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**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Jeffrey Skilling was convicted by a facially biased jury under a facially incomprehensible criminal statute. His convictions cannot stand.[1]

### I. SKILLING DID NOT RECEIVE A FAIR TRIAL BEFORE IMPARTIAL JURORS

The Government begins from the premise that the jurors who tried Skilling were impartial, and argues that no contrary presumption should apply. Even if one does, the Government concludes, it is rebuttable and was rebutted here.

The Government is wrong from start to finish. Skilling's jurors were not impartial—many were demonstrably *biased*, including one who believed Skilling "knew [he was] breaking the law" (SJA106sa), and another who believed that CEOs like Skilling "stretch[] the legal limits," and that "some get caught and some don't" (JA854-55a). Those jurors could not reasonably be deemed impartial under any standard. Indeed, given the widespread community hostility toward Skilling, the court should have presumed the jurors to be prejudiced, and therefore changed venue to obtain jurors from a community that was not itself a direct victim of Enron's devastating collapse. But even if community hostility creates only a *rebuttable* presumption of prejudice, it cannot be rebutted where, as here, the voir dire only confirmed and reinforced the very prejudices a proper voir dire should avoid.

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[1] The Government's factual recitation is inaccurate and incomplete, *see* Skilling C.A. Reply 1-14, but also irrelevant for present purposes.

### A. A Presumption Of Prejudice Arises When Pervasive Community Hostility Renders Voir Dire Insufficiently Likely To Expose And Avoid Juror Bias

In rare cases, widespread community passion creates conditions that render voir dire "inadequate" to identify jurors likely to be impartial. *Patton v. Yount*, 467 U.S. 1025, 1031, 1038 & n.13 (1984); *see Murphy v. Florida*, 421 U.S. 794, 798-99 (1975); *Mu'Min v. Virginia*, 500 U.S. 415, 448-50 (1991) (Kennedy, J. dissenting); PB29 (citing cases). This is such a case, as the Fifth Circuit unanimously concluded.

1. The Government first rejects the very idea of a presumption of prejudice, contending that a defendant challenging the impartiality of his jury based on general community animus must always establish that at least one juror was actually prejudiced. GB20. This Court has consistently held to the contrary since *Rideau v. Louisiana*, 373 U.S. 723 (1963), which expressly rejected the position the Government advances here, *see id.* at 729 (Clark, J., dissenting). Without exception, the lower courts have likewise long recognized a narrow category of cases involving "presumed prejudice" (based on the rare showing of overwhelming general animus), distinct from those requiring proof of "actual prejudice" (which focus on individual jurors). *See* LaFave et al., CRIMINAL PROCEDURE § 23.2(a) (3rd ed. 2007); *see, e.g.*, *U.S. v. Misla-Aldarondo*, 478 F.3d 52, 58 (1st Cir. 2007). As then-Judge Alito summarized settled law, when "community reaction to a crime" is sufficiently hostile, "a court reviewing for constitutional error will presume prejudice to the defendant without reference to an examination of the attitudes of

those who served as the defendant's jurors." *Riley v. Taylor*, 277 F.3d 261, 299 (3d Cir. 2001).

The Government's position would overrule that longstanding body of law, with no showing that it has been unworkable or hotly contested. *Pearson v. Callahan*, 129 S.Ct. 808, 816 (2009). The Government instead cites cases involving isolated trial errors allegedly affecting the jury's impartiality, which do require the defendant to prove that one or more jurors (otherwise presumed to be impartial) were actually prejudiced by the error. GB20. The whole point of the presumed prejudice rule, however, is that in cases involving widespread community and media animus, the standard devices for assembling a jury do not function reliably enough to justify the usual assumption that the jury is impartial. PB30-33; *infra* at 4-5.

2. The Government contends that the presumed prejudice caselaw means "only that the district court should conduct a more searching inquiry than usual and closely scrutinize juror claims of impartiality when pretrial publicity is particularly intense." GB28. Certainly the cases mean *at least* that much, and the district court here failed that standard by a wide margin. PB10-12; *infra* at 13-14. But the cases demand more: when the circumstances surrounding the trial give rise to a presumption that veniremembers will be prejudiced, "jurors' claims that they can be impartial should not be believed," *Patton*, 467 U.S. at 1031, so venue must be transferred.[2]

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[2] *Mu'Min*'s statement that substantial community passion may require more extensive voir dire (GB28-29) does not contradict prior precedents holding that transfer is sometimes required, because Mu'Min *was not seeking transfer*, but only more

The Government's "extensive voir dire only" approach also contradicts Criminal Rule 21. That rule *requires* a court to transfer when "so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Under the Government's theory that effective voir dire can *always* reliably ferret out prejudice, Rule 21 serves no purpose.[3]

