

No. 08-1394

THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

JEFFREY 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 THE PETITIONER

Alexander Schwab
Ben Johnson
Counsel for Petitioner

Yale Law School
127 Wall Street
New Haven, Connecticut 06511
(203) 432-4800

QUESTIONS PRESENTED

1) Whether 18 U.S.C. § 1346, which classifies as fraud any “scheme or artifice to deprive another of the intangible right of honest services,” is unconstitutionally vague, and if not, whether it requires the Government to prove that the defendant intended to advance his own private gain rather than the interests of his employer.

2) When media coverage has so biased the community that the defendant presumably cannot receive a fair trial in that venue, whether the trial must be transferred or whether the Government can rebut the presumption of prejudice, and, if the Government can rebut the presumption, whether it must do so beyond a reasonable doubt.

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OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit affirming the conviction but vacating the sentence is reported at *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit panel was entered on January 6, 2009. A petition for certiorari was filed on May 11, 2009 and certiorari was granted on October 13, 2009. *Skilling v. United States*, 130 S.Ct. 393 (2009) (mem.). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following is a list of the constitutional and statutory provisions involved in this case. For the full text of the constitutional and statutory provisions, please see the attached appendix.

U.S. Const. amend. V
U.S. Const. amend. VI
18 U.S.C. § 1361
18 U.S.C. § 1363
18 U.S.C. § 1364

STATEMENT OF FACTS

A. Enron's Tragic Story

Jeffrey Skilling joined Enron in 1991 and by 1997 had become President, Chief Operating Officer, and a member of the Board of Directors, eventually rising to CEO in 2001. *United States v. Skilling*, 554 F.3d 529, 534 (5th Cir. 2009). Mr. Skilling left Enron in August of 2001. At that point, Enron was a multi-billion dollar international corporation divided into four divisions: Wholesale, Transportation, Distribution, and Retail. *United States v. Skilling*, 554 F.3d 529, 534-35 (5th Cir. 2009).

After Enron declared bankruptcy in December 2001, a federal investigation uncovered a

series of questionable activities. Mr. Skilling's alleged illegalities can be summarized as follows:

- The Government argues that the Wholesale division was a “trading company” rather than a “logistics company,” as Enron and Mr. Skilling, as CEO, claimed. *Skilling*, 554 F.3d at 535. The Government also alleges that Enron shifted underperforming parts of other segments into the Wholesale segment to hide the poor results in those units. *Id.* at 535-36.
- Mr. Skilling repeatedly gave optimistic predictions to investors about the profits of business segments that turned out to be incorrect. The Government alleges that Mr. Skilling knew that these segments were in trouble and gave deliberately misleading guidance. *Id.* at 536-37.
- The Government claims that Mr. Skilling committed fraud when he allegedly used Enron's cash reserves to manipulate quarterly earnings. In particular, the Government alleges this type of fraud occurred three times between the fourth quarter of 1999 and the fourth quarter of 2000. *Id.* at 537-38. Mr. Skilling was not CEO at any point during those quarters.
- Enron entered into several hedging contracts with third-party entities. These entities, which were controlled by Enron CFO Andrew Fastow, bought, sold, and provided hedging contracts for Enron's assets. The relationship was disclosed in public SEC filings. *Id.* at 538. The Government claims that many of the sales were not “true sales,” and Enron's accounting, which treated them as if they were true sales amounted to fraud.
- The prosecution also argued that Mr. Skilling and other Enron executives lied to Enron's auditor, Arthur Andersen, about certain transactions and gave false statements about management's compliance with the auditors. *Id.* at 541.
- Mr. Skilling resigned from Enron in August of 2001. Nearly a month later, on September 6, he tried to sell 200,000 shares of Enron stock. The transaction did not go through because he was still listed as an Enron “affiliate,” a designation that would require that Mr. Skilling, now

a private citizen with no relationship to Enron, announce his personal financial transactions to the SEC and the public at large. *Id.* at 541. Mr. Skilling asked for and obtained a letter from Enron acknowledging that he was no longer a part of the firm. He gave the letter to his broker on September 10, 2001. The transaction was completed on September 17, 2001. *Id.* The Government believes that this stock sale amounts to insider trading.

Most of the evidence supporting the fraud claims comes from the testimony of Mr. Fastow and Mr. Causey. It is worth noting that both Mr. Causey and Mr. Fastow received lenient sentences in exchange for guilty pleas and testimony against Mr. Skilling. The government was so pleased with Mr. Fastow, that they petitioned the courts to reduce his ten-year sentence to seven. The government also allowed Mr. Fastow's wife to plead guilty to minor charges and to serve minimal jail time for her part in these matters.

B. Procedural History

In July 2004, a federal grand jury in the Southern District of Texas charged Mr. Skilling with conspiracy to commit securities and wire fraud, securities fraud, wire fraud, making false representations to auditors, and insider trading. *Skilling*, 554 F.3d at 542. The Government's theory at trial allowed for three objects for the conspiracy: (1) securities fraud, (2) wire fraud to deprive Enron and its shareholders of money and property, and (3) wire fraud to deprive Enron and its shareholders of the honest services owed by its employees. *Id.*

Honest services fraud, the third possible theory, is criminalized by 18 U.S.C. § 1346 (2006), which states that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Section 1346 was the Congressional reaction to *McNally v. United States*, 483 U.S. 350 (1987), which limited 18 U.S.C. § 1341, the mail fraud statute, to schemes to defraud people of money or tangible property.

Prior to *McNally*, various lower courts had developed a common law in which public officials and private employees could be found guilty under § 1341 of defrauding others of certain intangible rights: the right to honest government; the right to privacy; and, most commonly, the right to honest services. Holding the text of § 1341 to be silent in regard to intangible rights, *McNally* applied the rule of lenity to construe the statute against the Government and invalidate the doctrine. 483 U.S. at 359-60. One year after the decision, Congress passed § 1346, which courts have generally interpreted as overturning *McNally* with respect to 18 U.S.C. §§ 1341 and 1343 (the wire fraud statute), and as reinstating the honest services doctrine that had been developed prior to the decision. *See Skilling*, 544 F.3d at 544.

The trial took place in Houston, a city saturated with negative media coverage. Hostility to Enron emanated through front-page headlines, editorial pages, cartoons, the sports pages, and even theater reviews. The trial itself took place a mere six blocks from Enron's former headquarters. *Skilling*, 554 F.3d at 561. Recognizing that he could not hope to get an impartial jury in Houston, Mr. Skilling twice asked trial court for a change of venue. Both motions were denied, as was a motion to stay proceedings so that Mr. Skilling could argue the motion to the Fifth Circuit. Memorandum and Order, *United States v. Skilling*, No. 04-cr-00025 (S.D. Tex. Jan. 19, 2005); Order, *United States v. Skilling*, No. 04-cr-00025 (S.D. Tex. Jan. 23, 2006); Order, *United States v. Skilling*, No. 04-cr-00025 (S.D. Tex. Jan. 26, 2006). In spite of the nonstop adverse publicity concerning the collapse of Enron, the trial court found that there was no reason to presume prejudice in Houston. Voir dire began on January 30, 2006, and the trial ran through most of May. Mr. Skilling was found guilty of one count of conspiracy, twelve counts of securities fraud, five counts of making false statements, and one count of insider trading. *Id.* All

of the convictions relied on the conspiracy allegation, but because the jury returned a general verdict, it is unclear whether the jury convicted Mr. Skilling based on honest services fraud. *Id.*

On appeal, Mr. Skilling argued, inter alia, that the Fifth Circuit should reverse his convictions because his conduct did not violate § 1346, and because the trial court failed to transfer venue in the face of presumptive jury bias. With respect to § 1346, Mr. Skilling contended that under the Fifth Circuit case *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), § 1346 was inapplicable to his conduct, since his actions were intended to further the corporate interest and did not constitute self-dealing. *Skilling*, 554 F.3d at 545. Because the jury returned a general verdict, a defect in the honest services fraud theory would require reversal, as there would be no way of determining the theory under which the jury convicted him of conspiracy. *Id.* at 542. However, though the Fifth Circuit acknowledged that misapplication of § 1346 would require reversal, it construed *Brown* as only exempting from § 1346 conduct taken to advance the employer's interests that was explicitly sanctioned by the employee's superiors. *Id.* at 545. Regarding jury bias, Mr. Skilling argued that given the overwhelming and continual negative publicity surrounding the Enron collapse, the trial court should have presumed bias in the jury pool and transferred venue. *Id.* at 557. Though the Fifth Circuit agreed that there was reason to presume prejudice, it asserted that no actual prejudice resulted. *Id.* at 564-65.

SUMMARY OF ARGUMENT

The Fifth Circuit decision erred in two critical respects: first, it applied the unconstitutionally vague § 1346 and, in doing so, failed to require a showing of private gain; second, though the court correctly presumed bias based on the media and economic climate in Houston, it improperly held that such a presumption could be rebutted through regular voir dire. Either error provides sufficient basis to reverse the decision below.

I. Twenty years ago in *McNally v. United States*, this Court decided that it would not subject defendants to the judicially constructed honest services fraud doctrine absent “clear and definite” statutory language. 483 U.S. at 360. Today, this Court should reaffirm this principle.

This Court implored Congress in *McNally* to “speak more clearly than it ha[d]” if it sought to reinstate the honest services fraud doctrine. 483 U.S. at 360. In enacting § 1346, Congress failed in this task. The text of § 1346, which purports to criminalize “depriving another of the intangible right of honest services,” offers no definition of its terms. And, since no pre-*McNally* court ever used that particular phrase, it fails as a well-established term of art. Since it provides neither adequate notice of the acts it criminalizes nor guards against arbitrary and discriminatory enforcement, § 1346 is unconstitutionally vague.

