No. 08-1394

In The Supreme Court of the United States

JEFFREY K. SKILLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTIONS PRESENTED

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

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

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INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular significance here, NACDL has submitted amicus briefs to this Court in *Sorich v. United States*, 129 S. Ct. 1308 (2009) ("NACDL *Sorich* Amicus"), *Black v. United States*, No. 08-876 ("NACDL *Black* Amicus"), and *Weyhrauch v. United*

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

States, 08-1196 ("NACDL *Weyhrauch* Amicus"), arguing that the statute at issue in this case (18 U.S.C. § 1346) is void for vagueness.

SUMMARY OF ARGUMENT

1. The honest services statute is void for vagueness on its face. Neither the "vague and amorphous" statutory language nor the "jumble of disparate cases" construing it, *United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007), provides fair warning to ordinary people of the prohibited conduct or prevents arbitrary enforcement by federal prosecutors. The "core" principles that the government now purports to find in the statute have no basis in its text or legislative history and amount to little more than an invitation to judicial legislation.

2. Following the collapse of Enron, Skilling faced a wave of community hostility and inflammatory publicity equaled only in the Oklahoma City bombing case. The court of appeals correctly found that the extraordinary vitriol directed toward Skilling created a presumption of juror prejudice. But the court made two critical errors: it held, contrary to this Court's decisions, that the presumption of prejudice could be rebutted through voir dire, and it further found that the district court's perfunctory, five-hour voir dire overcame the presumption and produced a fair jury. Those rulings ignore the rationale for the presumption of juror prejudice, obliterate the distinction between presumed and actual prejudice, and, in combination, eviscerate the Sixth Amendment right to "indifferent"

jurors. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

ARGUMENT

I. THE HONEST SERVICES STATUTE IS VOID FOR VAGUENESS.

NACDL has argued in its *Sorich*, *Black*, and *Weyhrauch* amicus briefs that 18 U.S.C. § 1346 must be held void for vagueness, because the statute fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see* NACDL *Sorich* Amicus 13-23; NACDL *Black* Amicus 6-16; NACDL *Weyhrauch* Amicus 5-15.[2]

NACDL urges again the position stated in its prior briefs and argued by petitioner Skilling: the honest services statute is vague, both for lack of fair notice and for encouraging arbitrary enforcement by federal prosecutors.[3] We write further to address

[2] NACDL argues as well that § 1346 unconstitutionally intrudes on state sovereignty. NACDL *Black* Amicus 16-24; NACDL *Weyhrauch* Amicus 15-23. The federalism concerns in *Black* and *Weyhrauch* have equal force here.

[3] Two arguably distinct questions arise here. First, did the judicial interpretations of § 1346, *as they existed at the time of Skilling's conduct*, provide fair notice and prevent arbitrary enforcement? That question must be answered without the benefit of any clarity that this Court's decisions in *Black*, *Weyhrauch*, and this case might provide. Second, can this Court properly interpret § 1346 *now* to provide fair notice to future defendants and to prevent future arbitrary enforcement? Because NACDL contends that § 1346 is facially vague, *see infra* at 13-15, we focus on the second question.

issues that emerged during the oral arguments in *Black* and *Weyhrauch*.

1. Under the doctrine of constitutional avoidance, the Court must determine whether it can construe § 1346 to provide the constitutionally sufficient definiteness that Congress failed to include in the sparse statutory text. The answer is no. This Court has held that "[l]egislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).[4] The process of limiting the broad text of § 1346 through adjudication amounts to little more than forbidden judicial legislation. As Judge Jacobs has observed, "[T]he splintering among the circuits demonstrates [that] section 1346 effectively imposes upon courts a role they cannot perform. When courts undertake to engage in legislative drafting, the process takes decades and the work is performed by unelected officials without the requisite skills or expertise; and as the statutory meaning is invented and accreted, prosecutors are unconstrained and people go to jail for inchoate offenses." *United States v. Rybicki*, 354 F.3d 124, 164 (2d at Cir. 2003) (en banc) (Jacobs, J., dissenting); *see, e.g., United States v. Brumley*, 116 F.3d 728, 736 (5th Cir. 1997) (en banc) (Jolly, J., dissenting) (accusing majority of "assum[ing] a role somewhere between a philosopher king and a legislator to create its own definitions of the terms of a criminal statute").

