the message: "It will be based on what I hear in the courtroom." JA1000a-01a.

4. *Unsurprisingly, The Seated Jurors Largely Share Houston's Prejudices*

Many of those selected for Skilling's trial were directly affected by Enron's collapse and even openly biased. Of the 12 seated jurors:

- nine had been exposed to publicity about the case (SA12sa, 27sa, 42sa, 57sa, 72sa, 87sa, 118sa, 133sa, 177sa);
- nine expressed sympathy for Enron's employees or had a personal connection with Enron (SA11sa, 26sa, 60sa, 75sa, 87sa, 116sa-17sa, 151sa, 165sa, 180sa);
- four had negative opinions about the cause of Enron's bankruptcy (SA12sa, 27sa, 57sa, 177sa);
- four knew former Enron employees who lost savings (SA11sa, 26sa, 117sa; R:14537-38);
- three had negative views of Skilling and Lay or doubted their own impartiality (SA16sa, 106sa; R:14460);
- three said they were "angry" (SA60sa, 75sa, 90sa);
- one got laid off just before Enron's bankruptcy and was forced to cash out her 401(k), and thus empathized with Enron employees (SA60sa);
- one "repeatedly" commented to co-workers that "she was very interested in serving on the Enron jury" (JKS-13; Trial Tr. at 3-10 (Feb. 15, 2006) (sealed)); and
- one believed he might own Enron stock (SA19sa).

In their questionnaires, the seated jurors disclosed hostile opinions of the defendants and intensely prejudicial opinions about the facts of the case:

- "they probably knew they were breaking the law" (SA106sa);

- Skilling is "suspect" (SA16sa);
- "someone had to be doing something illegal" (SA222sa);
- "Collapse was due to greed and mismanagement" (SA12sa);
- "Greed on Enron's part .... A lot of people were hurt financially" (SA27sa, 30sa);
- "It makes me angry that so many people lost their jobs and their retirement savings" (SA60sa);
- "angry" about Enron (SA60sa, 75sa);
- "Not enough corporate controls or effective audit procedures to prevent mismanagement of corporate assets" (SA57sa);
- "the involuntary loss of the 401(k) savings made the most impact on me, especially because I have been forced to forfeit my own 401(k) funds to survive layoffs" (SA60sa);
- "Poor management and bad judgment. Greed" (SA177sa);
- "The small average worker saves money for retirement all his life. It's not right for someone or anyone to take or try to take this part of his life away from him" (SA192sa).

At voir dire, the jurors were inevitably persuaded to profess some measure of fairness, but their promises were hardly reassuring. To explain her questionnaire statement that "I think they probably knew they were breaking the law," SA106sa, Juror 63 said only that she did not "know what [she] was thinking at the time." JA937a. Juror 87 (the forewoman) stated that she believed "something went

wrong" at Enron, somebody there was "greedy," and the choice before her was "are they guilty of something illegal … [o]r are they just guilty of being poor managers?" JA974a-76a. Juror 10 said "somebody wasn't running the ship"; greed and mismanagement of its "head people" brought Enron down; and defendants were "suspect" because of "what I see on television." When asked if he would have any reluctance returning to his community after an acquittal, he said, "[m]aybe some hesitancy." JA851a-52a.

And then there was Juror 11. The *USA Today* headline says it all: "If Juror No. 11 is any indication: Look out, defense." Farrell, *USA Today*, Feb. 6, 2006, at Money 2B. Juror 11 worked across the street from Enron, and had a friend who "absolutely" lost money in his 401(k) because of Enron's collapse. JA853a-54a. And he knew about accusations that Enron illegally manipulated California energy prices—irrelevant and prejudicial claims the district court had excluded from the trial. SA27sa; R:13610-19. Juror 11 also greatly distrusted CEOs like Skilling and Lay. He said:

- All CEOs are "greedy" people who "stretch[] the legal limits." JA854a, 857a.
- "I'm not going to say that they're all crooks, but, you know," and "some get caught and some don't." JA854a-55a.
- When asked whether he would assume that the defendants "must have done something illegal," he replied "[n]o, not necessarily," but then added "I'm not sure" and "there's a lot of stuff that goes on that we don't know about that." JA857a.

- "Anyone from Billy Sol Estes to T. Boone Pickens, it's all greed. All the way up." JA854a.

When asked whether he thought Lay was greedy, Juror 11 responded, "Yeah, I think so." When asked if defendants would have to change his mind, he replied, "I don't hardly know how you could do that." The court then asked, "do you think anybody who makes $10 million or whatever he makes is probably greedy?," and the juror backpedaled: "No, I can't really answer that. I don't know." Defendants' cause challenge was denied. JA857a.

Skilling challenged the entire jury, objected specifically to seven seated jurors, objected to the court's failure to grant him additional peremptories, and objected to not being able to voir dire each juror fully. SA3sa-4sa; *see* R:14686-88. Every motion and objection was denied.

5. *The Media Frenzy Continues Through Trial*

The commencement of trial in Houston on January 30, 2006, only exacerbated the media frenzy. For the local media, it was, "AT LAST, THE BIG ONE." JA1866a. The courthouse braced for hundreds of journalists and curiosity seekers. R:39922; 39936; 39999-40000. Extra police were assigned to manage crowds outside. JA1878a-80a.

The district court acknowledged that jurors would follow news coverage despite instructions not to do so, R:14439-40, and the media relentlessly attacked Skilling's defense, sometimes for the express benefit of the jurors. A *Chronicle* staff editorial professed to tell jurors why they should convict, and another column warned the "ladies and gentlemen of the jury" not to be "drawn in by the circular argu-

ments and seductive logic" of the defense. JA1876a. The *Chronicle* set out to publicize evidence ruled inadmissible at trial; one feature recounted the evidence the district court had excluded, telling readers "it's worth remembering what the defense doesn't want the jury to hear." JA1923a. Jurors were reminded that theirs was "the hottest seat in town," and that "a city full of people whose lives were damaged by the scandal" would be seeking accountability for the bankruptcy that "rocked the city." R:39904.

The *Chronicle* covered "courtroom developments minute by minute, hour by hour," with various reporter-bloggers sitting in the courthouse and reporting live. R:38897-98, 38914-15, 38946-47; JA1487a-1858a; SR3:1691, 1701-09; PA155a-58a. It kept an exhaustive "guide" to the trial on its website, consisting of a "scorecard" of the charges, graphics explaining why various transactions were fraudulent, and a list of "key witnesses" and summaries of their likely testimony. R:39904, 39912, 39916, 39920, 39924, 39928, 39930, 39932, 39938, 39940, 39956, 39961, 39981, 39999, 40002, 40009, 40013, 40027. *Chronicle* coverage described the eventual testimony of those witnesses in detail, reporting that they disclosed "a culture of management corruption," "white collar deceit," and "greed." JA1906a, 1910a-12a, 1897a-901a, 1913a-19a, 1927a-30a; R:39658.

The *Chronicle* assured readers that the prosecution's case was "solid" and "damning," while ridiculing the defense as "sweeping revisionism," "delusional," "laughable," and "absurd." JA1526a, 1970a; R:39459-61, 39571, 39775-76, 39849. The *Chronicle* bemoaned the waning national interest in the story, but Houston's appetite did not let up. JA1887a-90a.

Before trial, even the Government admitted that—as it stated in a proposed gag order—there was a "reasonable likelihood that extra-judicial communications during trial will prejudice the parties' rights to a fair trial." R:12064-65. The court declined to issue the order, but its reasoning unwittingly summarized one key reason the case never should have proceeded in Houston: it was simply "impossible to prevent jurors from reading about the case and listening and watching media reports." R:10951.

6. *The Houston Jury Inevitably Convicts*

The Government vigorously opposed instructing the jury that a denial of "honest services" is "something close to bribery." R:36022. The "Government's evidence did not show[] that defendants engaged in bribery," it argued. R:41327-28. "Instead, the Government's evidence shows that defendants committed (or conspired to commit) honest-services fraud by breaching their fiduciary duties to Enron and its shareholders." *Id.* The Government succeeded in so instructing the jury, R:36424-25, and also succeeded in linking the remaining counts to the expansive honest-services conspiracy charge. R:36408-09; Pet. C.A. Br. 72-76.