Criminal statutes must give ordinary citizens fair notice of the conduct they prohibit, but § 1346 fails to provide minimal guidance even to judges. Lower courts, faced with the challenge of interpreting § 1346, have largely resorted to judicial engineering, which introduces the specter of an unconstitutional federal criminal common law. In the process, courts have created a host of conflicting precedents, each intuiting its own construction of § 1346. The Fifth Circuit, where Mr. Skilling was tried, could not even present a consistent portrait of § 1346 within its own cases. Nor are courts empowered to rely upon judicial gloss to remedy ambiguity in criminal statutes. In the face of such confusion, even if an objective meaning exists in the pre-*McNally* honest services fraud case law, citizens cannot be reasonably expected to conform their own behavior to this elusive standard.

Section 1346 also fails to prescribe adequate guidelines to law enforcement, thereby subjecting defendants to arbitrary and discriminatory prosecutions. Relying on § 1346, prosecutors have subjected a shocking range of conduct to severe federal criminal sanctions.

Given the statute's textual vagueness, such conduct seemingly includes run-of-the-mill fiduciary breaches. The sheer breadth of § 1346's application allows the Government to prosecute defendants even when evidence of genuine criminal behavior is weak. The threat of such abusive applications is especially high when, as in this case, public outrage is high and securing a conviction may advance a prosecutor's career.

Section 1346 may be unconstitutionally vague when viewed in its entirety, but the statute unambiguously requires that the Government prove that the defendant sought to advance his own private gain rather than the interests of his employer. Though Congress wrongly believed that a fully coherent definition of "the intangible right of honest services" existed before *McNally*, pre-*McNally* honest services fraud cases unanimously require an element of private gain. Every court that has fully explored the pre-*McNally* precedents has included it as an element of § 1346 fraud. On the other hand, those that have no such requirement have either never squarely addressed the issue or, as in the case of the Fifth Circuit, have explicitly repudiated the possibility of discerning meaning from the pre-*McNally* precedents and opted instead for judicial engineering.

However, even if the status of the private-gain requirement in pre-*McNally* precedents is uncertain, the rule of lenity requires that courts construe criminal statutes in favor of the defendant. The Government, then, must demonstrate that pre-*McNally* honest services fraud cases clearly did *not* require a showing of private-gain. Moreover, the private-gain requirement provides this Court with the best means of potentially avoiding § 1346's constitutional failings. Finally, in light of the private-gain requirement, § 1346 is inapplicable to Mr. Skilling's conduct because he was pursuing Enron's interests rather than his own private gain.

II. In addition, relentless and vitriolic media coverage of the Enron collapse in Houston made a fair trial there impossible. The media coverage in the city fed and reflected the

community's bias against Mr. Skilling. The *Houston Chronicle* printed thousands of stories on Enron and hundreds on Mr. Skilling's role. A hundred personal interest stories were written that focused on the suffering of Enron's "victims" and their anger at Mr. Skilling and other Enron executives. Polls conducted for both Mr. Skilling and the Government demonstrated extensive community bias against Mr. Skilling. One-in-three Houston residents were either directly affected by Enron's fall or had a close friend or family member who was. Any jury drawn from this population would feel pressure to convict.

This bias was so pervasive that it led the Fifth Circuit to take the extraordinary step of finding that the jury pool was presumptively prejudiced. The Fifth Circuit's decision conflated presumed prejudice with actual prejudice. It found the former, but that finding had no impact on its actual prejudice analysis or final decision. There is no reason to pursue an actual prejudice inquiry after prejudice has been presumed; once the court presumes bias, it should transfer the trial to a new venue. Failing to do so forces the defendant to face judgment before a biased jury in a structurally defective trial. Since the trial court twice rejected Mr. Skilling's motions to transfer venue away from Houston, his due process rights were trampled.

Even the court's actual prejudice analysis was flawed, since it relied on a short and shoddy voir dire that reflected the trial court's lack of concern with community prejudice. The Fifth Circuit agreed with Mr. Skilling that community prejudice was real and dangerous, but it also found that the resulting presumption could be rebutted. However, this Court has never held that the presumption is rebuttable—a rule that only exists in the Fifth Circuit.

Even if the presumption were in fact rebuttable, rebuttal must meet the reasonable doubt standard. Just as the Government must overcome the presumption of innocence or the presumption against harmless constitutional error beyond a reasonable doubt, it must also rebut

the presumption of bias beyond a reasonable doubt. This would be the minimum if we are to be as sure of our juries as we are of their verdicts. This requires the Government to prove a negative by eliciting statements from potential jurors who, since they are presumptively biased, are not to be believed when they say they are capable of impartiality. And, since the prejudice infects the structure of the trial itself, the Government cannot prevail on a harmless error analysis.

ARGUMENT

I. **THOUGH 18 U.S.C. § 1346 IS UNCONSTITUTIONALLY VAGUE, REGARDLESS OF THE STATUTE’S CONSTITUTIONALITY, THE GOVERNMENT MUST PROVE THAT THE DEFENDANT PURSUED HIS PRIVATE GAIN RATHER THAN THE INTERESTS OF HIS EMPLOYER.**

In *McNally*, this Court struck down the judge-made honest services fraud doctrine as beyond the purview of the mail fraud statute and a threat to the due process rights of defendants. Congress, seeking to reinstate the pre-*McNally* jurisprudence, passed § 1346 in response. But instead of clarifying Congress’s intentions, § 1346 has only made matters worse. By criminalizing “depriving another of the intangible right of honest services,” § 1346 violates the due process requirement that “every man . . . know with certainty when he is committing a crime.” *United States v. Reese*, 92 U.S. 214, 220 (1875). The statute has opened Pandora’s Box, applying federal criminal sanctions to a dizzying array of offenses, and confusing defendants, prosecutors, and judges alike.

Although § 1346, taken as a whole, is vague, one thing is clear: it only criminalizes conduct taken to advance the defendant’s private gain rather than the interests of the employer. Such a reading of the statute best accords with the jurisprudence § 1346 sought to reinstate, and those circuits that have fully examined the established meaning of “the intangible right of honest services” have agreed on this requirement. In fact, of all the means by which this Court may avoid the constitutional challenge to § 1346, recognizing the essential element of private gain is

most promising while simultaneously doing the least injury to the statute.

A. Section 1346 is void for vagueness.

In *McNally*, this Court urged Congress to “speak more clearly than it has” before courts extend mail and wire fraud beyond the deprivation of money or property. 483 U.S. at 360. Congress, in enacting § 1346, ignored this request. The result is an unconstitutionally vague statute that invites courts to “assume[] a role somewhere between a philosopher king and a legislator to create [their] own definitions of the terms of a criminal statute.” *United States v. Brumley*, 116 F.3d 728, 736 (5th Cir. 1997) (en banc) (Jolly, J., dissenting).

This Court set forth the test for facial vagueness in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (plurality opinion), which draws on two alternative grounds for invalidating a criminal law as vague: “First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” *Id.* at 56 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); accord *id.* at 64–65 (O’Connor, J., concurring). Section 1346 flunks both prongs of *Morales*: its unhelpful text and conflicting precedents “impose[] insufficient constraint on prosecutors, give[] insufficient guidance to judges, and afford[] insufficient notice to defendants.” *United States v. Rybicki*, 354 F.3d 124, 157 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting).

Under *Morales*, a facial attack is appropriate when, as here, “vagueness permeates the text” of a statute. 527 U.S. at 55 (plurality opinion); see also *id.* at 69 (Kennedy, J., concurring) (concluding that the statute in question was facially vague because it “would reach a broad range of innocent conduct”). While dicta in *United States v. Salerno*, 481 U.S. 739 (1987), suggested that a facial challenge requires that “no set of circumstances exists under which the Act would be valid,” *id.* at 745, this proposition attracted the support of only three members of the *Morales*

Court. In any case, six Justices agreed that a criminal statute that “reach[es] a substantial amount of innocent conduct” and fails to “establish minimal guidelines to law enforcement” is unconstitutionally vague on its face. 527 U.S. at 60-61 (plurality opinion); *see id.* at 69 (Kennedy, J., concurring); *id.* at 64-65 (O’Connor, J., concurring).

1. Ordinary citizens lack fair notice of the conduct § 1346 criminalizes.

Section 1346 is unconstitutionally vague for failing to provide fair notice of the conduct it prohibits. This Court has long held that the Fifth Amendment forbids laws that criminalize conduct “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Nowhere does § 1346 define “the intangible right of honest services,” and, as many courts have noted, the statute’s text offers no guidance to potential defendants. *See, e.g., United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (describing § 1346 as “amorphous and open-ended”); *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) (“The central problem is that the concept of ‘honest services’ is vague and undefined by the statute.”); *United States v. Brown*, 459 F.3d at 520 (remarking that § 1346 is a “facially vague criminal statute”); *Rybicki*, 354 F.3d at 135 (majority opinion) (arguing that one would have to “labor long and with difficulty in seeking a clear and properly limited meaning of ‘scheme or artifice to deprive another of the intangible right of honest services’ simply by consulting a dictionary for the literal, ‘plain’ meaning of the phrase”).

Appealing to an established common-law meaning for honest services fraud also fails to cure § 1346’s vagueness. This Court has long held that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”

Neder v. United States, 527 U.S. 1, 21 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)). However, before the enactment of § 1346, not a single case, state or federal, used the term “intangible right of honest services.” Some post-*McNally* courts explicitly rejected the possibility of finding a coherent definition of the term among the pre-*McNally* precedents and resigned themselves to defining the statute on their own. See *United States v. Sancho*, 157 F.3d 918, 920 (2d Cir. 1998), *overruled by Rybicki*, 354 F.3d at 124; *Brumley*, 116 F.3d at 733 (majority opinion). Furthermore, if, as the Government contends in opposing the private-gain requirement, pre-*McNally* case law comprised inconsistent versions of honest services fraud, no settled meaning actually exists. As noted in the *Rybicki* dissent, “a term of art has one single and apparent meaning in the same way that a pun has two.” 354 F.3d at 158 (Jacobs, J., dissenting). In other words, the text of § 1346 either possesses either a single meaning or no specific meaning at all.