[4] The Court has cited approvingly the description of this rule as the "principle of legality," which "implement[s] separation of powers, provide[s] notice, and prevent[s] abuses of official discretion." *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997).

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

2. The government insists that no judicial legislation is necessary; the Court need merely implement Congress' asserted intent to restore the "core" and "prototypical" pre-*McNally* principles that the cases established. *E.g.*, *Black* Tr. 30-32, 43, 46, 48; *Weyhrauch* Tr. 40, 42, 52. But as petitioner convincingly demonstrates, there was no consensus about the scope of honest services fraud before this Court briefly eliminated that theory in *McNally*. Brief for Petitioner ["Pet. Br."] 39-42. What the Fifth Circuit aptly termed "a jumble of disparate cases," *Brown*, 459 F.3d at 523, cannot provide the necessary fair notice.

Nor have the principles that supposedly may be divined from the pre-*McNally* cases prevented the government from arbitrary enforcement. To the contrary, the government has regularly taken positions in honest services prosecutions far beyond the core principles that it now purports to find in those cases. To cite a recent example: The government asserted at oral argument in *Black* and *Weyhrauch* that the honest services offense must involve a personal financial interest of the defendant, *Black* Tr. 31-33, 43-45; *Weyhrauch* Tr. 55; not even the financial interest of an adult son or other close relative falls within the statute, *Black* Tr. 31-33, 43-45. Yet earlier this year in *Sorich* the government successfully defended an honest services conviction where neither the defendant nor any of his alleged co-conspirators had any personal financial interest; they simply administered a patronage system that favored supporters of the incumbent city administration. *See Sorich*, 129 S. Ct. at 1311 (Scalia, J., dissenting from denial of certiorari); *United States v. Sorich*, 523 F.3d 702, 709 (7th Cir. 2008). Sorich is serving a prison sentence today based on a conviction that the government now concedes exceeded the scope of the honest services statute. Petitioner's brief (at 43-44) cites other examples of honest services prosecutions inconsistent with the interpretation of § 1346 that the government now espouses.

At oral argument in *Weyhrauch*, the government observed that the post-*McNally* honest services cases "evolved . . . without this Court's intervention and guidance to provide clarification," *Weyhrauch* Tr. 48--as if this Court had somehow dropped the ball.

But in case after case, including *Sorich*, *Black*, *Weyhrauch*, *Skilling*, and countless others over the last two decades,[5] the government vigorously opposed petitioners' efforts to obtain this Court's "guidance" and "clarification" concerning § 1346. The government thus preserved the opportunity for a generation of "headline-grabbing prosecutors" to use the statute "in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari).

In the twenty-one years since Congress enacted § 1346, federal prosecutors have made the most of that opportunity, without the slightest regard for the "core" principles that the government now endorses in an effort to save the statute. The government conceded at the *Weyhrauch* argument that "the core understanding of what honest services is may have been strayed from in some of those [post-*McNally*] cases, and some courts of appeals affirmed it." *Weyhrauch* Tr. 48-49. But it was *the government* that urged district courts to "stray[] from" what it now calls the "core understanding" of honest services fraud, and it was *the government* that urged the courts of appeals to affirm those concededly erroneous convictions. One can confidently predict that if this Court accepts the government's invitation to engraft its "core understanding" of § 1346 onto the vague statutory language, federal prosecutors will

[5] *See, e.g., Segal v. United States*, 128 S. Ct. 2069 (2008); *Colino v. United States*, 128 S. Ct. 1733 (2008); *Rybicki v. United States*, 543 U.S. 809 (2004); *Rise v. United States*, 541 U.S. 1072 (2004); *Panarella v. United States*, 537 U.S. 819 (2002).

turn at once to expanding that "understanding" until the statute again encompasses any conduct that a particular prosecutor deems "unappealing or ethically questionable." Only clear statutory language can perform the constitutionally required function of preventing arbitrary enforcement of § 1346.