On May 25, 2006, the jury convicted Skilling on 19 counts: one count of conspiracy to commit securities or wire fraud; 12 counts of securities fraud; five counts of making false statements to auditors, and one count of insider trading. PA19a. The jury acquitted Skilling on nine counts of insider trading. *Id.* After trial, jurors expressed pride that their verdict gave "victims … the accountability they deserved." R:38967-68; *see* R:40982 ("We were always

accountable. We had to find a way to circle back and tie up loose ends. And I think those [Enron] employees were entitled to the same thing."); JA1953a (jurors "kept their focus throughout the trial on the personal harm done to thousands of people when Enron spiraled into bankruptcy"). Skilling was sentenced to 292 months' imprisonment, three years of supervised release, and $45 million in restitution. PA19a.

B. Appellate Proceedings

1. The Fifth Circuit agreed with Skilling on appeal that because of "pervasive community bias against those who oversaw Enron's collapse" and "inflammatory pretrial publicity in the Houston area," the district court erred in failing to apply a "presumption of prejudice" among potential jurors. PA59a-60a. But the district court nevertheless did not err in refusing to change venue, the Fifth Circuit held, because the Government adequately "rebutted any presumed prejudice," PA54a—even though the district court itself never applied the presumption. The court concluded that the five-hour voir dire sufficed to rebut the presumption because the court admonished jurors not to seek vengeance against Enron's officers, warned them not to trust what they read in newspapers, and assessed their credibility. PA62a-68a.

2. Skilling also argued on appeal that his conduct, even if wrongful in some way, was not the crime of honest-services fraud, because the Government conceded that his acts were not intended to advance his own interests instead of Enron's. The Fifth Circuit agreed that Skilling's acts were not intended to harm Enron or to obtain personal benefit

at Enron's expense (PA27a), but it held that such facts are irrelevant to an honest-services prosecution (PA23a-27a). The only pertinent elements of § 1346, the court held, are a material breach of a state-law fiduciary duty and resulting harm to the employer. PA29a.

SUMMARY OF ARGUMENT

I. Skilling's trial never should have proceeded in Houston. Skilling's rights to due process and an impartial jury required the district court to exercise its authority under Criminal Rule 21 and its general supervisory power to transfer the case to a venue that was not rife with the anger and pain engendered by Enron's collapse.

A. This Court has long held that, under certain circumstances, a notorious crime or criminal trial can create such overwhelming passion in the local community—typically associated with inflammatory publicity—that even a careful voir dire will not suffice to ensure a fair trial, because jurors cannot or will not disclose biases, and because continuing publicity during trial and social pressure to convict can instill prejudice even after voir dire. Under such circumstances, jurors are presumed prejudiced, and venue must be transferred.

The Fifth Circuit correctly held that the community passion aroused by Enron's collapse and the vitriolic media treatment of Skilling and his defense warranted the presumption of prejudice recognized in this Court's precedents. But the court failed to recognize that the presumption, once it arises, cannot be rebutted through voir dire, because the very facts that give rise to the presumption also undermine the ability of voir dire to identify jurors who

are—and will remain—impartial. The court thus erred in allowing the Government to rebut the presumption.

B. Even if the presumption can be rebutted in certain limited circumstances, the court erred in holding that the Government rebutted it here. To rebut the presumption, the Government would have to prove beyond a reasonable doubt that each presumptively prejudiced juror was not, in fact, prejudiced. Neither court below applied that standard, and the Government did not meet it. Nor could it meet any other standard of rebuttal on this record. The truncated voir dire, with no individual questioning, did almost nothing to weed out prejudices exposed by screening questionnaires returned by potential jurors. The seated jurors admitted to many contacts with the facts of the case and prejudicial opinions about Skilling, including several jurors who prejudged his guilt. Far from rebutting the presumption of prejudice, the record below affirmatively confirmed it.

The decision to try Skilling in Houston is indefensible. Criminal Rule 21 exists to enable courts to transfer cases to federal districts—including in other states—untainted by passion, prejudice, and publicity when common sense warrants it, and when the Constitution requires it. There was no legitimate justification for not transferring the case to any of several identified venues where jurors could be presumed impartial, instead of the opposite.

II. Skilling not only was tried by jurors drawn from a community passionately committed to convicting him, but he was prosecuted under a vague statute that virtually ensured jurors would vindicate

that objective.

A. Section 1346 is an unconstitutionally vague statute. A federal criminal statute must define the conduct it proscribes so that ordinary persons have notice of what is prohibited, and prosecutors are constrained in what they can prosecute. But everyone agrees that § 1346 on its face says nothing about the conduct it proscribes. To identify its meaning, one must consult almost two decades worth of Federal Reports, searching for cases describing or enforcing the judicially-created crime of honest-services fraud, before this Court rejected them all as exceeding the judicial function in *McNally v. U.S.*, 483 U.S. 350 (1987). But those cases reflect only the same morass of conflict and confusion that, in part, led this Court to require that Congress define the crime clearly in the first place. Congress did not do so. And it is beyond the judicial function to identify, through common-law exegesis of pre-*McNally* precedents, the crime that Congress failed to define.

B. If this Court were inclined to complete Congress's work and define the conduct criminalized by § 1346, it should limit the statute to bribes and kickbacks—the one category of conduct unambiguously prohibited in pre-*McNally* caselaw. The category of self-dealing urged by the Government, by contrast, appeared only in a handful of cases and was poorly defined. One feature common to such cases, however, is that they involved conduct that was or could have been prosecuted as money or property fraud. There thus was (and is) no reason to include such cases within the ambit of § 1346—unlike bribes and kickbacks, which normally do not constitute money or property fraud, and thus *did* require separate statutory prohibition.

C. Finally, if the Court does read self-dealing into the statute, it should confirm that acts taken in pursuit of the normal compensation incentives offered by the employer to incentivize performance do not constitute the kind of self-dealing criminalized by the statute. Every pre-*McNally* case held that pursuit of "private gain"—what the Government now apparently describes as "undisclosed personal conflicting financial interests"—was a necessary precondition for honest-services fraud. But *no* case held that such private gain included normal compensation incentives established by (and known to) the employer. And because every employee—in the private sector at least—acts in pursuit of compensation incentives all the time, including compensation incentives within the concept of private gain would render that important limiting principle no limitation at all.

D. Because the Government does not argue that Skilling acted in pursuit of any personal financial interest apart from his normal compensation incentives—and indeed concedes that he always sought to *benefit* Enron—Skilling's honest-services fraud convictions cannot stand.

ARGUMENT

I. SKILLING'S CONVICTIONS SHOULD BE REVERSED BECAUSE PERVASIVE COMMUNITY BIAS AND INFLAMMATORY PUBLICITY INVADED HIS TRIAL

Applying a long line of this Court's precedents, the court of appeals correctly held that, given the inflammatory pretrial publicity and nearly unprecedented community passion aroused by Enron's collapse, the trial court erred in refusing to apply a

"presumption of prejudice" in determining whether jurors in the Houston venue could be impartial. PA56a-60a. The court held that Skilling had "demonstrate[d] an extreme situation of inflammatory pretrial publicity that literally saturated the community in which his trial was held." PA55a (quotation omitted). The prejudice "came from more than just pretrial publicity," the court emphasized, "but also from the sheer number of victims" of Enron's collapse. PA58a. Because the "collapse of Enron affected countless people in the Houston area," the community was infused with "non-media prejudice." *Id.* The recusal of the entire local U.S. Attorney's Office demonstrates the breadth and depth of Enron's contacts with the community, and of the pain and anger engendered by its collapse.