Moreover, defining § 1346 in terms of pre-*McNally* jurisprudence adds little additional clarity for the average citizen, who, if he wishes to comprehend the statute, is tasked with interpreting volumes of case law. Even in a society of lawyers, few could successfully complete this exegetical exercise, and minimal consensus, if any, would be reached. The ability of circuit courts to divine (conflicting) meanings from § 1346’s opaque text in no way indicates that the statute provides ordinary citizens with fair notice. Rather than to aid judges, “[t]he requirement imposed by the Supreme Court [in *McNally*] to speak more clearly . . . was for the benefit of the public, the average citizen . . . who must be forewarned and given notice that certain conduct may subject him to federal prosecution.” *Brumley*, 116 F.3d at 745-46 (Jolly, J., dissenting).

Even the courts are hopelessly divided over what limiting principles (if any) are encompassed by § 1346’s purportedly settled meaning. Some courts have held § 1346 to require

a right on the part of the victim to receive honest services. *See, e.g., United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996). Others have rejected this construction. *See, e.g., United States v. Paradies*, 98 F.3d 1266, 1282 (11th Cir. 1996). In some jurisdictions, § 1346 only applies to defendants who have violated state law. *See, e.g., Brumley*, 116 F.3d at 734. In several others, though, courts have expressly repudiated the state law requirement. *See, e.g., United States v. Bryan*, 58 F.3d 933, 940 (4th Cir. 1995), *abrogated on other grounds by United States v. O'Hagan*, 521 U.S. 642 (1997). Some courts have required that private sector applications of § 1346 involve a breach of a duty that is fiduciary in character. *See, e.g., United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997). Still others have held that § 1346 does not require a genuine fiduciary relationship to the entity being defrauded. *See, e.g., Sancho*, 157 F.3d at 920. Some courts require that the Government prove reasonably foreseeable economic harm to the victim, *see, e.g., United States v. Skeddle*, 940 F. Supp. 1146, 1148 (N.D. Ohio 1996), while others require only an intent to defraud, *see, e.g. United States v. Black*, 530 F.3d 596, 600 (7th Cir. 2008) (en banc). Some courts have even expressed reservations about applying § 1346 to the private sector at all. *See, e.g. United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996). And, as this case demonstrates, courts disagree on whether § 1346 requires defendants to have pursued their own private interests. *Compare Skilling*, 554 F.3d at 546 *with United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998). If courts cannot agree on the basic elements of § 1346, it is unfair to expect the average citizen to comprehend the statute's scope.

Within the Fifth Circuit, the § 1346 precedents provide no further clarity. Though the Government asserts that *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), offers sufficient notice that pursuing private gain is unnecessary for one to fall afoul of § 1346, such a proposition

is inconsistent with the Fifth Circuit's holding in *Brown*, another Enron case:

[W]here an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting [sic] him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud.

459 F.3d at 522. In addition, the Government misapplies *Gray*, which made much of the defendants' failure to disclose their scheme to their employer, *see* 96 F.3d at 775, whereas Mr. Skilling did not act in secret and even received approval from Enron's Board of Directors for several of the transactions in question, *see Skilling*, 554 F.3d at 545-46. And though the decision below emphasized that in *Brown* the defendants escaped the scope of § 1346 because their actions were directed by senior executives, *see Skilling*, 554 F.3d at 546, *Brown* distinguished itself from *Gray* largely by noting that Enron's corporate incentive policy aligned the defendants' interests with their employer, *see* 459 F.3d at 522 n.13—something the decision below never mentioned. In any case, the Fifth Circuit has itself characterized *Gray* as “[y]ing] outside the bulk of the honest-services case law.” *Brown*, 459 F.3d at 522 n.13. Yet the Government somehow expects this judicial anomaly to guide the behavior of ordinary citizens.

Nor do judicial interpretations of § 1346 save it from vagueness. Although a court's limiting construction of a statute may be considered in evaluating a facial challenge, *see Kolender*, 461 U.S. at 355, “due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” *Lanier*, 520 U.S. at 266. In the criminal context, the bar is set even higher: “[F]ederal crimes are defined by statute rather than by common law.” *United States v. Oakland Cannabis Buyer's Co-op.*, 532 U.S. 483, 490 (2001). Last year, this Court spoke even more directly on the issue, noting that even if “statutory ambiguity ‘effectively’ licenses us to

write a brand-new law, *we cannot accept that power in a criminal case*, where the law must be written by Congress.” *United States v. Santos*, 128 S. Ct. 2020, 2030-31 (2008) (plurality opinion) (emphasis added). Inconsistent judicial gloss is therefore insufficient to rescue § 1346.

2. Section 1346 enables arbitrary and discriminatory prosecutions.

Section 1346 is also unconstitutionally vague for failing to “establish minimal guidelines to govern law enforcement.” *Kolender*, 461 U.S. at 358. This requirement is “the more important” of the two tests for vagueness and is independently sufficient for facially invalidating a statute. *Id.* Though the statute is only twenty-eight words long, prosecutors have tried to apply § 1346 to an astounding array of conduct. *See, e.g., United States v. Thompson*, 484 F.3d 877 (7th Cir.) (reversing the conviction of a section chief in the Wisconsin Bureau of Procurement who favored awarding a contract to a cheaper travel agency for indeterminate “political” reasons); *Bloom*, 149 F.3d at 649 (rejecting attempts to apply § 1346 to a city alderman, who, in his capacity as a private attorney, counseled a client to use a proxy bidder at a tax scavenger sale); *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997); *Gray*, 96 F.3d at 769 (extending § 1346 to three Baylor University basketball coaches who provided potential recruits with written coursework and answers to correspondence exams to help them obtain the credits required for eligibility). In the instant case, the Government relies on § 1346 to prosecute perceived ethical breaches in the absence of evidence of any genuine corporate crime. Even the lead prosecutor has since remarked that “prosecutors struggled with fundamental weaknesses that we knew might lead to acquittals. As persuasively argued by defense counsel at trial, no ‘smoking gun’ documents implicated either defendant.” John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments*, 44 Am. Crim. L. Rev. 197, 197 (2007).

Meanwhile, the Government’s proposed interpretation of § 1346 is “as standardless as the

statute itself.” *Rybicki*, 354 F.3d at 161 (Jacobs, J., dissenting). Under the Government’s rendering of § 1346,

Nothing . . . prevents criminalization of any of the following conduct: a regulated company that employs a political spouse; an employee who violates an employee code of conduct; a lawyer who provides sky-box tickets to a client’s general counsel; a trustee who makes a self-dealing investment that pays off; or an officeholder who has made a decision in order to please a constituent or contributor, or to promote re-election, rather than for the public good (as some prosecutor may see the public good).

Id. The Government’s construction would also encompass “a mayor’s attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee’s recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer.” *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (mem.) (Scalia, J., dissenting from denial of certiorari). The Government would even have § 1346 empower it to prosecute routine dishonesties: an elected official failing to keep campaign promises, or even “a salaried employee’s phoning in sick to go to a ball game.” *Id.* Nothing protects citizens from such excesses but the good will of the individual prosecutor. Unfortunately, as was the case here, political pressures and career opportunism can render law enforcement less than independent in its decision to prosecute.

Not only do the Government’s limiting factors fail to meaningfully constrain abusive enforcement; they even possess the very inadequacies from which the Government accuses the private-gain requirement of suffering. While the Government suggests that § 1346 requires a genuine fiduciary relationship, several pre-*McNally* cases have rejected this as an element of honest services fraud. *See United States v. Margiotta*, 688 F.2d 108, 127-28 (2d Cir. 1982); *United States v. Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980); *United States v. Yonan*, 622 F. Supp. 721, 729-30 (D. Ill. 1985). In fact, the Government has itself relied in the past on this pre-

McNally precedent in order to *reject* any § 1346 requirement of a genuine fiduciary relationship. See Brief for the United States 17-18, *Sancho*, 154 F.3d at 918 (No. 97-1406). It would seem that the Government only finds limits in § 1346 when it is convenient to do so.

In short, § 1346 provides prosecutors with a dangerous weapon. Section 1346 undermines fair notice and enables abusive and politically-motivated prosecutions. This Court should strike it down as unconstitutionally vague and remind Congress to “speak more clearly,” 483 U.S. at 360.

B. Regardless of § 1346’s constitutionality, the Government has failed to prove the statute’s requirement that the defendant pursued his own private gain instead of his employer’s interests.

Though § 1346 is unconstitutionally vague, this Court should reverse the Fifth Circuit’s decision regardless of the statute’s validity. To establish a violation of § 1346, the Government must at least show that the defendant pursued his own private interests rather than those of his employer. The defendant need not have succeeded in his schemes, nor must he pursue his own personal financial gain. He may, for example, have misused his position in order to enrich a close friend at his employer’s expense. In the case of Mr. Skilling, the Government failed to meet this burden, and the decision below should be reversed.

1. To interpret § 1346, this Court must look to pre-*McNally* honest services fraud case law.

In stating that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services,” § 1346 codifies the honest services fraud jurisprudence that existed prior to *McNally*. Though, as already argued, “the intangible right of honest services” was not a well-established term of art in the pre-*McNally* jurisprudence, to the extent that private gain was at least an established element of honest services fraud, that understanding must guide interpretation of § 1346. See *Neder*, 527 U.S. at 21.