3. Even if this Court can now divine a narrow core of covered conduct from the pre-*McNally* cases--bribery and kickbacks, for example, as Professor Alschuler proposes[6]--it should not substitute the elements of those offenses for the 28 words of § 1346. If Congress wanted to criminalize bribery and kickbacks that might otherwise go unpunished under federal law,[7] it should have said so clearly, as this Court encouraged it to do in *McNally*. The legislature cannot "set a net large enough to catch all possible offenders," and then leave it to this Court to "step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876).

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[6] Brief of Albert W. Alschuler as *Amicus Curiae* in Support of Neither Party, *Weyhrauch v. United States*, No. 08-1196 ["Alschuler Br."]. Justice Breyer referred to this during the *Black* argument as "Alschuler alternative A." *Black* Tr. 34. Although Professor Alschuler addresses a formulation of honest services that includes a limited form of self-dealing--what Justice Breyer called "Alschuler alternative B," *id*.--he makes clear that, in his view, § 1346 extends only to bribery and kickbacks. Alschuler Br. 28-33.

[7] The federal criminal code already reaches many forms of bribery and kickbacks. *See, e.g.*, 18 U.S.C. § 1952 (prohibiting interstate or foreign travel in aid of various offenses, including bribery and extortion punishable under state or federal law); *id*. § 666 (prohibiting bribery of officials of state and local entities that receive more than $10,000 per year in federal funds); *id*. § 201 (prohibiting bribery of federal officials).

It stretches the notion of statutory interpretation past the breaking point for a court (a) to discern from the amorphous language and minimal legislative history of § 1346 that Congress meant to reinstate pre-*McNally* honest services cases; (b) to review those cases and discard the many that are in conflict or otherwise do not involve the supposed "core" prohibited conduct; (c) to examine the cases that remain and determine that they involve bribery and kickbacks; (d) to hold, based on those "core" cases, that the "intangible right of honest services" means something like "the right to services untainted by bribes or kickbacks"; and then, presumably, (e) to borrow the elements of bribery and kickback offenses from statutes that expressly prohibit that conduct (18 U.S.C. §§ 201 and 666, for example), to establish precisely what the government must prove under § 1346 to obtain a conviction. This Court has never endorsed such an extravagant concept of statutory interpretation, and it should not do so here.

4. At argument in *Weyhrauch*, the government cited *United States v. Kozminski*, 487 U.S. 931 (1988), as an analogous instance of statutory interpretation. *Weyhrauch* Tr. 44. But *Kozminski* provides no support for the judicial legislation the government asks the Court to perform here. That case involved charges under 18 U.S.C. §§ 241 and 1584 that the defendants had held persons in "involuntary servitude." The Court rejected the government's proposal to embark on "the inherently legislative task of defining 'involuntary servitude' through case-by-case adjudication." 487 U.S. at 951. Instead, it applied the rule of lenity, *id*. at 952,

limiting the definition for purposes of both statutes to that found in "the actual holdings" of "every case in which this Court has found a condition of involuntary servitude," *id*. at 942-43.

Addressing § 241 (which prohibits conspiracies to interfere with "the free exercise or enjoyment of any right or privilege secured to [a person] by the Constitution or laws of the United States"), the Court observed:

> Congress intended the statute to incorporate by reference a large body of potentially evolving federal law. This Court recognized [in prior cases], however, that a statute prescribing criminal punishment must be interpreted in a manner that provides a definite standard of guilt. The Court resolved the tension between these two propositions by construing § 241 to prohibit only *intentional interference with rights made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them*.

487 U.S. at 941 (emphasis added). Applying this "made specific" principle, *Kozminski* held that the government's theory of culpability--that "involuntary servitude" could exist based on purely psychological coercion--exceeded the scope of § 241. *See id*.. at 944. The *Kozminski* Court thus drew an explicit line between allowing judges and juries to "apply substantive standards established by Congress" and

"tolerat[ing] the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis." *Id*. at 951. The government's position with respect to § 1346 places it firmly on the wrong side of that line.