As elaborated in greater detail above, *see supra* at 4-12, the community passion surrounding Skilling's prosecution was as dramatic as any in U.S. criminal trial history. If a presumption of juror prejudice applies in any case, it had to apply here, as the Fifth Circuit recognized. PA56a.[4] And if an exercise of the court's power to transfer cases within the federal system to escape such prejudice was warranted in any case, it was this one. Under the circumstances, there was no valid justification for refusing to trans-

[4] The Government argued at the certiorari stage that the Fifth Circuit erred in holding that a presumption of prejudice arose, and therefore that the case does not properly present the question whether the presumption is rebuttable. "In granting certiorari," however, this Court "necessarily considered and rejected that contention as a basis for denying review." *U.S. v. Williams*, 504 U.S. 36, 40 (1992). The Government's contention that no presumption arose here is wholly untenable in any event. *See* Pet. Cert. Reply 6-9; Pet. C.A. Reply 97-118.

fer venue to one of several locales untainted by pervasive community hostility and media vitriol, from which no juror here could escape. *Compare*, *e.g.*, JA417a-429a (Houston phone-poll responses concerning knowledge and opinions of Skilling) *with id.* at 493a-551a (same for Atlanta); *see* JA621a-26a (analyzing similar data for Phoenix, Denver, and Atlanta).

The Fifth Circuit held, however, that the district court did not err in refusing to transfer venue. It held (a) that the presumption of prejudice among Houston jurors *could* be rebutted, and (b) that the Government *did* rebut the presumption, by showing "from the *voir dire* that an impartial jury was actually impanelled." PA55a (quotation omitted). Both holdings were wrong.

A. When A Presumption Of Prejudice Arises, It Cannot Be Rebutted Through Voir Dire

1. *This Court's Precedents Have Consistently Held That The Presumption Of Prejudice Cannot Be Rebutted Through Voir Dire*

This Court has long and consistently held that when the community from which jurors are drawn is sufficiently poisoned either by adverse publicity, or by the effects of the very events at issue, or both, a presumption of prejudice among potential jurors arises that requires a change of venue. In those circumstances, voir dire cannot perform its usual function of securing a fair and impartial jury. *See Mu'Min v. Virginia*, 500 U.S. 415, 429-30 (1991); *Patton v. Yount*, 467 U.S. 1025, 1031-33, 1040 (1984); *Murphy v. Florida,* 421 U.S. 794, 799 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966);

Estes v. Texas, 381 U.S. 532, 550-51 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963); *Irvin v. Dowd,* 366 U.S. 717, 725-28 (1961).

In *Irvin*, defendant was charged with six murders in a small Indiana town, and police press releases announcing Irvin's confession were "intensively publicized." 366 U.S. at 719-20. Although each juror gave assurances of fairness to the trial court in voir dire, this Court examined the "popular news media" surrounding the trial and the four-week, 2,738-page voir dire record to test whether these assurances were legally adequate. *Id.* at 720, 724-28. The Court concluded they were not. The "build-up of prejudice" in the media was "clear and convincing"; the jury pool was overrun with scores of jurors with disqualifying biases; and eight seated jurors came to voir dire believing Irvin was guilty. *Id.* at 725-27. Even though those jurors later promised they could be fair, the Court held their statements could not be believed under the circumstances. *Id.* at 727.

While *Irvin* may be understood as a case addressing the actual prejudices of a particular jury, the Court generalized the presumed prejudice rule in a trilogy of cases starting with *Rideau*. In that case, the Court held that "only a change of venue was constitutionally sufficient" to ensure "an impartial jury," because the jurors' community "had been exposed repeatedly and in depth to the prejudicial pretrial publicity there involved." *Groppi v. Wisconsin*, 400 U.S. 505, 510-11 (1971) (describing *Rideau*). The defendant in *Rideau* gave a filmed confession to murder, which was broadcast on local television stations. 373 U.S. at 723-25. This Court presumed potential jurors were prejudiced by the publicity, and therefore reversed the convictions "without pausing to ex-

amine a particularized transcript of the *voir dire*" to see whether it actually produced impartial jurors. *Id.* at 727. The Court did so even though voir dire showed that only three of the 12 jurors had seen the broadcast; none of the three "testified to holding opinions of [defendant's] guilt"; and all three testified they could "give the defendant the presumption of innocence" and "base their decision solely on the evidence." *Id.* at 731-32 (Clark, J., dissenting). As the Court explained: "*Any* subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at 726.

The Court again followed a categorical approach in *Estes*, which involved a defendant charged with financial frauds. His case attracted intense media scrutiny: press coverage spanned eleven volumes of the court record; a disruptive televised pretrial hearing was seen by much of the venire; and press coverage continued during trial. 381 U.S. at 534-38. This Court reversed the convictions. Although "there was nothing so dramatic as the home-viewed confession" in *Rideau*, the Court explained, the jury pool had been "bombard[ed]" with publicity about the case and Estes had been subjected to "minute electronic scrutiny." *Id.* at 538. The state, like the Government here, argued Estes could point to no "isolatable prejudice" among jurors or at trial, and that any prejudice was "hypothetical." *Id.* at 541-42. The Court disagreed, holding that the case was one "in which a showing of actual prejudice is not a prerequisite to reversal." *Id.* at 542.

In the cases cited in *Estes* where actual prejudice was not required, the Court employed a per se rule of reversal even though it was *possible* that the fact-

finders in each case were, in fact, impartial.[5] The Court in these cases "departed from" its approach of "careful[ly] examin[ing] the facts in order to determine whether prejudice resulted." *Estes*, 381 U.S. at 543-44. The Court instead adopted *per se* reversal rules in these cases because the right to impartial adjudication is so fundamental, the existence of prejudice to that right in such circumstances is so "hard to evaluate," and the "appearance of justice" is so important. *Id.* at 542-45.

The Court applied the categorical approach again in *Sheppard*. There, the Cleveland media launched "editorial artillery" against a doctor accused of murdering his wife. 384 U.S. at 335-42. At trial, reporters were allowed to sit inside the bar and interfere with Sheppard's defense; the media wrote articles critical of his defense to which jurors were exposed; and the jurors' identities were published. *Id.* at 342-49. This Court held that such circumstances required reversal, again without regard to proof of actual juror prejudice: "Since the state trial judge did not fulfill his duty to protect Sheppard from the *inherently* prejudicial publicity which *saturated the community* and to control disruptive influences in

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[5] *See Tumey v. Ohio*, 273 U.S. 510, 523-32 (1927) (judge with even "slightest pecuniary interest" in case may not hear it); *In Re Murchison*, 349 U.S. 133, 136, 140 (1955) (judge may not serve in prosecutorial role as it might cloud impartiality, without showing of actual bias); *Turner v. Louisiana*, 379 U.S. 466, 471-74 (1963) (reversing conviction where sheriff deputies who served as prosecution witnesses interacted with sequestered jurors, without showing of actual prejudice). The Court has followed this approach in numerous other cases. *E.g.*, *Gomez v. U.S.*, 490 U.S. 861, 876 (1989); *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966); *Leonard v. U.S.*, 378 U.S. 544, 544-45 (1960); *Marshall v. U.S.*, 360 U.S. 310, 312-13 (1959).

the courtroom," *id.* at 363 (emphasis added), the Court granted Sheppard's habeas petition without inquiring into any individual juror's bias, and despite juror assurances of impartiality, *id.* at 351-52.

Subsequent decisions have consistently read the foregoing precedents as establishing a *per se* rule of transfer or reversal where the community passion or trial taint is severe enough to warrant a presumption of juror prejudice. Most recently, the Court in *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006), confirmed that exposure to prejudicial publicity "require[s] reversal of the conviction because the effect of the violation cannot be ascertained." *Id.* at 149 n.4; *see Mu'Min*, 500 U.S. at 429 (when a "presumption of prejudice in a community" arises from the "wave of public passion" surrounding events of trial, "the jurors' claims that they can be impartial should not be believed"); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) ("when a petit jury has been … exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Patton*, 467 U.S. at 1031, 1038 & n.13 (while voir dire "usually identifies bias," in certain situations it is "inadequate," because prejudice can be such that "jurors' claims that they can be impartial should not be believed").

Conversely, in *no* case has this Court indicated that, where community passion is severe enough to raise doubts about the impartiality of jurors drawn from that community, those doubts can be overcome merely by trusting the answers given in voir dire. The Court's decisions uniformly hold the opposite.