The statute’s text also suggests that it reestablishes a preexisting legal doctrine with a

settled meaning. Section 1346 refers to “*the right of honest services*,” § 1346 (emphasis added), rather than *a right to honest services*. Congress’s use of the definite article implies that it sought not to protect all rights of honest services, but rather a specific understanding of the term. *See Rybicki*, 354 F.3d at 137-38. Furthermore, the phrase “right of” typically invokes a term of art, as opposed to a “right to” a certain benefit to be defined. *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 562 (1977) (referencing the “right of publicity” as a specific interest in one’s voice and likeness); *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 113 (1957) (treating the term “right of way” as a whole). The statute therefore contemplates the existence of “the intangible right of honest services” as a defined term of art, not a broad prosecutorial mandate into which new meaning should be read.

Section 1346’s legislative history provides further evidence of Congress’s intention of reinstating pre-*McNally* case law. Representative Conyers stated that § 1346 “restor[ed] the mail fraud provision to where that provision was before the *McNally* decision,” and that “[n]o other change in the law [wa]s intended.” 134 Cong. Rec. 33,297 (1988). Senator Biden, the sponsor of S. 2793, a more complex honest services fraud bill that was never passed, later described § 1346 in similar terms. *See* 134 Cong. Rec. S17,360-02 (Nov. 10, 2008) (noting that Congress intended to “reinstate” the pre-*McNally* case law “without change” when it enacted § 1346). Whether or not it was correct in doing so, Congress understood the pre-*McNally* case law to have already defined honest services fraud.

2. Pre-*McNally* honest services fraud precedents are unanimous in including the element of private gain.

At the time of *McNally*, private sector honest services fraud had been restricted to cases in which defendants had misused their offices for private gain. Though these cases lack independent value as precedent for this Court, they do illuminate the meaning of § 1346, since

Congress intended the statute to reinstate the pre-*McNally* honest services jurisprudence. Conversely, post-*McNally* lower court decisions, except to the extent that they examine and follow the pre-*McNally* case law, lack value as interpretive aids.

McNally, itself, understood the existing honest services fraud doctrine to involve a private-gain element: “Under these cases, 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). In fact, the private-gain element was not even a subject of controversy; Justice Stevens, writing in dissent, found private gain in both public and private precedents. The public sector cases¹ included instances in which “officials ha[d] secretly made governmental decisions *with the objective of benefiting themselves or promoting their own interests*, instead of fulfilling their legal commitment to provide the citizens of the State or local government with their loyal service and honest government.” *Id.* at 363 (Stevens, J., dissenting) (emphasis added). The private sector cases² involved defendants “with clear fiduciary duties to their employers or unions . . . be[ing] found guilty of defrauding their employers or unions *by accepting kickbacks or selling confidential information.*” *Id.* (emphasis added). Every case cited by Justice Stevens in his comprehensive survey of private sector honest services fraud involved a clear element of private gain.³ *Id.* at 363 n.3. Because Congress enacted § 1346 to restore the pre-*McNally* honest services fraud doctrine, these decisions offer strong support for the private-gain standard.

¹ Justice Stevens also cites mail fraud prosecutions involving the falsification of votes. *See McNally*, 483 U.S. at 363 (Stevens, J., dissenting). However, since he dubs these cases deprivation of “honest election[s],” they are not directly relevant to understanding § 1346. *See United States v. Turner*, 465 F.3d 667, 672-73 (6th Cir. 2006).

² The dissent mentions private sector frauds in which individuals were defrauded through the mails or the wires of their rights to privacy and other nonmonetary rights. However, as noted in *Rybicki*, such cases neither employ the term “honest services” nor seem to involve honest services fraud. *See* 354 F.3d at 138 n.13. Rather, these cases appear to deal with the deprivation of intangible rights other than that the right of honest services. *See id.*

³ The cases included *United States v. Price*, 788 F.2d 234, 235-36 (4th Cir. 1986) (kickbacks); *United States v. Boffa*, 688 F.2d 919, 930-31 (3d Cir. 1982) (bribery); *United States v. Curry*, 681 F.2d 406 (5th Cir. 1982) (self-dealing); *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981) (self-dealing); *United States v. Bohonus*, 628 F.2d 1167, 1169 (9th Cir. 1980) (kickbacks); *United States v. Bryza*, 522 F.2d 414, 415-16 (7th Cir. 1975) (kickbacks); *United States v. George*, 477 F.2d 508, 510 (7th Cir. 1973) (kickbacks); and *United States v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) (bribery).

Moreover, those circuit courts to have explicitly considered the pre-*McNally* case law are unanimous in their requirement of a private-gain element in private sector honest services fraud. In *Rybicki*, the Second Circuit supplemented Justice Stevens’s inquiry with several additional pre-*McNally* private sector honest services fraud precedents. The Second Circuit divided these cases into two general categories: those involving bribes or kickbacks, and those involving self-dealing.⁴ Both categories involve a private-gain element. Observing this pattern, the court incorporated it into its own interpretation of § 1346, holding that “when applied to private actors,” a scheme or artifice to deprive another of the intangible right of honest services means

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 the 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.

354 F.3d at 141-42 (emphasis added). The court’s painstaking historical analysis reveals the consistent inclusion of a private-gain element in pre-*McNally* honest services fraud cases.

In *Bloom*, the Seventh Circuit also analyzed the pre-*McNally* case law and reached the same conclusion as this Court and the Second Circuit. After inquiring into the pre-*McNally* history of honest services fraud, the court determined that “[n]o case we can find in the long history of intangible rights prosecutions holds that a breach of fiduciary duty, without misuse of one’s position for private gain, is an intangible rights fraud.” 149 F.3d at 656. Having established the limits of pre-*McNally* honest services fraud, the court held that “it is best to limit the

⁴ In addition to those cases mentioned in Justice Stevens’s dissent, the Second Circuit cited *United States v. Kwiat*, 817 F.2d 440 (7th Cir. 1987) (self-dealing); *United States v. Schwartz*, 785 F.2d 673 (9th Cir. 1986) (kickbacks); *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985) (kickbacks); *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983) (self-dealing); *United States v. Ballard*, 663 F.2d 534 (5th Cir. Unit B Dec. 1981) (self-dealing); *United States v. McCracken*, 581 F.2d 719 (8th Cir. 1978) (self-dealing); *United States v. Hasenstab*, 575 F.2d 1035 (2d Cir. 1978) (kickbacks); and *Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949) (self-dealing).

intangible rights approach to the scope it held when the Court decided (and Congress undid) *McNally*. An employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain.” *Id.* at 656-57. The *Bloom* holding therefore accords with the *McNally* and *Rybicki* definitions of honest services fraud.

The Sixth Circuit has also implied that private gain is essential to honest services fraud prosecutions under § 1346. In *United States v. Turner*, the court examined “pre-*McNally* honest services precedents” in order to determine the breadth of § 1346. *See* 465 F.3d at 674-75. In language similar to that used in *Rybicki* and *Bloom*, the court noted that “honest services fraud is ‘anchored upon the defendant's *misuse of his public office for personal profit.*’” *Id.* at 676 (emphasis added) (quoting *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986)). Those circuits that have rightly interpreted § 1346 in light of pre-*McNally* case law have reached the same conclusion: private gain is an essential element of honest services fraud.

By contrast, in those circuits that have not limited § 1346 to cases involving private gain, courts have lacked the historical analysis present in *McNally*, *Rybicki*, *Bloom*, and *Turner*. Some circuits have suggested, albeit less explicitly, that private gain is an essential element of honest services fraud. *See United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (describing the honest services fraud doctrine as involving an “official us[ing] his office for personal gain.”); *Sawyer*, 85 F.3d at 724 (“The cases in which a deprivation of an official's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain.”). While not as thorough as *Bloom* or *Rybicki*, these cases do highlight private gain as a presumptive element of honest services fraud. Finally, several circuits have never addressed the private-gain issue. *See United States v. Weyhrauch*, 548 F.3d 1237, 1247 (9th Cir. 2008) (recognizing that pre-*McNally* cases generally consisted of

either bribery, kickbacks, or concealing conflicts of interest); *Cochran*, 109 F.3d at 660 (Tenth); *Jain*, 93 F.3d at 436 (Eighth); *Bryan*, 58 F.3d at 942 (Fourth).

Notably, the Fifth Circuit, the one court to explicitly reject the private-gain requirement, is also the only one to explicitly repudiate relying on pre-*McNally* honest services fraud cases. *Brumley*, the Fifth Circuit's main attempt to define the scope of § 1346, rejected inquiring into the consistent elements of pre-*McNally* honest services fraud cases as an exercise in futility. 149 F.3d at 733. The court cited a series of pre-*McNally* honest services fraud cases to prove its point, *see id.*, overlooking the fact that the private-gain element is present in all of them.⁵ Ignoring this, the court instead held that § 1346 defendants violate state law. *Id.* at 734. Because *Brumley* predates *Rybicki* and *Bloom*, it is possible that the Fifth Circuit had never contemplated the private-gain element unifying pre-*McNally* honest services case law.

In *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002), the Third Circuit did attempt to provide an historical basis for rejecting the honest services fraud standard used in *Bloom*. However, *Panarella* contested *Bloom*'s requirement that the defendant "misuse his position," not the private-gain requirement. In fact, the Third Circuit based its decision on *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), a pre-*McNally* case in which the standard of conduct the defendant had violated required that "every department head and staff member was prohibited from using his position as an employee of the City of Chicago to benefit personally," *id.* at 645 (emphasis added), suggesting that the private-gain element was very much present in *Bush*. Thus, *Panarella* does not threaten the private-gain requirement.