As the later decision in *Lanier* also makes clear, nothing in this Court's rulings on the scope of criminal sanctions under the civil rights statutes supports the interpretive task that the government asks it to undertake here. Even where, as in § 241, Congress expressly incorporates a body of "potentially evolving federal law" into a criminal statute, the statute cannot be enforced unless the incorporated requirements have been "'made specific' by the text" of those separately defined provisions or by "settled interpretations" of them. *Lanier*, 520 U.S. at 267. Indeed, the same public actors vulnerable to civil rights prosecutions may not even be held *civilly* liable unless the constitutional right at issue is already "clearly established." *Id*. at 270-71.

In stark contrast, there is no separate constitutional or statutory "intangible right of honest services," the contours of which must be "made specific" or "clearly established" before a federal prosecutor charges a violation of § 1346. Instead, the meaning of the "right" must be traced, if at all, to the assertedly incorporated law from the pre-*McNally* era, which is nothing more than a "jumble of disparate cases" from the courts of appeals, many in conflict with each other, from which the government asks this Court to extract "core" principles. Those cases "leave the law insufficiently certain" to

constitute "warning [that] is fair enough." *Lanier*, 520 U.S. at 269.

Kozminski's refusal to read § 1584 broadly is also telling. The Court found that the government's proposed reading "would appear to criminalize a broad range of day-to-day activity." 487 U.S. at 949. It declared that the government's interpretation "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes"; that it would "subject individuals to the risk of arbitrary or discriminatory prosecution and conviction"; and that it would "fail to provide fair notice to ordinary people who are required to conform their conduct to the law." *Id*. at 949-50. Those objections to the government's interpretation of § 1584 apply with equal force to its approach to § 1346.

Kozminski rejected the government's argument--identical to the argument it makes in *Black* and *Weyhrauch*[8]--that the specific intent requirement of § 1584 cured any vagueness problem. The Court declared that "in light of the Government's failure to give any objective content to its construction of the phrase 'involuntary servitude,' this specific intent requirement amounts to little more than an assurance that the defendant sought to do an unknowable something." *Id*. at 950 (quotation omitted). Similarly here, the "intent to defraud" element that the government trumpets as a cure to the vagueness in § 1346 provides no assurance that

[8] *Black* Tr. 51; *Weyhrauch* Tr. 33-37, 51.

the defendant has fair notice of what the honest services statute prohibits. *Cf. United States v. Kincaid-Chauncey*, 556 F.3d 923, 950 (9th Cir.) (Berzon, J., concurring) ("[R]equiring a 'specific intent to defraud' cannot always function as a sufficient limiting principle--one that would effectively prevent such political misuse [of § 1346 by prosecutors]--in the absence of a well-specified and commonly understood notion of when non-disclosure amounts to 'fraud.'"), *cert. denied*, 2009 U.S. LEXIS 8812 (U.S. Dec. 7, 2009).

5. The Court should hold § 1346 void for vagueness on its face, rather than merely as applied to Skilling (and Black and Weyhrauch). Certainly the statute is vague as to the conduct of those petitioners; but § 1346, like the statute at issue in *Kolender*, is impermissibly vague in *all* of its applications and thus should be struck down as facially invalid. *See Rybicki*, 354 F.3d at 155-65 (Jacobs, J., dissenting); *see also Brown*, 459 F.3d at 534-35 (DeMoss, J., concurring). The amorphous statutory language, the sparse legislative history, and the conflicting cases interpreting § 1346 fail to provide fair notice to anyone, regardless of the conduct at issue.

Lawyers and judges may be able to discern, through the elaborate interpretive process described above, that Congress intended the statute to apply to bribes and kickbacks. But § 1346 does not "provide the kind of notice that will enable *ordinary people* to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion) (emphasis added). And even if the Court were to find that the honest services statute *does* give

fair notice as to some narrow category of conduct such as bribes and kickbacks, the statute in all cases fails adequately to restrain the discretion of federal prosecutors.