2. <u>*Voir Dire Cannot Ensure An Impartial Jury When Community Passion Is Sufficiently Intense*</u>

This Court's cases holding that the presumption of prejudice cannot be rebutted through voir dire rest on the premise that "the community and media reaction" is "so hostile and so pervasive as to make it apparent that even the most careful *voir dire* process would be unable to assure an impartial jury." *Flamer v. Delaware*, 68 F.3d 736, 754 (3d Cir. 1995) (Alito, J.) (en banc) (quotation omitted). That is, when "adverse pretrial publicity" combines with the "added pressure" of a "huge wave of … public passion" to create an "atmosphere corruptive of the trial process," this Court "will presume a fair trial could not be held, nor an impartial jury assembled." *Mu'Min*, 500 U.S. at 448-50 (Kennedy, J., dissenting).

This Court's precedents recognize several reasons why even a careful voir dire cannot ensure an impartial jury when the community is so thoroughly soaked with hostility and prejudicial publicity. First, potential jurors in such circumstances can become infused with biases they cannot recognize or will not disclose. *See Estes*, 381 U.S. at 545; *Irvin*, 366 U.S. at 727-28. A "juror may have an interest in concealing his own bias," or "may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring); *see Miller-El v. Dretke*, 545 U.S. 231, 267-68 (2005) (Breyer, J., concurring); *Pennekamp v. Florida*, 328 U.S. 331, 359 (1946) (Frankfurter, J., concurring). And the "psychological impact" of requiring each potential juror to declare his fairness "before [his] fellows" can engender bias, provoke false assurances, or result in sincere expres-

sions of impartiality that are fleeting at best. *Irvin*, 366 U.S. at 728; *see U.S. v. Dellinger*, 472 F.2d 340, 375 (7th Cir. 1972) ("natural human pride" may compel juror to assert his fairness).[6]

Second, even if a juror honestly believes he can objectively hear the evidence before trial, he may come to fear "return[ing] to his neighbors" with anything other than a guilty verdict. *Estes*, 381 U.S. at 545; *see Turner*, 379 U.S. at 472. As the trial court warned jurors here, it "would take courage" for them to acquit. R:14595.

Finally, when pervasive inflammatory publicity continues throughout trial—especially where, as here, the court admits jurors will be exposed to it—jurors who truthfully profess impartiality at voir dire may have their fairness and judgment impaired by the outside media influences. *See Sheppard*, 373 U.S. at 363.

A wealth of empirical data confirms the premises that animate the presumption of prejudice. Scholars have demonstrated the danger of "conformity prejudice," i.e., the fear of community disapproval for rendering an unpopular verdict. *See* Vidmar, *Case Studies of Pre-and Midtrial Prejudice in Criminal and Civil Litigation*, 26 L. & Hum. Behav. 73, 81-82 (2002). They have also exposed the inability of voir dire to weed out jurors biased by adverse publicity,[7]

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[6] The trial record here included substantial evidence showing the strong likelihood of undetectable prejudice among potential Houston jurors. JA379a-88a, 634a-37a, 654a, 692a-93a, 779a-80a, 799a; R2800-08, 13829.

[7] Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 Psychol. Reps. 1299, 1301 (1975) (jurors who claimed they could disregard publicity

even with judicial admonitions to ignore such publicity (which tend to exacerbate the problem).[8]

Given the problem of unrecognized or undisclosed juror prejudice, the per se transfer/reversal rule articulated in this Court's precedents cannot be seriously questioned. And cases in which the Court held that the rule did not apply—because the presumption did not arise—only confirm the importance of applying the rule here, because those cases involved far less inflammatory publicity, no sense that the entire community had been victimized by defendant's conduct, and no showing of bias in the venire and among seated jurors remotely comparable to Skilling's showing here.[9] The cases also involved *state*

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were far more likely to convict than jurors not exposed); Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity*, 40 Am. U.L. Rev. 665, 695 (1991) (jurors who claimed they could be impartial after being exposed to publicity were as likely to convict as jurors who doubted impartiality); Dexter et al., *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity*, 22 J. Applied Soc. Psychol. 819, 839 (1992) ("publicity increased perceptions of defendant culpability and a proposed remedy, extended voir dire, failed to qualify the effect of pretrial publicity"); Studebaker et al., *Pretrial Publicity*, 3 Psychol. Pub. Pol'y & L. 428, 449 (1997).

[8] *E.g.*, Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 L. & Hum. Behav. 409, 430 (1990); Minow & Cate, *Who Is An Impartial Juror in an Age of Mass Media?*, 40 Am. U.L. Rev. 631, 648 (1991).

[9] *See Mu'Min*, 500 U.S. at 418-21 (defendant submitted 47 articles in support of venue motion; no actual juror had formed opinion of defendant's guilt based on publicity); *Patton*, 467 U.S. at 1032-33 (news coverage of case had dissipated by time of trial and "community sentiment had softened"); *Dobbert v. Florida*, 432 U.S. 282, 302-03 (1977) (defendant did not exercise all peremptory challenges; pointed to "no specific portions of

court prosecutions and procedures, with which the Court has much less authority to interfere. *See infra* at 34.

3. <u>*A Per Se Venue-Transfer Rule Would Not Be Costly To The Judicial System*</u>

Reaffirmance of the rule requiring transfer or reversal when a presumption of prejudice arises would secure the fundamental right to an impartial jury without imposing any substantial cost on the judicial system. Most federal appellate courts and state supreme courts have long held that the presumption is irrebuttable when it arises, *see* Pet. 30-33, and there is no evidence that either the state or the federal systems have suffered as a result. Indeed, the presumption has been invoked by the lower federal courts to transfer venue or reverse convictions in only approximately 20 cases in the 50 years since *Irvin*.[10]

Unlike evidentiary or other rulings made in the heat of trial, venue motions typically are made pretrial, when there is time for sober reflection. Nor does changing venue affect the trial's truth-seeking function, like the exclusion of evidence—to the contrary, by eliminating inevitable prejudice, changing venue encourages more accurate results.

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record" to show why prejudice should be presumed); *Murphy,* 421 U.S. at 802, 801 (most articles about defendant appeared seven months before trial and were factual; jurors had only vague recollection of publicity, believed it to be irrelevant, and expressed no colorable indicia of bias; only one equivocal statement in voir dire exhibited bias).

[10] Pet. C.A. Reply 88-89 n.33 (collecting cases); *see Daniels v. Woodford*, 428 F.3d 1181, 1210-12 (9th Cir. 2005); *U.S. v. Agriprocessors, Inc.*, 2009 WL 2848860 (N.D. Iowa 2009).

Requiring transfer when the presumption arises in federal cases is especially straightforward. Such cases can easily be transferred within the unitary federal system to venues unaffected by the events, publicity, and passions of the case. And to the extent state systems may lack similar geographic or procedural flexibility, the concern has no bearing in federal cases like this one, where the authority to transfer venue is controlled not only by the Constitution, but also by Federal Criminal Rule 21 and the Court's inherent supervisory power. This Court "enjoy[s] more latitude in setting standards" in federal courts "under [its] supervisory power" than in "interpreting the provisions of the Fourteenth Amendment with respect to" procedures used in state courts. *Mu'Min*, 500 U.S. at 422, 424; *see Marshall*, 360 U.S. at 312-13 (invoking inherent power in reversing conviction where jurors were exposed to prejudicial publicity but promised they could be fair); *Murphy*, 421 U.S. at 804 (Burger, C.J., concurring) ("I would not hesitate to reverse petitioner's conviction in the exercise of our supervisory power, were this a federal case."); *Rideau*, 373 U.S. at 728-29 (Clark, J., dissenting) (similar).

B. Even If The Presumption Of Prejudice Were Rebuttable, The Fifth Circuit Erred In Concluding The Government Rebutted It Here

1. If the presumption of prejudice is rebuttable under the circumstances of this case or any other, the Government should be required to prove beyond a reasonable doubt that no seated juror was actually affected by media and community bias. *See Chapman v. California*, 386 U.S. 18, 24 (1967); Fed. R. Crim. P. 52(a).

2. Proving beyond a reasonable doubt that no juror was prejudiced is an exacting burden, and one the Government did not satisfy here. The Fifth Circuit has suggested, for example, that "a showing that none of the twelve jurors empanelled had ever been exposed, first or second hand, to the inflammatory publicity, would probably suffice." *Mayola v. Alabama*, 623 F.2d 992, 1001 (5th Cir. 1980); *see U.S. v. Chagra*, 669 F.2d 241, 252 (5th Cir. 1982) (11 "jurors knew nothing about this case" and the twelfth had only "minimal contact").