⁵ See *United States v. Holzer*, 816 F.2d 304, 307-10 (7th Cir. 1987) (bribery); *United States v. Silvano*, 812 F.2d 754 (1st Cir. 1987) (self-dealing); *United States v. Lovett*, 811 F.2d 979 (7th Cir. 1987) (bribery); *United States v. Bruno*, 809 F.2d 1097, 1104-06 & n.1 (5th Cir. 1987) (bribery); *United States v. Barber*, 668 F.2d 778 (4th Cir. 1982) (kickbacks); *Bradford v. United States*, 129 F.2d 274, 276 (5th Cir. 1942) (self-dealing); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) ("No trustee has more sacred duties than a public official and any scheme to obtain an unfair advantage by corrupting such a one must in the federal law be considered a scheme to defraud.").

Tellingly, where private gain has been absent, pre-*McNally* cases have reversed honest services frauds convictions. See *United States v. Dixon*, 536 F.2d 1388, 1399 (2d Cir. 1976) (“There is abundant authority that a scheme to use a private fiduciary position to obtain direct pecuniary gain is within the mail fraud statute.”) (emphasis added). In *Dixon*, the court refused to extend the honest services doctrine to the defendant because he had “received no money or property by virtue of the omission.” *Id.* at 1400. Judge Friendly, writing for the court, differentiated the facts of the case from traditional honest services frauds in which an “official has been paid to act in breach of his duties” or has acted “to enhance his private advantage, often by taking bribes.” *Id.* Because every prior honest services fraud case involved “an element of corruption” not present in *Dixon*, the court rejected the broad application of honest services fraud to an instance in which an employee violated SEC regulations. *Id.* at 1401.

Nor was *Dixon* an aberration. In *United States v. Gray*, the court characterized honest services fraud as “anchored upon the defendant's misuse of his public office for personal profit.” 790 F.2d at 1295. Even the Government’s brief in *Carpenter v. United States*, 484 U.S. 19 (1987), acknowledged the private-gain element. Citing *Dixon*, the Government described honest services fraud as “a scheme to use a private fiduciary position to obtain direct pecuniary gain,” a position the Government characterized as “uniformly held” by the lower courts. Brief for the United States at 32, *Carpenter*, 484 U.S. at 19 (No. 86-422). Submitted the month before *McNally* was decided, the Government’s brief offers key insight into how honest services fraud was commonly perceived at the time.

In response to the unmistakable presence of private gain in pre-*McNally* honest services fraud cases, the Government cites *United States v. Weiss*, 752 F.2d 777 (2d Cir. 1985), alleging that it provides a pre-*McNally* exception to the private-gain requirement. However, the

Government plainly misinterprets the dicta on which it bases this assertion. Although the court found irrelevant the fact that “the government presented no evidence that [a] . . . cash fund was actually used for [the defendant’s] own personal enrichment,” *id.* at 784, the court was not rejecting the private-gain requirement. Rather, the analysis related solely to the Government’s evidentiary burden in demonstrating the presence of private gain. The Second Circuit did not require a showing that the defendant actually enriched himself because private gain could be inferred from “the use of [corporate] funds for a non-corporate purpose.” *Id.* In fact, the court further remarked that though “[t]here was no direct evidence offered concerning the final destination of the misappropriated funds. . . . the record . . . allowed the jury to ‘have drawn a justifiable inference that defendants used the scheme *for their own benefit.*’” *Id.* at 784-85 (emphasis added) (quoting *United States v. Siegel*, 717 F.2d 9, 14 (2d Cir. 1983)). If anything, then, *Weiss* provides only further evidence of the universal presence of private gain in pre-*McNally* honest services fraud precedents.

3. Under the rule of lenity, this Court must construe § 1346 as including an element of private gain even if the pre-*McNally* honest services fraud doctrine is ambiguous on that issue.

Although § 1346 unambiguously requires an element of private gain, even if it does not, the rule of lenity requires that this Court construe the statute in favor of Mr. Skilling. Proper statutory interpretation militates against the Government’s position, but to the extent that the pre-*McNally* case law is uncertain on whether private gain is an element of honest services fraud, “ambiguity concerning the ambit of” § 1346 “should be resolved in favor of lenity.” *Jones v. United States*, 529 U.S. 848, 849 (2000) (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)). This Court has found lenity especially appropriate in the context of mail fraud, since “mail fraud is a predicate offense under RICO . . . and the money laundering statute.” *Cleveland*

v. United States, 531 U.S. 12, 25 (2000). Admittedly, the rule of lenity does not apply simply in virtue of § 1346’s textual ambiguity; lenity is applicable only when ambiguity persists even after the traditional canons of statutory interpretation have been consulted. *See United States v. Shabani*, 513 U.S. 10, 17 (1994). But, as already explained, § 1346 draws its meaning from pre-*McNally* honest services fraud precedents. Even if, taken as a whole, those precedents are ambiguous in requiring a private-gain element, this Court should presume the private-gain requirement in order to narrow the statute’s scope. The Government must therefore do more than establish that the presence of private gain in pre-*McNally* honest services fraud cases is uncertain; instead, its burden is to prove that there remains no “reasonable doubt” that private gain is not a required element. *Moskal v. United States*, 498 U.S. 103, 108 (1990).

4. Because Mr. Skilling’s actions were intended to advance Enron’s interests rather than to achieve his own private gain, the decision below should be reversed.

Given the absence of the private-gain element in the instant case, the Fifth Circuit’s decision below should be reversed. Where, as here, the jury is not instructed on an essential element of the offense, the Government must prove “beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.” *Neder*, 527 U.S. at 17. This is a burden the Government has not met. Mr. Skilling’s actions, though deceitful, were intended to further the corporate interest by raising Enron’s stock prices. In fact, Enron’s Board of Directors approved several of the actions for which Mr. Skilling was charged with fraud. *See Skilling*, 554 F.3d at 546. While Mr. Skilling’s personal success was tied to that of Enron, this is not properly private gain under § 1346; otherwise, the private-gain requirement would cease to be a meaningful limiting principle, since courts could construe any act an employee takes on behalf of his employer as motivated by the prospect of professional success. *See Brown*, 459

F.3d at 522 (“[T]he Government's insistent argument, that a fiduciary breach is itself a sufficient reflection of interest divergence . . . mak[es] every knowing fiduciary breach a federal crime.”); *cf. Thompson*, 484 F.3d at 882-83 (refusing to count a raise in the defendant’s salary as private gain for the purposes of § 1346 because such an interpretation would promote absurd results). Here, Mr. Skilling intended to advance Enron’s interests, not his own private interests. Even the lead prosecutor at trial has since admitted that Mr. Skilling “took steps seemingly inconsistent with alleged criminal intent. Prior to Enron's collapse, he offered to return to the company as its steward, and in the weeks prior to bankruptcy he took several steps toward engineering and personally financing a private buyout.” *Hueston, supra*, at 198.

Although the indictment and the Government’s theory allowed for two other objects of the conspiracy in addition to honest services fraud,⁶ in light of the jury’s general verdict, it is impossible to discern the theory on which the jury relied. Where a jury returns a general verdict of guilt, that verdict “must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.” *Zant v. Stephens*, 462 U.S. 862, 881 (1983). Even the Fifth Circuit, which accepted the Government’s unsupported interpretation of § 1346 below, conceded that “if any of the three objects of Skilling’s conspiracy offers a legally insufficient theory, we must set aside his conviction to avoid the possibility that the verdict rests on the insufficient theory.” *Skilling*, 554 F.3d at 543. At trial, the Government both denied the private-gain requirement and failed to demonstrate that Mr. Skilling was motivated by anything other than Enron’s corporate interest. Accordingly, this Court should reverse the decision below.

⁶ The indictment and the Government’s theory also allowed for two other objects of the conspiracy: securities fraud and wire fraud to deprive Enron and its shareholders of money and property. *See Skilling*, 554 F.3d at 542.

5. Recognizing the private-gain requirement would help this Court avoid the vagueness and federalism defects that are otherwise inherent to the statute.

Recognition of § 1346's private-gain requirement is the best means of preserving the statute's constitutionality. In the face of a vagueness challenge, construing § 1346 in this fashion would provide employees with notice of what conduct is subject to criminal penalty and limit arbitrary or discriminatory prosecutions. In fact, reliance on this historically-based interpretation is what enabled the Second Circuit to uphold the statute in the face of a vagueness challenge. *Rybicki*, 354 F.3d at 142-43. Absent the element of private gain, § 1346 becomes an overreaching common-law statute encompassing all fiduciary breaches. *See Brown*, 459 F.3d at 521-22 (explaining that omitting a private-gain element from § 1346 would allow the statute to “encompass[] every knowing fiduciary breach”); *Bloom*, 149 F.3d at 655 (“Misuse of office . . . for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime.”). The Government's flawed interpretation would also criminalize unspecified fiduciary breaches developed over time by judicial opinion. As noted by Justice Scalia, “[A] freestanding, open-ended duty to provide ‘honest services’—with the details to be worked out case-by-case” amounts to “nothing more than an invitation for federal courts to develop a common-law crime for unethical conduct.” *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari).

The private-gain requirement also minimizes federal intrusion into areas of state authority. Traditionally, state courts developed common-law fiduciary duties and have retained primary responsibility for their enforcement. Using § 1346 to impose harsh federal criminal penalties for run-of-the-mill violations of these state civil duties would encroach upon an area traditionally governed by the states. Though, under the Supremacy Clause, Congress may legislate in such areas if not otherwise constitutionally barred, in doing so, Congress “must make

its intention to do so unmistakably clear in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Construing § 1346 as requiring an element of private gain limits the statute to one particular form of misconduct: employee pursuing their own private interests—as opposed to those of their employer—through the use of the federal mails and wires. Other laws already cover more general employee misconduct.