Nor can the Government's theory be reconciled with the principles underlying the presumption. First, the Government cannot explain how heightened voir dire can reliably expose concealed or unrecognized prejudices that are especially problematic among jurors drawn from a hostile community. PB31-33 nn.7-9. The Government simply recites the general rule that "jurors follow their instructions" (GB30-31), but that assumption necessarily applies only to jurors who have already been deemed trustworthy enough to serve on the jury, and who have sworn to follow their instructions. No case has applied that assumption to unsworn veniremembers where broad community hostility gives substantial reason to doubt their assurances of fairness. Under those conditions, the opposite presumption applies:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may

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extensive voir dire. 500 U.S. at 417.

[3] Contrary to the Government's suggestion (GB19 n.3), the question whether transfer was required under Rule 21 is preserved for this Court's consideration. Pet. App. 55a-56a n.39.

unwittingly have been influenced by it.

*Murphy*, 421 U.S. at 803; *see Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *Misla-Aldorando*, 478 F.3d at 59.

Second, the Government cannot explain how voir dire can prevent jurors—even those who seem impartial at the outset—from succumbing to severe pressure during trial from community peers to convict the defendant. PB31-32.

3. This very case refutes the suggestion that reaffirming the presumption of prejudice will make trials in high-profile cases impossible. The record below established that communities such as Denver and Phoenix had nowhere near the familiarity with Enron or Skilling that the Houston community did. Pet. App. 141a-146a.[4]

Additionally, one of the most nationally prominent criminal cases ever tried—the Oklahoma City bombing case—was transferred to Denver and successfully tried, albeit after an 18-day voir dire following two separate juror questionnaires. Removing that trial "from the eye of the emotional storm in Oklahoma to the calmer metropolitan climate of Denver" is exactly what allowed a careful voir dire to identify impartial jurors despite intense nationwide publicity. *U.S. v. McVeigh*, 153 F.3d 1166, 1182 (10th Cir. 1998). As *McVeigh* demonstrates, taking

[4] The Government cites its own survey ostensibly indicating that Phoenix residents were more likely to consider Skilling guilty than Houston residents. GB7. But that analysis (JA 662a-696a) *excluded respondents who were unfamiliar with the Enron prosecutions*. Phoenix residents were more likely (by a factor of three) than Houston residents to be unaware of Enron prosecutions. When all respondents were included, Phoenix proved a far less biased venue. JA663a-664a, 669a-670a.

seriously the presumption of prejudice in the rare situations it arises does not preclude trials in major cases—rather, it *facilitates* fair trials in such cases, and ensures legitimacy in their results.

### B. Pervasive Hostility And Adverse Publicity In Houston Warranted A Presumption That Houston Jurors Could Not Judge Skilling Impartially

The Fifth Circuit correctly held that this case was one of the rare few that raised a presumption of prejudice among local jurors.

1. Enron's "financial meltdown … left an entire town angry, cuckolded and saddened," the *Los Angeles Times* reported in 2002. JA1195a. "[P]sychologically, symbolically, Enron had no equal. Its name graced the polished trestles of the new baseball stadium. Cash from the company laced the fine and performing arts, and kept charities afloat. … Enron told this infant metropolis it was the center of a new economy, and eagerly Houston believed." JA1196a. When the company suddenly collapsed, it was considered "a horrible betrayal of the city"—Houstonians "who had no connection to the company" said they were "ashamed of its behavior." JA1195a. Up to the time of trial, another news account explained, "the shame and humiliation surrounding the implosion of the city's most powerful, glamorous business remained an open wound." JA1976a. The *Chronicle* reported that Houston remained "a city full of people whose lives were damaged by the scandal." R:39904.

The Government itself fully understood that Enron's collapse victimized the city as a whole, urging the trial court to recognize at sentencing that "Hous-

ton as a community was hit particularly hard by the collapse." R:42161. The Fifth Circuit likewise emphasized that "countless people in the Houston area" were affected. Pet. App. 58a. Perhaps most tellingly, all 150-plus attorneys in the local U.S. Attorney's office recused themselves from Enron cases—confirmation of the breadth of Enron's connections and the depth of the passion aroused by its collapse.

Houstonians directed their shame and anger squarely at Skilling. He was lambasted almost daily in the *Chronicle* in vitriolic terms, described as equivalent to, e.g., a child molester, rapist, embezzler, and terrorist. PB5-6. The Government's *own poll* found that almost 60% of Houstonians believed they needed no further information to conclude that Skilling was guilty. R:4055, 4107-12. Within the venire itself, even the Government agreed that some 40% of the 283 returned questionnaires (the actual percentage was much higher) manifested sufficiently intense bias toward Skilling to warrant immediate dismissal, with no prospect of so-called "rehabilitation" at courtroom voir dire. PB9.