This point is best shown through an example that Justice Breyer offered in his concurrence in *Morales* and Justice Scalia raised at oral argument in *Weyhrauch*: Suppose a person who commits an unjustified homicide is prosecuted under a statute that says, "It is a crime to do wrong." *Id*. at 71 (Breyer, J., concurring); *Weyhrauch* Tr. 45.[9] The person surely had fair warning before he acted that his murderous conduct was "wrong" and thus fell within the scope of the statute. Nevertheless, the statute is vague on its face, "not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide law enforcement officers." *Morales*, 527 U.S. at 72 (Breyer, J., concurring) (quotation omitted).

It therefore makes no difference whether, under the "fair notice" prong of vagueness analysis, a person who takes bribes knows he is violating the law. Section 1346 is still impermissibly vague because it gives prosecutors almost unlimited discretion to determine what undesirable conduct they will pursue. As Justice Breyer explained, the honest services statute "is unconstitutional . . . because the [prosecutor] enjoys too much discretion

[9] *See also United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (offering as example of vague statute one that "merely penalized all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury").

in *every* case. And if every application of the [statute] represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications." *Id*. at 71 (emphasis in original).

6. In NACDL's view, the Court's analysis of § 1346 should end with a finding that the statute is unconstitutionally vague on its face. If the Court determines that the statute can survive the vagueness challenge, we agree with petitioner and Professor Alschuler that it must be limited to bribes and kickbacks. Pet Br. 48-52; Alschuler Br. 28-32. But if the Court goes on to determine what conduct beyond bribes and kickbacks amounts to a deprivation of the "right to honest services" in the corporate context, we urge it to consider a further point: the circumstances under which an employee's knowledge and actions should be imputed to a corporation when the corporation (Enron, in Skilling's case) is the alleged victim of the employee's conduct.

Courts have held for at least a century that a corporation may be criminally liable for an employee's acts when "the act is done for the benefit of the [corporation], while the [employee] is acting within the scope of his employment in the business of the [corporation]." *New York Central and Hudson River Railroad Co. v. United States*, 212 U.S. 481, 494 (1909). Under *New York Central*, courts hold a corporation responsible for the conduct of an employee within the scope of his employment if he acts even *in part* for the benefit of the corporation; only when the employee acts *solely* for his own benefit is the corporation excluded from criminal

liability. *See, e.g., United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 970 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999); *United States v. Automated Medical Laboratories,* 770 F.2d 399, 407 (4th Cir. 1985).

This imputation rule should apply equally when the corporation is the alleged victim of the employee's criminal conduct. An employee should not be criminally liable for allegedly depriving the corporation of his honest services when he acts within the scope of his employment and *at least in part* for the benefit of the corporation. Only when an employee acts *solely* for his own benefit should he be subject to criminal liability for defrauding the corporation of his honest services.

Permitting imputation of an employee's knowledge and acts when the corporation is the alleged perpetrator and not when the corporation is the alleged victim creates an illogical disparity. It makes no sense for the corporation to be both perpetrator and victim in the eyes of the law based on exactly the same employee conduct. In the context of this case, it makes no sense to permit the government to say on one hand that Skilling--who indisputably acted within the scope of his employment and for the benefit of Enron--violated his duty of honest services to the company, while at the same time permitting private plaintiffs and others to hold Enron liable based on Skilling's knowledge and actions. A corporation may be a fictional person (at least for some purposes), but it is only *one* such person; it

cannot logically be *two* fictional persons, one with the employee's knowledge and the other without.[10]

The *Rybicki* gloss on § 1346--which, to be clear, exceeds the proper role of the federal courts by assuming Congress' role to "make" laws--comes close to adopting the imputation rule we advocate. *Rybicki* holds that, in cases involving private individuals, the honest services statute requires proof of a "scheme or artifice to use the mails or wires to enable an officer or employee of a private entity . . . purporting to act for and in the interests of his or her employer . . . 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).[11] As the word "instead"