Absent the element of private gain, § 1346 is constitutionally suspect under this Court’s vagueness and federalism jurisprudence. However, by recognizing the requirement, this Court may avoid these constitutional dilemmas. *See Jones*, 529 U.S. at 857 (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”). Not only does proper construction of § 1346 favor recognizing a private-gain element; it also provides this Court with the best means by which it can preserve the statute’s constitutionality.

II. ONCE THE JURY POOL IS PRESUMED TO BE PREJUDICED, THE GOVERNMENT MAY NOT REBUT THAT PRESUMPTION, AND THE COURT SHOULD TRANSFER VENUE. IF THE GOVERNMENT CAN REBUT THE PRESUMPTION, IT MUST DO SO BEYOND A REASONABLE DOUBT.

A. When the jury is presumptively prejudiced, the trial court should transfer venue.

Given the level of negative publicity in Houston, Mr. Skilling could not get a fair trial, and the district court should have transferred the venue. “[W]here there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it” *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (emphasis added). Despite overwhelming adverse publicity that prejudiced the jury pool, the district judge denied two motions to transfer venue. Whatever else presumed prejudice does, it certainly provides “a reasonable likelihood” that there will not be a fair trial.

1. Mr. Skilling has a right to an impartial jury.

Mr. Skilling has the right to a trial by “an impartial jury free from outside influences.” *Sheppard*, 384 U.S. at 362; *see also id.* at 351 (“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and arguments in open court, and not by any outside influence, whether of private talk or public print.”) (quoting *Patterson v. State of Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) (Holmes, J.)). The influence of public print in this case is extensive, to the point that the Fifth Circuit found that there was reason to presume prejudice. *Skilling*, 554 F.3d at 559. In these extreme and rare instances, the theory that underlies our system is at risk.

Jurors are not expected to be ignorant of the events in question. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Mr. Skilling has never suggested that mere awareness should disqualify a juror. Instead, he has consistently maintained that the level of coverage of and community impact from the collapse of Houston’s largest company corrupted the jury pool. Having established that the jury pool is tainted, any potential juror drawn from that pool is presumed to be biased and therefore incapable of “render[ing] a verdict based on the evidence presented in court.” *Id.*

Courts must carefully guard against jury contamination from pervasive and hostile press coverage. The Court has long recognized the truism that “Any judge who has sat with juries knows that, in spite of forms they are extremely likely to be impregnated by the enviroing atmosphere.” *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (quoting *Frank v. Mangum*, 27 U.S. 309, 349 (1915) (Holmes, J., dissenting)). The advent of the modern media has led to a growing concern with impaneling impartial juries. “Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.”

Sheppard, 384 U.S. at 362-63. This admonition predates the development of cable news and the Internet, and the concerns and corresponding obligations can only be heightened by the increasing media saturation that has marked the four decades since *Sheppard*.

2. Presumed prejudice is different from, but just as harmful as, actual prejudice.

Two distinct types of prejudice can infect a trial. Presumed prejudice occurs when the jury pool becomes so corrupted, most likely by unremitting, adverse publicity, that a fair trial is not possible. To determine if there is presumed prejudice, courts must examine the publicity that the defendant complains of as well as the circumstances surrounding that publicity. *Sheppard*, 384 U.S. at 351-52. Appellate courts review the overall circumstances de novo. *Id.* at 362. Actual prejudice occurs when the particular, seated jury is so influenced by publicity that they cannot render an impartial verdict. Actual prejudice falls within the bailiwick of the trial court and as such appellate courts review rulings for abuse of discretion. *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991). Though the Fifth Circuit's initially addressed these topics separately, it ultimately conflated them in such a way as to render the former irrelevant, despite clear Supreme Court precedent to the contrary. Finding a presumption of prejudice is a distinct question with its own implications. *See Rideau v. Louisiana*, 373 U.S. 723 (1963).

Courts presume prejudice when the pretrial publicity is sufficiently hostile and inflammatory and when that publicity saturates the community. *Rideau*, 373 U.S. at 726-27; *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975). Presumed prejudice is rarely invoked and only in extreme situations. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). Most claims alleging due process violations require a showing of identifiable prejudice, but "at times a procedure employed . . . involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U.S. 532, 542-43 (1965). The Fifth Circuit's finding

of presumed bias demonstrates that this is such a case. In such rare cases “it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion” *Sheppard*, 384 U.S. at 351 (quoting *Irvin*, 366 U.S. at 728). This Court has in at least three cases found that hostile and pervasive media publicity can presumptively prejudice a jury and violate the defendant’s due process rights.

In *Sheppard*, the trial court failed to protect Sheppard from the “inherently prejudicial publicity which saturated the community.” *Sheppard*, 384 U.S. at 363. In addition, the media frenzy even extended into the courtroom itself. *Id.* at 345-49. Since the trial court refused to transfer venue or continue the case, the Court reversed and granted the habeas petition.

The Court overturned the conviction in *Estes* because the media circus during pretrial presumptively biased the venire. In the presence of the veniremen, the court conducted two days of hearings on the defendant’s motion to bar media from the courtroom. The media presence during that hearing caused “considerable disruption” and the coverage was similarly disruptive to the community. *Estes*, 381 U.S. at 536. Expressing concern that the high level of publicity “could only have impressed those present, and also the community at large, with the notorious character of the petitioner as well as the proceeding,” the Court expressed grave concern that this “set it apart in the public mind as an extraordinary case or, as Shaw would say, something ‘not conventionally unconventional.’” *Id.* at 536-38. In this case, the heightened media coverage and the early notice and lengthy nature of the questionnaire sent to prospective jurors flagged this case as extraordinary in the public’s mind in general and the veniremen’s minds in particular.

Of the cases finding presumptive prejudice, only *Rideau* based its presumption solely on pretrial publicity and, as such, is the best guide to the law applicable to the case at bar. In *Rideau*, the defendant’s staged confession was aired on a local television station in a small community.

More than a third of the population of the parish saw the confession. Based on the clear evidence of contamination of the jury pool the Court did “not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community” not contaminated by the televised confession. *Rideau*, 373 U.S. at 727. Rideau clearly sets out the rule that when pretrial publicity leads the court to presume bias, whatever happens at voir dire is irrelevant since the criminal process has already been fatally infected with bias.

3. The publicity and attitude prevalent in Houston made a fair trial impossible.

Houston's local paper, *The Houston Chronicle*, provided constant and incendiary coverage of Enron's downfall. Literally thousands of articles were written on the subject. In 2004, for example, there were more than five hundred articles on Enron including fifty-seven on the front page. By contrast, the major daily papers in Phoenix, Atlanta, and Denver ran a combined total of seven front-page articles. Declaration of Edward Bronson, Ph.D. in Support of Defendant Jeffrey Skilling's Motion to Transfer Venue at 12, *United States v. Skilling*, No. 04-cr-00025 (S.D. Tex. Nov. 7, 2004) [hereinafter Bronson Declaration]. Nearly a hundred articles focused on the impact of Enron's collapse on “sympathetic individuals [who] expressed feelings of anger and betrayal toward Enron. These stories are hard to characterize as non-inflammatory.” *Skilling*, 554 F.3d at 559. Editorial cartoons lambasted Skilling and other Enron executives, *id.*, and Mr. Skilling's name made more than fifty headlines and more than 450 stories between the collapse and the trial. Bronson Declaration, *supra*, at 11. The Chronicle's devotion to prejudging Mr. Skilling even extended to the sports page. *Skilling*, 554 F.3d at 560. The Chronicle's obsession contributed to and reflected public prejudice.

The leading sociologist of Houston, who has annually surveyed the city for more than

twenty-five years noted that the city feels “a deep and pervasive negativity toward Enron and its executives” Declaration of Stephen L. Klineberg, Ph.D. in Support of Defendant Jeffrey Skilling’s Motion to Transfer Venue at 7, *United States v. Skilling*, No. 04-cr-00025 (S.D. Tex. Nov. 8, 2004). Dr. Klineberg’s research indicates that the city feels a “deep and pervasive sense of betrayal and anger” and he expressed confidence that “[v]irtually all jurors will be aware of these public perceptions and attitudes (either through their prior experiences or through the experience of the trial itself), and they are likely to feel a great deal of pressure to conform their verdict to those attitudes.” *Id.* This concern based on his years of research and experience is backed up by extensive surveys done prior to trial.

Polling indicated that Houston had a significantly higher level of awareness of the Enron collapse and much more settled and widely held beliefs in who was responsible than peer cities. In response to the question “Please name all the former Enron executives you know of who are guilty of crimes,” more than twelve-percent of Houstonians volunteered Mr. Skilling’s name. Residents of Houston were between four to nine times as likely as residents in other cities to label Mr. Skilling guilty without even hearing his name from the pollster. *See* Declaration of Philip K. Anthony, Ph.D., in Support of Defendant Jeffrey Skilling’s Motion to Transfer Venue at 19, *United States v. Skilling*, No. 04-cr-00025 (S.D. Tex. Nov. 8, 2004). When asked what they thought of Jeffrey Skilling, over thirty-percent of the members of the Houston polling sample gave a negative opinion. Some offered statements like: “Jeff Skilling is guilty. My company went bankrupt because of its connection with Enron”; “I have only two words to explain all of the people involved in Enron and I will not expand further: economic terrorists”; and “Jeff Skilling is a crook. All the Enron executives were white-collar crooks. Enron was the most deceitful company in US history.” *Id.* at 7. Polling also revealed that roughly a third of

Houston residents personally knew someone who was harmed by Enron's fall. *Id.* at 22. Even the Government's own expert found in his own polling that more than ninety percent of Houston were aware of the case against Mr. Skilling and more than sixty-three percent had already determined that Mr. Skilling was definitely or probably guilty. Declaration of David A. Zagorski, Ph.D., in Response to Defendants' Motion to Transfer Venue at 12-13, *United States v. Skilling*, No. 04-cr-00025 (S.D. Tex. Dec. 3, 2004).