Skilling's trial was described by one news account as "one of those galvanizing civic events, like the Rockets winning the championship," and his conviction was considered no less than an "exoneration of the city." JA1984a. A "collective giddiness swept over Houston" on announcement of the verdict—finally, the city "had permission to move on." JA1976a. In the *Chronicle*'s words, Skilling's conviction brought "needed closure" to Houston "after the civic trauma of the Enron debacle." JA1955a. "[W]hat the guilty verdicts have provided," declared Houston's paper of record, "is an exorcism." *Id.*

2. The widespread economic impact and sense of civic shame distinguishes Skilling's case from other high-profile cases. Pet. App. 58a; Media Br. 7-8. Other cases typically involve isolated crimes against individual victims, and are known to the broader public only because of celebrity involvement or other sensational details. Here, the community itself was considered a victim, and it blamed Skilling.

The Government thus errs in seeking "deference to the trial court about the effect of publicity on the jury pool." GB34. The trial court's finding of no presumption fails under any standard,[5] not only because its assessment of pretrial publicity as neutral was manifestly incorrect, but also because its ruling incorrectly addressed *only* publicity. GB9a-19a. As the Fifth Circuit emphasized (Pet. App. 58a), the trial court's ruling ignored the more serious problem: no Houstonian needed to read the newspapers to understand the cataclysmic effects of Enron's collapse on the city as a whole, and the intensity of Houston's animosity toward Skilling. The undisputed fact that many potential jurors who professed not to follow the news nevertheless expressed prejudicial views about Skilling (Skilling C.A. Reply 110-15 & App. 3), establishes that animus pervaded Houston through sources other than those the district court considered.

The unusual and highly toxic combination of communitywide victimization and focused blame on

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[5] An appellate court on direct review has "the duty to make an independent evaluation of the circumstances." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *see* LaFave et al., *supra*, § 23.2(a) (it is a "basically legal question" whether presumption arises (citing *Mu'Min* and *Patton*)).

the defendant also distinguishes Skilling's case from cases in which this Court did not find a presumption of prejudice warranted. *Patton*, for instance, involved a single murder, and by the time of the defendant's second trial four years after the event, "prejudicial publicity was greatly diminished and community sentiment had softened." 467 U.S. at 1032. Here, "the publicity remained intense throughout" (Pet. App. 59a), and the passage of time only "allow[ed] the hurt and anger and resentment to churn" (R:39904).

*Mu'Min* similarly involved an individual crime in a large metropolitan region, and the allegation of prejudice was based on pretrial publicity reflected in just 47 newspaper articles, mostly appearing in a low-circulation community newspaper. 500 U.S. at 418 & n.1. And unlike here, none of the seated jurors had formed opinions about the defendant's guilt—the one juror who equivocated was removed sua sponte by the judge. *Id.* at 420-21.

3. The Government offers three reasons the Fifth Circuit erred in concluding that the district court should have applied a presumption of prejudice. None has merit.

a. The Government contends that, at least in large metropolitan communities, voir dire can *always* be structured to obtain an impartial jury, no matter what crime is involved. GB32. Not so. The size of the community matters, but large communities are not immune from pervasive prejudice requiring transfer, as exemplified by *McVeigh*, Andrew Fastow's wife's case (transferred to Brownsville), and the D.C. sniper cases (transferred to southeastern Virginia).

Notably, in contending that it was possible to obtain a reliably impartial jury in Houston because of its size, the Government actually concedes Enron's collapse *did* create substantial "non-media prejudice" throughout the community. GB32-33. The Government contends, however, that the jury questionnaires adequately addressed that prejudice. *Id.* But the Government makes no effort to show how questionnaires could adequately expose concealed or unrecognized prejudices. And in fact, the questionnaires here were *not* used to expose and exclude biased jurors. *See infra* at 13-14. Even worse, the questionnaires affirmatively *exacerbated* the risk of prejudice because they included Skilling's co-defendant Rick Causey, who pleaded guilty on the eve of trial. Although "prejudice was inherent in [Causey's] well-publicized" plea (Pet. App. 57a), the court refused to remove the plea's taint by distributing new questionnaires to a new venire.

b. The Government next argues that Skilling could be tried fairly in Houston because other courts held that Enron-related criminal cases could be tried fairly there. But one prominent case before Skilling's—Lea Fastow's—was transferred to another venue. GB8 n.1. And jurors in other Enron cases were excluded for cause for expressing views far less prejudicial than those expressed by the Skilling jurors. PB36. Most important, other executives confronted nothing like the venomous conditions faced by Skilling, who was uniquely demonized as the criminal mastermind who betrayed the city. PB5-7; *supra* at 7-8. According to the *Chronicle*, mixed results in Enron trials were but a "distraction" before "the Big One"—"[f]rom the beginning," the Government's "one true measure of success" was "Lay and