The Government here made nowhere close to such a showing. To the contrary, as shown above, more than half of the seated jurors admitted to blatantly prejudicial facts and opinions, including: nine who had been exposed to publicity about the case, nine who had a personal connection with Enron, three who had admittedly prejudged the defendants, three who confessed that they were angry, one who told co-workers she very much wanted to get on Skilling's jury, and one who thought he owned Enron stock (and thus was a *direct victim* of Skilling's conduct on the Government's theory). *Supra* at 12-15.

Of all the jurors, Juror 11—*USA Today*'s "Look out, defense" juror—expressed the most obvious bias.[11] The list of his cartoonishly prejudicial commentary on the case and on Skilling, *see supra* at 15-

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[11] The Fifth Circuit declined to consider jurors other than Juror 11 because Skilling did not specifically challenge each individually for cause (as he did Juror 11). PA64a. But Skilling *did* challenge the entire jury, objected to seven jurors specifically, and sought additional peremptories and voir dire. *Supra* at 16. In any event, if a presumption applied, then the burden was on the *Government* to prove the *lack* of prejudice, not on Skilling to prove the prejudice required for cause dismissal.

16, would compel dismissal in any rational voir dire process even absent a presumption. Yet he was allowed to serve.

Notably, before trial the Government itself argued that comments much less prejudicial than those made by Juror 11 and his peers would require dismissal. In successfully opposing Skilling's motion to transfer venue, the Government argued that a proper voir dire would weed out potentially biased jurors, pointing to numerous jurors who were "properly …excused for cause" in the prosecution of several Enron and Merrill Lynch executives. R:3275. These included a juror "who stated that he would receive the testimony of either Skilling or Fastow with a 'grain of salt'"; one "who indicated his knowledge of persons who had lost their Enron pensions"; one who "indicat[ed] bias in case in which 'executives are charged'"; one who expressed "sympathies for persons 'hurt' by Enron"; one "who lost substantial money on Enron contracts and who admitted to 'hard time being unbiased'"; and one who had "knowledge of acquaintance's loss of substantial money and the case's 'association with Enron.'" *Id.*

As the Government's venue-transfer opposition recognized, such statements demonstrate the kind of actual bias that precludes a fair trial even *absent* a presumption of prejudice. A fortiori, where a presumption *does* apply, statements like these—and much worse—necessarily preclude rebuttal of the presumption.[12]

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[12] The Government notes that Skilling's jurors also made some non-prejudicial statements and promised fairness, and it asserts that "ambiguous and contradictory" voir dire answers do not establish juror bias, citing *Murphy* and *Patton*. BIO25.

3. The court of appeals held otherwise, erroneously deferring to the district court's findings that jurors were not actually prejudiced. PA62a-68a. Those findings warrant no deference, however, because the district court applied the wrong legal standard in reaching them—i.e., it failed to presume that jurors were prejudiced, and thus to require the Government to affirmatively prove each juror's impartiality. "Historical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions." *Rogers v. Richmond*, 365 U.S. 534, 547 (1961); *see Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

If the court had applied the correct legal standard, the dynamic of voir dire and the nature of the court's inquiry into prejudice would have been completely different. Most important, because the court did not apply the presumption, the court failed to treat the jurors' assurances as inherently unreliable, and thus subject at least to serious skepticism. Instead the court did the opposite, accepting *at face value* jurors' promises of fairness. *See supra* at 11-12. But such statements cannot be trusted when the presumption applies—that is the *whole point* of the presumption. *See*, *e.g.*, *Mu'Min*, 500 U.S. at 429; *see generally supra* at 30-32.

Further, if the court had presumed prejudice among all potential jurors, it could not have refused to permit probing inquiry into each individual juror's biases. To the contrary, the *Government* would have

But in those cases the presumption of prejudice *was not triggered*. Where it is, as here, prejudicial statements cannot be simply canceled out by non-prejudicial comments.

been forced to make detailed inquiries of each juror in order to prove each juror's impartiality beyond a reasonable doubt, and of course the defense would have been entitled to pursue similar lines to smoke out concealed or latent prejudices.

None of that happened here. Instead the district court satisfied itself that Skilling failed to prove actual prejudice for little reason other than the court looked jurors "in the eye" and decided to credit their promises of fairness. PA66a-67a. If the presumption of prejudice can be rebutted on that kind of showing, the presumption has no meaning at all.

II. SKILLING'S CONVICTIONS BASED ON HONEST-SERVICES FRAUD CANNOT STAND

A. Section 1346 Is Unconstitutionally Vague

A statute violates due process when it is so vague that it does not give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. Rockford*, 408 U.S. 104, 108 (1972); *see Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Section 1346 is just such a statute. It prohibits a scheme to deprive another of "the intangible right of honest services." 18 U.S.C. § 1346. Those spare words "provide[] no clue to the public or the courts as to what conduct is prohibited under the statute." *U.S. v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002), *overruled in part by U.S. v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003); *see U.S. v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (§ 1346 is "amorphous and open-ended"); *U.S. v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) (§ 1346 "is vague and undefined");

U.S. v. Brown, 459 F.3d 509, 520 (5th Cir. 2006) (§ 1346 is a "facially vague criminal statute"); *U.S. v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003) ("the plain language of § 1346 provides little guidance as to the conduct it prohibits").

Section 1346's reference to "*the* intangible right of honest services" and its legislative history indicate that Congress believed it was codifying some specific, preexisting right whose meaning could be easily discerned from pre-*McNally* lower court decisions. *See Cleveland v. U.S.*, 531 U.S. 12, 19-20 (2000). But Congress was wrong. Certain principles in the pre-*McNally* caselaw approach coherence, but only to the most discriminating lawyer or judge, and overall the pre-*McNally* caselaw is a hodgepodge of oft-conflicting holdings, statements, and dicta. Reading those cases into § 1346 by the common-law method thus does nothing more than substitute a multitude of vague and inconsistent standards for the facially meaningless phrase that Congress plucked out of the caselaw.[13]

1. *Pre-*McNally *Caselaw Was Hopelessly Unclear And Conflicting*

Contrary to the Government's premise that the constitutionally required "fair notice" of § 1346's

[13] *See*, *e.g.*, *U.S. v. Kwiat*, 817 F.2d 440, 443 (7th Cir. 1987) ("honest and diligent services"); *U.S. v. Conner*, 752 F.2d 566, 572 (11th Cir. 1985) ("fraud which is perpetrated through a breach of the fiduciary duty"). *U.S. v. Boffa*, 688 F.2d 919, 931 (3d Cir. 1982) ("loyal, faithful, and honest services"); *U.S. v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980) ("honest services" and "right to have … business conducted honestly"); *U.S. v. Bryza*, 522 F.2d 414, 422 (7th Cir. 1975) ("loyal services"); *U.S. v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979) ("honest and faithful Government").

meaning can be found somewhere in the pages of the Federal Reports before 1987, those pages reveal only conflict and confusion as to what conduct constituted the made-up crime of honest-services fraud. The disagreements included:

- What source of law courts and potential defendants should have relied on to identify the illegal conduct. *See U.S. v. Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983) (employment relationship "that imposes discretion"); *Boffa*, 688 F.2d at 931 (federal labor statute "established, as a matter of federal law, union members' right to the honest and faithful services of union officials"); *U.S. v. Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982) (no need to decide whether federalism considerations require state law duty because state law imposed a fiduciary duty on the defendant); *U.S. v. Ballard,* 663 F.2d 534, 541 (5th Cir. 1981) ("state or federal statute or may arise from the employment relationship itself"); *U.S. v. Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980) (position of "great trust and considerable power"); *U.S. v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978) (finding significant the absence of state law disclosure duty).
- Whether the law required that the defendant contemplate that his actions would cause economic harm to his employer. *Compare Lemire*, 720 F.2d at 1337 (contemplated or foreseeable economic harm required); *Ballard*, 663 F.2d at 541 (no violation where employer was receiving maximum price); *Rabbitt*, 583 F.2d at 1026 (no violation because, *inter alia*, there was no evidence that contracts resulted in "inferior work, greater expense, or any other tangible loss"); *U.S. v. McNeive*, 536 F.2d 1245, 1252 (8th Cir. 1976)

(no violation because, *inter alia*, the city "did not suffer any tangible or pecuniary injury"); *Epstein v. U.S.*, 174 F.2d 754, 768 (6th Cir. 1949) (no violation where corporation purchased at "market prices") *with U.S. v. Price*, 788 F.2d 234, 237 (4th Cir. 1986) ("economic injury need not be shown"); *U.S. v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987) ("immaterial …whether the City suffered a financial loss"); *U.S. v. Newman*, 664 F.2d 12, 20 (2d Cir. 1981) (economic harm not required in every case, but assuming the requirement in that case); *U.S. v. Castor*, 558 F.2d 379, 383 (7th Cir. 1977) (same); *U.S. v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982) (no requirement of contemplated loss of money or property, but indictment alleged such a loss); *see also U.S. v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975) (declining to decide question because "pecuniary injury" was established).