Finally, the community perceives that it has much to gain financially from a conviction and a real chance that some jurors might feel that they will be at least indirect beneficiaries of a financial windfall if Mr. Skilling is found guilty. Declaration of Roy Weinstein in Support of Defendant Jeffrey Skilling's Motion to Transfer Venue at 3-6, *United States v. Skilling*, No. 04-cr-00025 (S.D. Tex. Nov. 8, 2004) [hereinafter Weinstein Declaration]. The Sarbanes-Oxley Act set up a fund for victims of the Enron collapse funded in large part by the assets seized pursuant to a guilty verdict against company executives. The *Chronicle* has reported on the fund and the effect of a conviction numerous times. Thousands upon thousands of Houston residents stood to gain significant sums if the Government could convict Mr. Skilling. Weinstein Declaration, *supra*, at 4-6. The people who stood to gain were the same as those who sat in judgment.

In sum, the publicity was hostile and unrelenting. The thousands of negative articles fermented in the psyche of the city until the jury pool became hopelessly contaminated. The adverse media message preyed upon and fed a community sense that Enron and its executives had wronged the city itself. Moreover, as the *Chronicle* was always quick to remind potential jurors, Enron's collapse caused disruptions to the city's commerce well beyond the loss of employment and retirement funds at and through Enron; hundreds of companies in the Greater Houston area suffered from the loss of business with Enron or its employees. *Skilling*, 554 F.3d

at 560. In this maelstrom, Mr. Skilling was forced to face a jury drawn from an angry public seated a mere six blocks from the former headquarters of Enron. These facts demonstrate a “reasonable likelihood” that a fair trial would not be possible. *Sheppard*, 384 U.S. at 362-63. The Fifth Circuit was therefore correct to presume prejudice.

4. Once prejudice is presumed venue should be transferred.

Once prejudice has been presumed, a trial in that venue would violate due process:

Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927). The Court has applied this rule to reverse judgments in criminal trials where the prejudice was inherent in the process. In *Rideau* and *Estes*, the Court followed the rule to reverse convictions that followed prejudicial media coverage. Likewise, in *Turner*, the use of deputy sheriffs who were witnesses in the case as chaperones for the jurors was enough for reversal without a showing of actual prejudice. *See* 379 U.S. at 471. The rule has also been followed in other contexts including the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the effect of contributions in judicial races, *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009). Given the pervasive community prejudice before and during the trial, there was certainly a “possible temptation to the average man” to deny Mr. Skilling his due process rights. The trial should have been moved to protect Mr. Skilling’s rights, but it was not

In such an instance the court should take preventative actions to protect the defendant’s right to an impartial jury. Transferring venue away from a presumptively biased community serves the justice system. “[O]ur system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way justice must satisfy the appearance of justice.” *Estes*, 381 U.S. at 543 (quoting *Offutt v. United States*, 348 U.S. 11,

14 (1954)). Here a guilty verdict was procured from a jury called out of a prejudiced community with limited voir dire and in the midst of a media storm and economic uncertainty. Under these conditions, it is hard to maintain that there is an appearance of justice.

Once prejudice is presumed any trial in that venue is fatally flawed. The Court has rebuked procedures that impanel juries from a biased jury pool, *Rideau*, 373 U.S. 723, procedures that prejudice jurors during pretrial, *Estes*, 381 U.S. 532, and trials that include both such procedural defects, *Sheppard*, 384 U.S. 333. The Houston media in this case was as hostile as it was relentless, leading the Fifth Circuit to take the rare step of overturning the trial court's finding that there was no need to presume prejudice. Moreover, the Fifth Circuit ignored several aspects of the voir dire process that irreparably tainted the pretrial process. It follows that Mr. Skilling's due process rights were not so much violated as trampled.

Reversal in this case is appropriate to vindicate the constitutional rights at stake and to provide appropriate supervision to lower federal courts as they select juries. *See Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Aldridge v. United States*, 283 U.S. 308 (1931); *Connors v. United States*, 158 U.S. 408 (1895). This Court has repeatedly suggested that it will maintain a higher standard for impaneling impartial juries than the Constitution alone requires. *Mu'Min*, 500 U.S. at 424; *see also Murphy*, 421 U.S. at 804 (Burger, C.J., concurring). Even if the Court was to withhold judgment on whether the Constitution requires a change of venue when prejudice is presumed, it could establish that rule as a matter of policy in federal courts. *See Marshall v. United States*, 360 U.S. 310, 313 (1959).

Lower federal courts have for the most part already internalized that rule. This is why this Court has not had to find presumptive prejudice since *Sheppard*. Lower courts since *Sheppard*, even in large metropolitan centers, have regularly transferred venue after presuming prejudice.

See Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985); *United States v. McVeigh*, 918 F. Supp. 1467 (W.D. Ok. 1996) (transferring out of Oklahoma); *United States v. Moody*, 762 F. Supp. 1485 (N.D. Ga. 1991); *United States v. Ebens*, 654 F. Supp. 144 (E.D. Mich. 1987) (transferring venue of a retrial out of Michigan and northern Ohio because of negative publicity); *United States v. Engleman*, 489 F. Supp. 48 (E.D. Mo. 1980) (transferring from St. Louis); *United States v. Abrahams*, 453 F. Supp. 749 (D. Mass. 1978) (transferring venue in a white-collar case in Boston); *United States v. Marcello*, 280 F. Supp. 510 (E.D. La. 1968).

The policy is well justified not only by the system's commitment to preserving defendants' rights, but also by its interest in promoting judicial economy. As Judge Hungate put it, "Effective and economic judicial administration is not well served by calling an inordinate and unwieldy number of veniremen to see if an unbiased jury might be obtained, especially when it is already apparent that a substantial chance of intolerable prejudice exists." *Engleman*, 489 F. Supp. at 50; *accord Ebens*, 654 F. Supp. at 146. Picking unbiased needles out of such haystacks at best wastes resources or at worst gives the judge a vested interest in trampling the defendant's rights so as not to waste all of the effort put into seating the least bad jury available.

5. Actual prejudice inquiry only begins if there is no presumed prejudice.

The Fifth Circuit ignored the distinctive importance of presumed prejudice and instead placed all of the real emphasis on an unnecessary and poorly conducted search for actual prejudice. The Court in *Rideau* expressly rejected this reasoning. There, the dissent argued that "[u]nless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity, epitomized by the televised interview [made] petitioner's trial a meaningless formality." *Rideau*, 373 U.S. at 729 (Clark, J., dissenting). The majority, however, recognized that after the community has been so prejudiced "[a]ny

subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.” *Id.* at 726. The Court expressly “h[e]ld, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial by jury drawn from a community” that had not been biased by the prejudicial and pervasive media coverage. *Id.* at 727.

Even *Patton v. Yount*, 467 U.S. 1025 (1984), a key precedent for the Respondent, suggests that a presumption of bias eliminates the need for an examination of actual prejudice. There, the petitioner had been convicted at an initial state trial. That conviction was overturned on other grounds. *See Commonwealth v. Yount*, 256 A.2d 464 (Pa. 1969). Four years later, Mr. Yount was retried and convicted on the same charges. The Third Circuit found that pretrial publicity had made a fair trial impossible. This Court reversed after finding no actual prejudice.

The *Patton* Court moved to actual prejudice analysis only after finding no presumed prejudice. The Court was impressed by the fact that jury selection for the second trial began four years after the first trial. *Patton*, 467 U.S. at 1032. This was important because it allowed time for community sentiment and media publicity to cool. The Court noted that the local papers printed less than one article a month on the case between the reversal of the first verdict and the beginning of jury selection in the second case. *Id.* The *Patton* majority also took comfort from the fact that media coverage during the voir dire process addressed “the prolonged process of jury selection” rather than “the crime or prior prosecution.” *Patton*, 467 U.S. at 1032. This stood in contrast to media conduct before the first trial when media attention and public sentiment were at their height. *Id.* The intervening years effectively served as a continuance: one of the prescribed remedies for dealing with presumed prejudice. *See Sheppard*, 384 U.S. at 362-63.

The Court came to the same conclusion in *Murphy*, noting that the news articles were

largely factual in nature and had virtually disappeared from the papers seven months before the trial started. The lapse in time cooled things enough that there was no longer a reason to presume prejudice. In *Murphy* as in *Patton*, only after the Court was satisfied that the lapse in time made a fair trial possible could it determine if the jury actually impaneled was fair. In contrast, there was no such break in this case and therefore no similar chance for the fever of public passion to subside. From January 1, 2006 through May 1, 2006, the *Houston Chronicle* alone had 911 articles dealing with Enron and 278 that dealt with Mr. Skilling. In fact, in the one week prior to the start of voir dire alone, the Chronicle published thirty-two articles referencing Mr. Skilling as a part of the fifty that mentioned Enron. Moreover, the Fifth Circuit in this case found that there was a presumption of prejudice. With this finding, there is no need to consider actual prejudice.

B. Even if this Court finds no presumed bias, the Fifth Circuit's actual prejudice review was fatally flawed.

Even under the Fifth Circuit's mangled interpretation of *Rideau* where presumed prejudice evaporates into actual prejudice review, the jury selection process was so flawed as to require reversal. The pretrial period was contaminated by the length of time potential jurors were exposed to inflammatory publicity and could not possibly have been saved by the shoddy voir dire. Mr. Skilling should be tried in a venue not implacably hostile to him, or at a minimum where at least minimal protections are in place to protect his right to an impartial jury.

The trial in *Irvin v. Dowd*, took place under continuous and prejudicial coverage even after a transfer of venue from an adjacent county. 366 U.S. 717. Despite the rising tide of popular opinion and volume of hostile media, no court at any level presumed the jury pool to be biased. However, noting the risk of potential bias, this Court closely examined the voir dire for evidence of actual bias. Since two-thirds of the jury admitted to believing that the defendant was guilty before trial, the Court found actual prejudice and reversed the decision. *Id.* at 728.