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[10] The one case to address the imputation question squarely in the context of an honest services prosecution held that the imputation rules are not the same "on both the perpetrator and victim sides." *Sun-Diamond Growers*, 138 F.3d at 971. The court rested this conclusion on the view (unsupported by relevant legal authority or empirical evidence) that imputation is a "legal fiction" which may be adjusted for policy reasons; that a broad imputation rule on the perpetrator side "encourage[s] monitoring"; and that "it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims." *Id.* These ipse dixits do not justify the illogic of treating a corporation as both victim and perpetrator based on the same conduct of the same employee.

[11] The Second Circuit added that "in self-dealing cases, unlike bribery or kickback cases, there may also be a requirement of proof that the conflict caused, or at least was capable of causing, some detriment." 354 F.3d at 142; *see id.* at 141 (in the self-dealing context, "the defendant's behavior must thus cause, or at least be capable of causing, some detriment--perhaps some economic or pecuniary detriment--to the employer").

suggests, the *Rybicki* standard would be violated only when the employee acts solely in his or her own interest. To make this point perfectly clear, if the Court were inclined to adopt the *Rybicki* codification it should add the word "solely" before "in his or her or the defendant's own interests."

II. THE PRESUMPTION OF PREJUDICE THAT ARISES FROM INTENSE COMMUNITY HOSTILITY AND PERVASIVE ADVERSE PUBLICITY CANNOT BE REBUTTED THROUGH VOIR DIRE.

The court of appeals correctly held that the massive harm to Houstonians from Enron's collapse and the intense, inflammatory publicity that followed required a presumption of juror prejudice. But the court then went badly astray; it held that the presumption could be rebutted through voir dire, and it found that the perfunctory voir dire that the district court conducted here--which the court of appeals bizarrely described as "exemplary" and "thorough," Pet. App. 62a--sufficed to ensure an unbiased jury. Those rulings are indefensible.

1. The court of appeals' decision properly acknowledges the extraordinary hostility that Houston and its citizens displayed toward Skilling and his codefendant, Kenneth Lay. Pet. App. 56a-59a. Skilling's brief provides further detail. Pet. Br. 4-18. Other than Oklahoma City following the attack on the Murrah Federal Building, there has likely never been a community that so strongly and uniformly viewed itself as the victim of the offenses to be tried. And, other than Oklahoma City, there has

likely never been a community that so strongly and uniformly *hated* the defendants. Here, as in the Oklahoma City bombing case, the effects of Enron's bankruptcy on the Houston community "are so profound and pervasive that no detailed discussion of the evidence is necessary." *United States v. McVeigh*, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996).

This Court has made clear that in such extraordinary (and rare) cases, even the most meticulous jury selection cannot ensure an unbiased panel. The jurors' assertions that they can put aside their feelings and beliefs and perform their duty fairly--no matter how earnest--simply "should not be believed." *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991); *see, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963). As this Court observed, "No doubt each juror was sincere when he said he would be fair and impartial . . . but the psychological impact of requiring such a declaration before one's peers is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

Here, as in the Oklahoma City case, the Constitution and Fed. R. Crim. P. 21 required the district court to transfer venue and then conduct a rigorous voir dire of prospective jurors from the new venue. Given the sheer loathing for Skilling and Lay that the collapse of Enron engendered in Houston, only with both of those protections--change of venue and thorough voir dire--could there be any confidence that the defendants would face the unbiased jury to which the Constitution entitled them.