- Whether the standards for public sector and private sector cases were the same. *Compare Lemire*, 720 F.2d at 1337 n.13 ("public officials may be held to a higher standard of public trust"); *Ballard*, 663 F.2d at 541 n.17 ("public officials may have a special duty to disclose, based on the public trust, which lowers the standard of materiality"); *U.S. v. Keane*, 522 F.2d 534, 549 (7th Cir. 1975) (distinguishing private sector case on the ground that "this case . . . involves a public official") *with Price*, 788 F.2d at 237 (applying same standard).

- Whether honest-services duties extended only to persons who were taking "official" action. *Compare Bush*, 522 F.2d at 647 (fiduciary duty extended to press secretary who had no official role in awarding contracts) *with Rabbitt*, 583 F.2d at

1026 (no violation because, *inter alia*, legislator "did not, in his official capacity, control the awarding of state contracts").

- Whether use of the fiduciary position was a necessary element. *Compare Lemire*, 720 F.2d at 1335 ("that the fiduciary utilize his trusted position" is required element) *with U.S. v. Bronston*, 658 F.2d 920, 926 (2d Cir. 1981) ("proof that the fiduciary relationship was used or manipulated in some way is not necessary").

Without a consensus on these basic questions, any argument that the statute codified a single, coherent, preexisting conception of honest services—a conception obviously available to ordinary persons from prior caselaw—falls apart completely. "Surely no unambiguous meaning can be assigned to a phrase that has no meaning except what can be distilled from *some* pre-*McNally* cases provided that *other* pre-*McNally* cases are ignored, particularly since the designation of overruled cases that are in and those that are out is itself essentially arbitrary." *Rybicki*, 354 F.3d at 160 (Jacobs, J., dissenting). "Ordinary people cannot be expected to undertake such an analysis; rare is the lawyer who could do it; and no two lawyers could be expected to agree independently on the elements of an offense that must be defined by such a project." *Id.*

2. *The Government's History Of § 1346 Prosecutions Proves That The Statute Has No Single, Clear, Coherent Meaning*

The Government's current position that § 1346 has a single, clear meaning is conclusively refuted by the history of its prosecutions, in which it has repeatedly proffered whatever meaning is necessary to

prosecute whatever defendant happens to be in the Government's sights:

- While the Government now argues that the statute requires the existence of a fiduciary duty, *Black* GB11-12, it recently argued the opposite, *U.S. v. McGeehan*, 584 F.3d 560, 574 (3d Cir. 2009).
- While the Government now argues that public officials who act for political motives do not commit honest-services fraud, *Weyhrauch* GB45, it recently argued the opposite, *U.S. v. Thompson*, 484 F.3d 877, 878 (7th Cir. 2007).
- While the Government now argues that a person can commit honest-services fraud only for "official action," *Black* GB36-37, it previously argued the opposite, and that *any* workplace misconduct would suffice, *U.S. v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997).
- While the Government now argues that the honest-services statute itself, and not state law, is the source of any fiduciary duty, *Weyhrauch* GB11-12, it previously argued that a violation of a state law ethical duty is relevant and sufficient evidence of honest-services fraud, *U.S. v. Sawyer*, 85 F.3d 713, 726-27 (1st Cir. 1996).
- While the Government now argues that a defendant's lack of knowledge of his disclosure obligation is relevant in assessing whether he had an intent to deceive, *Weyhrauch* GB48, it recently argued the opposite, *U.S. v. Carbo*, 572 F.3d 112, 116 (3d Cir. 2009).
- And while the Government now argues that the defendant must act to further his personal finan-

cial interest, and that the statute essentially reduces to bribes, kickbacks, and self-dealing, *Weyhrauch* GB41, 45-46, the Government argued *against* exactly these limitations in both the district court and the court of appeals below, U.S. C.A. Br. 80-81 & n.9; R:41327-29.

The foregoing history shows that § 1346 not only fails to provide clear notice of criminalized conduct, but also facilitates opportunistic and arbitrary prosecutions, which implicates the "other principal element of the [vagueness] doctrine": the "requirement that a legislature establish minimal guidelines to govern law enforcement," lest the statute "permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolendar v. Lawson*, 461 U.S. 352, 358 (1983) (quotations omitted). The point is not whether the Government "applied this discretion wisely or poorly in a particular case," but that § 1346 "is unconstitutional …because the [Government] enjoys too much discretion in *every* case." *Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring).

3. *The Common-Law Method Of Divining Meaning From Pre-*McNally *Precedents Does Not Cure The Statute's Vagueness*

The Government's current theory of the statute is based on the Second Circuit's decision in *Rybicki*, 354 F.3d 124, which sought to distill the pre-*McNally* caselaw into a single, coherent standard. *Rybicki* holds that, at least in the private sector, § 1346 prohibits

> a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives

> rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom a duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.

Id. at 141-42. In the Second Circuit's view, reading these elements into § 1346 would cure its facial vagueness. *Id.* at 144. The Government has now endorsed the *Rybicki* standard substantially—but not entirely, *see infra* at 47-48—and has urged its application to public and private sector cases. *Black* GB35-38; *Weyhrauch* GB44.

But even if one considers the *Rybicki* standard logical or functional, it was not actually expressed in *any* pre-*McNally* case as a consensus standard for defining honest-services fraud—and it certainly was not identified as such by any member of the Congress that enacted § 1346. Instead, in the manner of a common-law court, the Second Circuit examined the underlying fact patterns of the pre-*McNally* cases and asked what legal standard could be judicially inscribed into the statute that would be most consistent with the results reached in those cases. 354 F.3d at 138-42.

This Court has never approved that kind of common-law rescue operation of an otherwise vague statute. To the contrary, the Court has made clear that such creativity exceeds the judicial function, because "under our constitutional system … federal crimes are defined by statute rather than by com-

mon law." *U.S. v. Oakland Cannabis Buyers' Coop.,* 532 U.S. 483, 490 (2001).

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

U.S. v. Reese, 92 U.S. 214, 221 (1876).

The *Rybicki* court sought to draw support for its common-law analysis from *Neder v. U.S.*, 527 U.S. 1, 22-23 (1999). In *Neder*, however, the Court interpreted the term "fraud" to encompass a materiality requirement because there was a clear, preexisting consensus that materiality was an essential element of fraud. In *Rybicki*, by contrast, the Second Circuit created a *new* meaning for honest-services fraud that was not articulated by any court as a consensus position prior to *McNally*. The Second Circuit's approach would be equivalent to incorporating a materiality requirement into a fraud statute not because courts had ever articulated it as a consensus requirement, but because a retrospective examination of the facts of successful prosecutions revealed that, if there had been a materiality requirement, it usually (but not always) would have been satisfied. That is common-law creation, not judicial interpretation. "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of [the Court's] duty." *Reese*, 92 U.S. at 221.