By contrast, this Court in *Patton*, after rejecting the finding of presumed prejudice, looked at the voir dire procedures and decided that there was no actual prejudice. *Patton*, 467 U.S. at 1032-33. The facts in *Patton* are similar to *Irvin*, but there are key differences that the Court was careful to point out. *Id.* at 1034 n.10. Those key differences highlight elements of the decision below in this case that cry out for reversal. Not only did the Fifth Circuit carry on an actual prejudice analysis while still presuming prejudice—in clear contrast to *Patton* where the Court only proceeded after finding that such a presumption was incorrect—it conducted a flawed evaluation of the actual prejudice claim. *Skilling*, 554 F.3d at 561-65. Its analysis of the actual prejudice question ignored serious problems with the voir dire process that amount to an abuse of discretion even under the more deferential review. *See Irvin*, 366 U.S. at 717.

Voir dire in this case was flawed in three important ways. First, the judge conducted the proceedings assuming that there was no presumptive prejudice. Second, the judge did not follow the correct procedure to conduct voir dire in cases where there is a clear risk of potential jurors having been exposed to prejudicial material. Third, the voir dire questionnaire put potential jurors on notice and heightened their sensitivity to prejudicial media coverage and community sentiment. All of these mistakes violated Mr. Skilling's rights under the Fifth and Sixth Amendments, and any would be fatal to the Government's case.

The initial mistake with the voir dire was conducting the proceedings against the wrong background assumptions. The trial judge did not believe that the community was biased, and therefore believed that the potential jurors were presumably unbiased. If the venire is presumed to be impartial, the court need only look for reasons to exclude potential jurors. However, when the community at large is biased, the judge must presume that each juror is biased as well. If the venire is presumptively biased, the court must look for reasons to seat particular jurors. In

essence, the Government must prove the negative that the juror is not biased. Setting aside for the moment whether or not this is possible to do at all, it was not even attempted in this case.

Although the Fifth Circuit made much of the fact that Mr. Skilling did not use any challenges for cause during voir dire, *see Skilling*, 554 F.3d at 562 n.53, this entirely misses the point: the petitioner had objected to all of the jurors as presumably biased to begin with. It does not matter that he could not point to a particular reason why a particular juror should not be seated when the jury pool is presumptively biased. If the presumption and the burden shift, then the Government should have to prove why a particular juror is *not* biased. This is a burden that they cannot possibly bear because the only evidence they can offer is the testimony of the potential juror that they are and will be unbiased, but under the presumption, these claims “should not be believed.” *Patton*, 467 U.S. at 1031.

Secondly, the trial court failed to follow the correct procedure during voir dire by not questioning each juror alone. “If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors.” Criminal Justice Standards Comm., ABA, ABA Standards for Criminal Justice § 8-3.5(a) (2d ed. 1980). In this case, the judge divided the venire into subgroups before questioning individually. So while the veniremembers were questioned individually, they were always questioned in the presence of other potential jurors. In this case, where there is a real concern about the fairness of the jury, the judge failed to follow ABA guidelines for voir dire.

Further, this Court has indicated a substantial preference for individual voir dire outside of the presence of other veniremembers in cases where there has been heavy publicity. When there is a high volume of adverse media and public sentiment running against the defendant,

jurors are likely to understate their actual bias. *See Irvin*, 366 U.S. at 728. In *Patton*, the Court noted one difference between the facts in that case and *Irvin* was that potential jurors in *Patton* were brought into the court individually for questioning apart from other prospective jurors. While not solely determinative of the outcome, the Court noted that this was “not an unsubstantial distinction.” *Patton*, 467 at 1034 n.10. There is a substantial difference between the effective voir dire seen in *Patton*, and the ineffective voir dices present in both *Irvin* and this case. The lower court’s decision rests in large part on its finding that the trial court conducted an exemplary voir dire. *Skilling*, 554 F.3d at 562. This is a curious and unsustainable conclusion given that voir dire ignored both clear Supreme Court guidance and ABA Standards.

Thirdly, the danger of constant and adverse media coverage is perhaps at its height before trial when there is no jury to sequester. *Estes*, 381 at 536. In this case, potential jurors were notified that they were included in the venire months before the trial. For months, every piece of prejudicial news that appeared in the paper or on the television, every comment from a neighbor, friend, or acquaintance formed an opinion as to the guilt or innocence of the defendants. Those stories and comments presumptively biased the community, which had no special reason to pay attention or to ponder the guilt or innocence of Mr. Skilling. These veniremembers had already been notified that they were potential jurors in this case, and it is only natural that they would begin to pay extra attention to the biased coverage that fed Houston’s bias against the defendants.

In addition, while examining the trial for prejudice, the *Patton* majority was quite concerned, not only with the procedures, but also with the extent of the voir dire. Whether or not prejudice is presumed, where there has been significant adverse pretrial publicity, “the trial court should undertake ‘*searching* questioning of potential jurors . . . to screen out those with fixed opinions as to guilt or innocence.’” *Mu’Min*, 500 U.S. at 440 (O’Connor, J., concurring) (quoting

Neb. Press Assn., 427 U.S. at 564). Asking searching questions takes time. The trial court in *Irvin* took eight days to choose fourteen jurors from 430 veniremen. In *Patton*, the court took ten days to select fourteen jurors from 167 veniremen. *Patton*, 467 U.S. at 1034 n.10. The district court in this case spent one day to select a jury from over a hundred potential jurors. One day, even after collecting written responses is not enough time to probe presumably biased jurors.

C. Any rebuttal must be beyond a reasonable doubt.

The “reasonable doubt” standard in America “is an ancient and honored aspect of our criminal justice system,” *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), which dates back at least to the Boston Massacre trials of 1770. *See generally* John H. Langbein, Renee Lettow Lerner, & Bruce P. Smith, *History of the Common Law* 697 (2009). One scholar has traced its roots to the medieval concern for the soul of the trier of fact. *See* James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* 93 (2007). The more modern concern with minimizing the risk of error grows from a concern for the rights of the accused. Whatever the justification the standard exists to vindicate the truism that it is better to free the guilty than convict the innocent. *See Henry v. United States*, 361 U.S. 98, 104 (1959); and 4 William Blackstone, *Commentaries on the Laws of England* 352 (Univ. of Chi. Press 1979) (1769) (“[I]t is better that ten guilty persons escape, than that one innocent suffer.”).

In this context, it would be strange if due process required a higher degree of certainty in the jury’s decision than in the jury itself. This result is untenable both because we can be no more confident in a jury’s verdict than we are in the jury itself, and because Mr. Skilling has the same constitutional interest in the reasonable doubt standard as he does in an impartial jury. Any lesser standard would explicitly leave room for a biased jury to convict an innocent man.

To avoid the conviction of innocents, the Government must rebut presumptions beyond a

reasonable doubt. Most famously, the Government must overcome the presumption of innocence. *See Coffin v. United States*, 156 U.S. 432, 453 (1895) (the presumption of innocence “lies at the foundation of the administration of our criminal law.”). In particular, the Government must prove every element of the charged offence beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970); *Patterson v. New York*, 432 U.S. 197, 215 (1977) (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)). If the Government can rebut a presumption of jury bias, it must carry the same burden it faces with every other presumption: reasonable doubt. *Deck v. Missouri*, 544 U.S. 622, 635 (2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (shackling defendant in front of the jury creates presumption of bias).

However, there is one clear difference between presumed prejudice in *Rideau* and *Deck* that brings things full circle. *Deck* prejudice is rebuttable by demonstrating harmless error. 544 U.S. at 622. *Rideau* demonstrates that when the jury is presumptively prejudiced, trial is improper and harmless error analysis is inappropriate. As the Eleventh Circuit pointed out:

In *Rideau*, the evidence of guilt was also overwhelming; the Supreme Court nevertheless presumed prejudice. To hold otherwise would mean an obviously guilty defendant would have no right to a fair trial before an impartial jury, a holding which would be contrary to the well established and fundamental constitutional right of every defendant to a fair trial.”

Coleman, 778 F.2d at 1541.

The prejudice seen in *Rideau*, *Irvin*, *Sheppard*, and this case does not lend itself to harmless error analysis even if shown beyond a reasonable doubt. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). This Court has required reversal for fundamental constitutional errors when they cause structural problems. *See Johnson v. United States*, 520 U.S. 461, 468 (1997) (citing *Gideon*, 372 U.S. 335 (complete denial of counsel)); *Tumey*, 273 U.S. at 510 (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury);

McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). These cases are in addition to the previously cited cases where presumed bias infected a trial and this Court reversed.

Those cases contain a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante*, 499 U.S. at 310. These errors “necessarily render a trial fundamentally unfair.” *Rose v. Clark*, 478 U.S. 570, 577 (1986). When these errors occur, defendants lack “basic protections” without which “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.” *Id.* at 577-578.

Deck prejudice arises in the context of an otherwise structurally sound trial. When the jury is presumptively prejudiced from the start, the framework of the trial itself is defective. Accordingly, Respondent cannot rebut the presumption after trial through harmless error analysis. Since the Government cannot show that the jury was actually unbiased beyond a reasonable doubt and harmless error analysis is unavailable, the decision below must be reversed and a new and fair trial granted.

CONCLUSION

For the foregoing reasons, Petitioner Jeffrey Skilling respectfully requests that this Court reverse the decision of the Fifth Circuit below.

Respectfully Submitted,

Alexander Schwab

Ben Johnson

Counsel for the Petitioner
November 30, 2009

APPENDIX: CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1361 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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1363 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. § 1364 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.