The district court provided *neither* protection. Faced with overwhelming evidence that Houston was suffused with hostility toward Skilling and Lay, the court cursorily rejected Skilling's motions to transfer venue. The court then declared that voir dire would last no more than a day. It insisted on conducting voir dire itself, with only the most perfunctory follow-up questioning by counsel. It ignored unmistakable indications of bias in the potential jurors' questionnaires. It persistently asked leading questions of potential jurors--questions (*e.g.*, "can you nevertheless be fair and impartial?") designed to mask, rather than expose, bias. It signaled to hesitant jurors the answers that it sought, affirming the jurors' ability to be fair and impartial. Even when grounds to strike potential jurors for cause became apparent, the court often denied challenges. And the court granted Skilling and Lay a meager two additional peremptory challenges (for a total of twelve combined challenges), and then denied repeated requests for additional peremptories. All told, the district court imposed a voir dire process that took only five hours and screened forty-six jurors--eight more than the minimum required. *See* Pet. Br. 7-12 (describing voir dire and jury selection).

The district court's conduct of jury selection--from the denial of the motions to transfer venue without a hearing to the brief and superficial voir dire to the rulings on challenges for cause to the denial of additional peremptory challenges--represents a shocking triumph of expediency over fairness. The Fifth Circuit's conclusion that the district court's perfunctory examination of potential jurors suffices

to rebut the presumption of prejudice, if allowed to stand, spells the end of this Court's recognition, in cases such as *Rideau* and *Sheppard,* that community hostility and pervasive adverse publicity render voir dire ineffective in rooting out bias.

2. The notion that the presumption of juror prejudice can be rebutted through voir dire not only flies in the face of this Court's prior rulings; it is utterly illogical. The Court recognizes the presumption of prejudice because, in those rare circumstances where hostile publicity engulfs a community, or the community views itself as a victim of the alleged crime, jurors' assurances of impartiality are unreliable. *See, e.g., Mu'Min*, 500 U.S. at 429; *Patton v. Yount*, 467 U.S. 1025, 1031 (1984); *Irvin*, 366 U.S. at 727-28. To hold that such assurances can rebut the presumption of juror prejudice is to reject the underlying premise of the presumption itself--that voir dire is categorically unreliable under the circumstances.

Treating voir dire as categorically unreliable in presumed prejudice cases does not rest on mistrust of potential jurors; it simply acknowledges psychological reality. Pet. Br. 30-32. A similar recognition underlies cases holding that, in rare circumstances, jurors cannot be relied upon to follow the trial court's instructions to disregard certain evidence, no matter how conscientiously they try. *See, e.g., Gray v. Maryland*, 523 U.S. 185, 190 (1998) ("'[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury

system cannot be ignored.'") (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)); *Jackson v. Denno*, 378 U.S. 368, 388-89 (1964) (jury cannot be relied on to follow instruction to disregard confession it has found to be involuntary; Court asks, "If it finds the confession involuntary, does the jury--indeed can it--disregard the confession in accordance with its instructions?"). Just as jurors cannot reliably cabin or ignore particularly inflammatory evidence, they cannot reliably recognize and acknowledge the potential impact of particularly inflammatory publicity or community sentiment. "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin*, 366 U.S. at 727.

3. As a practical matter, allowing the presumption of juror prejudice to be rebutted through voir dire under the court of appeals' standard collapses the important distinction between presumed and actual juror prejudice. The only difference between a *rebuttable presumption* of prejudice and *actual* prejudice is the burden of proof; the government has the burden of rebutting the presumption, while the defendant has the burden of establishing that jurors are actually prejudiced. But under the court of appeals' analysis, this distinction makes no practical difference. In the Fifth Circuit's view, a juror's assurance that he can be impartial--even an uncertain assurance in response to leading questions from the court after prior admissions of bias or hostility--suffices to rebut the *presumption* of prejudice just as surely as it defeats a defendant's

effort to show *actual* prejudice. A presumption so readily rebutted is meaningless.[12]

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

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

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[12] The rebuttal standard that petitioner proposes (if the per se rule he principally advances does not apply)--the traditional "harmless beyond a reasonable doubt" standard that this Court applies to constitutional error, Pet. Br. 34-38--preserves the distinction between presumed and actual prejudice. But even that standard does not adequately account for the psychological reality that under extraordinary circumstances, jurors cannot reliably recognize and disclose biases through voir dire.

CONCLUSION

The conviction should be reversed.

Respectfully submitted,

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