The fact that *Rybicki*'s methodology cannot transform a vague statute into a clear one is confirmed by the Government's manipulation of *Rybicki*. Rather than accept the product of its common-law methodology by its terms, the Government modifies *Rybicki*, without either admitting that it is doing so or grounding its modifications in any pre-*McNally* caselaw. For example, *Rybicki* states that honest-services fraud can occur only when an employee "purport[s] to act for and in the interests of the employer," but "secretly …act[s] in his …own interest[] *instead*." 354 F.3d at 142 (emphasis added). That formulation indicates that an employee who *simultaneously* seeks to further both the employer's interest and his own interest does *not* commit honest-services fraud. The Government's formulation tracks *Rybicki* verbatim, until mysteriously eliminating the term "instead," *Black* GB35-37, suggesting that action to further mutual interests is a federal felony merely so long as the employee's interest is undisclosed. The Government has not cited any pre-*McNally* authority demonstrating a consensus reflecting that important modification.

While that modification would expand the scope of *Rybicki*, the Government also introduces other, limiting refinements to the *Rybicki* standard. For example, it says there is a requirement that the defendant take "official action," *Black* GB36-37, and that "personal interest" does not include a public official's desire to be reelected, *Weyhrauch* GB45. Neither limitation is expressed in *Rybicki*. The only apparent point of these refinements is to gerrymander the statute to exclude the hypotheticals identified in Justice Scalia's dissent in *Sorich v. U.S.*, 129 S.Ct. 1308, 1309 (2009), i.e., the employee who takes sick

leave and goes to the ballgame (no official action), the employee who recommends an unqualified friend for employment (no official action), and the politician who votes for a measure that benefits a small minority in order to gain reelection (no personal interest). *Black* GB36-37; *Weyhrauch* GB45-46. These additional acts of statutory manipulation provide the final confirmation—if any were needed—that § 1346 is intolerably and unconstitutionally vague.

B. Section 1346 Should Be Limited To Acts Taken For Private Gain In The Form Of Bribes Or Kickbacks

If the Court were to engage in the enterprise of constructing the federal crime of honest-services fraud proscribed by § 1346, it should hold that the crime is confined to action taken to obtain private gain from parties other than the defendant's employer—i.e., bribes or kickbacks received from a third party as a quid pro quo for some advantage from the employer. The statute should not be read to encompass the ambiguous, outlier category of "self dealing" cases. *See U.S. v. Granderson*, 511 U.S. 39, 54 (1994) (where the "text, structure, and history fail to establish that the Government's position is unambiguously correct," the Court "appl[ies] the rule of lenity and resolve[s] the ambiguity in [the defendant's] favor").

1. *The Paradigm Cases Prior To* McNally *Involved Only Bribery And Kickbacks*

No party in any of the three honest-services fraud cases before the Court—including the Government—contends that Congress literally intended to inscribe every single pre-*McNally* precedent into § 1346. Indeed, no such approach would have been possible,

given the conflicts existing in the caselaw. *Supra* at 39-42. In the Government's words, Congress instead intended to codify only "paradigm cases." *Black* GB29 n.11.

Bribes and kickbacks were *the* paradigm cases. The overwhelming majority of prosecutions for honest-services fraud before *McNally* involved employees who secretly received bribes or kickbacks from third parties in return for taking action that would benefit the third parties. *See Thompson*, 484 F.3d at 884. Thus, "treating Section 1346 as limited to such situations is consistent with its language," *id.*, and gives the statute "real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995).

2. *Limiting § 1346 To Bribery And Kickbacks Would Avoid Redundancy With Money Or Property Fraud*

Defining § 1346 to encompass only bribes and kickbacks also would extend mail and wire fraud to uncovered territory while avoiding redundancy with traditional money or property fraud. In the bribery or kickback context, the employee receives payments not from a deceived employer, but from a third party who has not been deceived. *See McNally*, 483 U.S. at 360-61 (money received as kickback is not State's money). There is thus ordinarily no clear money or property fraud. The real injury to the employer in a bribery or kickback case is the corruption of the employer's decisionmaking process—a harm that occurs without regard to whether the employer loses money or property.

For example, when a state governor accepts a bribe in exchange for support of racetrack legislation, the scheme may actually contemplate that the

state and its treasury will be benefitted by the legislation. But the scheme is inherently corrupt because the state has been deprived of the governor's honest judgment on whether such legislation would be in the state's interest. *See Mandel*, 591 F.2d at 1362. Similarly, when a union official awards an unqualified applicant union membership in exchange for money in excess of normal union dues, and passes the normal dues on to the union, the union does not lose any money. But the arrangement is inherently corrupt because the union has been deprived of the officer's honest judgment on who qualifies for membership. *See Price*, 788 F.2d at 237. As these examples illustrate, interpreting the statute to reach bribes and kickbacks gives § 1346 a distinct and important function within the mail- and wire-fraud statutes.

That interpretation would also be consistent with Congress's intent to overturn *McNally*. *See* 134 Cong. Rec. 33,297 (1988) (statement of Rep. Conyers) ("This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended."). In *McNally*, the Court held that an official involved in a dishonest "kickbacks" scheme, 483 U.S. at 356, could not be prosecuted under the mail-fraud statute, because there was no evidence the scheme deprived the state of any money or property, *id.* at 360-61. Interpreting § 1346 to encompass bribe and kickback schemes would therefore reflect Congress's specific intent to overrule *McNally* itself.

3. *Self-Dealing Cases Were Not Paradigmatic Before* McNally *And Are Redundant Of Money Or Property Fraud*

In *Rybicki*, the Second Circuit identified only one fact pattern other than bribery and kickbacks that was prosecuted successfully before *McNally*: so-called "self dealing" cases, where an employee directed business to a third party in which the employee had an undisclosed personal interest. But *Rybicki* identified only *six* cases involving that fact pattern in the private sector, and in three, a defendant's conviction was reversed. 354 F.3d at 140-41. The number of cases fitting this fact pattern in the public sector was also vanishingly small. *See Bush*, 522 F.2d 641; *Keane*, 522 F.2d 534; *Silvano*, 812 F.2d 754. These highly atypical cases have nowhere near the pedigree in pre-*McNally* law the paradigm bribe and kickback cases have. There is thus no basis for reading these outlier cases into § 1346.

What is more, the pre-*McNally* self-dealing cases were effectively money or property fraud cases anyway, and thus did not need to be addressed by a new fraud statute. Unlike bribes and kickbacks, where money or property comes directly from a third party who is not deceived, the money or property in self-dealing cases comes directly from an employer who *has* been deceived. In fact, in many of the pre-*McNally* cases, the success of the prosecutions turned on whether the Government could demonstrate that the employer suffered a money or property loss. *See Epstein*, 174 F.2d at 765 (undisclosed self-dealing is not mail fraud where employer paid fair price); *Lemire*, 720 F.2d at 1337-38 (self-dealing requires proof that defendant contemplated economic harm to employer); *Ballard*, 663 F.2d at 541

(no violation where employer received the maximum price fixed by law); *Bush*, 522 F.2d at 646, 648 (self-dealing scheme deprived public employer of money or property). Because the self-dealing cases collapse almost completely into money or property fraud, there was (and is) no need to extend § 1346 to this already-covered territory.

Finally, unlike accepting bribes and kickbacks, it is not inherently corrupt for an employee to take an action that benefits the employer without disclosing that the employee will also receive a benefit. *Lemire*, 720 F.2d at 1337-78. A mutual benefit is just that—a mutual benefit. While an undisclosed conflict is generally proscribed at common law under agency and trust principles for prophylactic reasons, there is no clear indication Congress intended to treat it as a serious felony—unless the agent actually defrauds the principal out of money or property. The Court should therefore decline to read the amorphous self-dealing cases into § 1346. Instead, the prosecution of self-dealing, when it is corrupt and harmful, can proceed under the traditional money or property fraud statute.[14]

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[14] Confining *§* 1346 to quid pro quo bribes and kickbacks would also provide something approaching fair notice of what the statute prohibits. An ordinary person consulting pre-*McNally* caselaw to define *§* 1346 would find *only* bribery and kickbacks clearly included as honest-services fraud. It would be impossible to discern with any certainty whether and when self-dealing was prohibited. And it impossible even now to understand what qualifies as prohibited self-dealing, as Judge Berzon has demonstrated. *U.S. v. Kincaid-Chauncey*, 556 F.3d 923, 947-48 (9th Cir. 2009).

To the extent that the Court wishes to include self-dealing within § 1346's compass, however, it should confine the concept to those narrow circumstances specifically described in prior

C. At A Minimum, § 1346 Requires The Jury To Find That The Defendant Acted For Private Gain Distinct From The Employer's Regular Compensation Incentives

At the very least, § 1346 should require the jury to find that the defendant acted for private gain—as the Government now apparently concedes. If there is any principle that is clear from the pre-*McNally* cases, it is the requirement of private gain. And that requirement did not then, and does not now, include the very gain the employer explicitly contemplated as compensation for the employee's service.

1. Every pre-*McNally* honest-services case—without exception—involved actions taken by the employee for private gain. An employee who accepts a bribe or a kickback in exchange for official action is, by definition, acting for private gain. And so too is an employee who, at the employer's expense, directs the employer's business to an entity in which he has an undisclosed financial interest.

Prior to *McNally*, at least three circuits expressly announced a requirement of private gain. In *U.S. v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), Judge Friendly cited "abundant authority" from federal courts of appeals holding that "a scheme to use a private fiduci-

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caselaw: self-dealing where the defendant directs money or property to a third party in which he has an undisclosed interest. It should resist the Government's invitation to expand this category to include *any* undisclosed financial conflict. That broader category was not a consensus position pre-*McNally*. And because the statute does not clearly specify the limits of prohibited self-dealing, the rule of lenity compels the narrower understanding. *U.S. v. Santos*, 128 S.Ct. 2020, 2028 (2008).

ary position *to obtain direct pecuniary gain* is within the mail fraud statute." *Id.* at 1399 (emphasis added). His opinion reversed the conviction of a corporate officer who failed to make required disclosures to stockholders, on the ground that he "received no money or property by virtue of the omission." *Id.* at 1400. Distinguishing cases in which the defendant acted "to enhance his private advantage"—"by taking bribes," for example—Judge Friendly concluded that mail fraud requires an "element of corruption" that was "not present" under the circumstances, where the defendant did not act for private gain. *Id.* at 1400-01.

The Sixth and D.C. Circuits similarly enforced a private gain requirement. *U.S. v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986) ("the intangible rights theory is anchored upon the defendant's misuse of his public office for personal profit"); *Lemire*, 720 F.2d at 1335 ("[This Court has] required …that the fiduciary utilize his trusted position to obtain a benefit for himself at the expense of the person whose trust he breaches."). And *no* circuit took the position that honest-services fraud could be established where the defendant did not act for private gain.

Thus, when summarizing the caselaw in *McNally*, this Court correctly described the honest-services cases as establishing that "a public official owes a fiduciary duty to the public, and misuse of his office *for private gain* is a fraud." 483 U.S. at 355 (emphasis added).

While the Government resisted a private-gain requirement in the district and appellate courts here, it has now acknowledged a requirement very close to private gain. As the Government asserted during

oral argument in *Weyhrauch*, in pre-*McNally* cases, "the government was after[] personal conflicting financial interests." *Weyhrauch* Oral Arg. Tr. 55; *see Weyhrauch* GB45 (the "core interests that give rise to the divided loyalties are personal financial interests"). The Government has thus abandoned its prior view that *any* action a jury finds to be materially contrary to the employer's interest constitutes honest-services fraud. Its current view is that § 1346 instead requires the jury to find that the defendant took official action to pursue undisclosed personal financial interests in conflict with the employer's. *Black* Oral Arg. Tr. 31, 44-45.

2. Given the accepted approach of construing § 1346 in light of pre-*McNally* caselaw, the statute's private-gain element must also take its meaning from the same body of authority. Thus, while private gain clearly includes bribes and kickbacks, and conceivably could include payments to entities in which the defendant has an interest, it clearly does *not* include employee salary or other normal incentives offered by the employer to promote employee performance. No pre-*McNally* case of which we are aware holds that an employee who acts only pursuant to his normal compensation incentives acts for private gain.

Further, if private gain includes the employee's normal compensation incentives, then the private-gain requirement does little or no work in clarifying and confining the scope of § 1346. In our market economy, private employees and other market actors are *presumed* to act in pursuit of their personal financial interest. Employers count on that behavior in incentivizing performance through salary, benefits, bonuses, stock options, and the like. In that

sense, "every salaried employee can be said to work for her own interest while purporting to act in the interests of the employer." *Rybicki*, 354 F.3d at 161 (Jacobs, J., dissenting). Thus, unless the concept of private gain excludes acting to obtain normal compensation incentives, virtually any employee who breaches a material fiduciary duty could be deemed an honest-services felon.

Compensation incentives also constitute the employer's method for aligning an employee's interest with its own. Employee action that is directed to increasing compensation therefore furthers an interest that the employer has chosen to establish. And the employee's compensation incentives are of course known to the employer who creates them. As such, action taken in pursuit of increased compensation fails to satisfy a basic element of honest-services fraud as defined by the Government: that the employee take official action in pursuit of undisclosed financial interests that conflict with the employer's interests.

In *Thompson*, 484 F.3d at 884, the Seventh Circuit recognized that an employee who acts to increase her salary does not act for private gain: "It would stretch the ordinary understanding of language to call a public employee's regular compensation, approved through above-board channels, a kind of 'private gain'." *Id.* at 884. Nor is there any appellate decision, before or after *McNally*, "holding that an increase in official salary ... is the sort of private gain that makes an act criminal under § 1341 and 1346." *Id.* Finally, the court emphasized, "the Rule of Lenity counsels us not to read criminal statutes for everything they can be worth." *Id.* The court therefore correctly held that "an increase in salary

for doing what one's superiors deem a good job" is not "a 'private benefit' for the purpose of § 1346." *Id.*

D. Skilling's Honest-Services Conviction Must Be Reversed

Under the foregoing legal principles, Skilling's convictions—all of which rested at least in part on the honest-services theory the Government has now abandoned, *see* Pet. Cert. Reply 4-5; Pet. C.A. Reply Br. 29-46—must be reversed. That is true, of course, if the Court invalidates § 1346 as unconstitutionally vague. But it is also true if the Court adopts any of the limiting principles discussed above.

The Government's theory is not that Skilling received bribes or kickbacks, or that he directed money or property to an entity in which he had a personal interest, or indeed that he acted for *any* private gain that was distinct from his ordinary compensation incentives. The Government openly conceded at trial that Skilling stole no money from Enron, that the case against Skilling was not about "greed," that Skilling sought to pursue Enron's "best interests," and that every act for which he was prosecuted was undertaken for the purpose of protecting Enron and promoting its share value. Pet. 3-4. The Government proceeded on the theory that Skilling nonetheless committed honest-services fraud simply because he took on too much risk for the long-term good of Enron, and improperly touted the company. Pet. 3-5. It did not seek an instruction requiring jurors to find that Skilling acted pursuant to undisclosed personal financial interests in conflict with Enron's. Instead the Government urged the jury to send Skilling to prison simply because he breached his "duty to do [his] job and do it appropriately." Pet. 4. That

theory of honest-services fraud has no grounding in pre-*McNally* caselaw, and is totally at odds with the Government's current conception of the statute.

The implications of that theory, moreover, extend far beyond what Congress reasonably could have intended when it enacted § 1346 to overrule *McNally*, a public-official kickback case. In the private sector, corporate officers are expected to take business risks and cheerlead for their enterprises. A rule that criminalizes every business decision that seems imprudent to prosecutors or lay jurors in hindsight—but does not involve the corrupt pursuit of private gain—would force officers to proceed at their peril in making everyday business judgments. Fortunately, the theory of honest-services fraud the Government advanced below is not the law, as the Government now recognizes. Skilling's convictions must be reversed.

CONCLUSION

The decision below should be reversed, and the case remanded for a new trial.

Respectfully submitted,

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STATUTORY APPENDIX

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall … be deprived of life, liberty, or property, without due process of law ….

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ….

U.S. Const. amend. VI.

Section 1343 of Title 18 of the United States Code provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

Section 1346 of Title 18 of the United States Code provides:

> For the purposes of this chapter, the term

> "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.