Skilling in a cold steel cage. … Let the small fry fish swim free if need be. We've got bigger fish in need of frying." JA1457a-60a.

c. The Government finally contends that Skilling's acquittal on nine of ten insider trading counts proves the jury's fairness. GB34. But the jury convicted Skilling on *nineteen other counts*, and the Government essentially abandoned the nine insider trading counts in its closing. R:37010. There is no logical or empirical reason to expect that biased jurors would necessarily run the table, especially where—as here—prosecution overcharging gives them ample opportunity to deliver the guilty verdicts they want to deliver.

### C. The Government Did Not Rebut The Presumption That Skilling's Jurors Were Prejudiced

The Government finally argues that, even if there was a rebuttable presumption of prejudice, the Government rebutted it here. That argument cannot be squared with this record.

1. At the outset, the Government cannot answer the straightforward point that if a rebuttable presumption of prejudice was triggered, the trial court's findings concerning individual juror impartiality were legally meaningless, because it did not apply the proper burden in making those findings. PB37. Indeed, the failure to apply any presumption renders the entire process largely irrelevant. The central error here was not the impaneling of particular jurors who showed actual prejudice, but the failure to *presume* that *all* of the potential jurors were prejudiced, and thus to take adequate steps to avoid or mitigate that risk. If the court had presumed each juror to be

prejudiced against Skilling until proven otherwise,[6] the court could not reasonably have:

- limited courtroom voir dire to just five hours and only 46 jurors (out of 4.5 million Houston-area residents);
- cross-examined overtly biased jurors until extracting a rote promise of fairness; and
- accepted at face value promises of fairness from jurors who openly expressed prejudicial opinions.

The court instead conducted voir dire largely as it would in any other case, and thus failed to accord Skilling the basic protections to which he was entitled given the community and media conditions.

2. To support its assertion that Skilling's jurors "neither knew nor cared much about Enron's collapse," the Government focuses solely on their attention to news media, noting that "nine jurors did not read the *Houston Chronicle*, four rarely or never watched television, and ten said they did not follow the news about Enron." GB21. By the Government's own account, then, three jurors *did* read the *Chronicle*, eight jurors *did* watch television, and two jurors *did* follow Enron news. The Government does not even attempt to argue that these jurors were uninfluenced by the spectacularly inflammatory coverage they saw. Even more important, the Government's analysis flatly ignores all the non-media bias that

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[6] Contrary to the Government's submission (GB35), rebuttal (if allowed) must be proved beyond a reasonable doubt, because constitutional error occurs when the court fails to transfer venue under conditions that render all potential jurors presumptively prejudiced. PB34.

demonstrably influenced the jurors. *Supra* at 6-8.

3. In attempting to prove the actual impartiality of the entire jury, the Government addresses only *two* of the twelve—Jurors 11 and 90. GB22-23.[7] The Government ignores:

- Juror 63, who answered "yes" to the question whether she had an opinion as to Skilling's guilt and stated that the defendants "probably knew they were breaking the law." SA106sa.
- Juror 10, who answered "yes" to the same question, and believed that Enron's collapse was "due to greed and mismanagement." SA12sa, 16sa.
- Juror 20, who said she was "angry" about Enron's collapse and that she, too, had been "forced to forfeit [her] own 401(k) funds to survive layoffs." SA60sa.
- Juror 87 (the forewoman), who believed Enron managers were "greedy" and that her choice at trial was whether the defendants were "guilty of something illegal" or "guilty of being poor managers"—a predisposition contrary to Skilling's defense that Enron collapsed because of a sudden (but avoidable) liquidity crisis that occurred months after Skilling left. JA974a-76a.

The Government has no theory for how the presumption of prejudice was rebutted as to those jurors.

Of particular note is Juror 63, whose courtroom voir dire exemplifies the flawed process below.

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[7] The Government also defends the impartiality of Juror 113 (GB22-23)—an alternate.

When asked whether she had changed her belief (acknowledged on her questionnaire) that Skilling knew he was breaking the law, she said only, "I don't know," while conceding that her "knowledge isn't any different than it was then." JA936a-37a. Although she indicated no reason for any changed opinion, the court nonetheless pressed as to whether she could presume the defendants are innocent. She responded "absolutely," and that she did not "know what [she] was thinking at the time" of the questionnaire. That was enough for the court to seat her on the jury.

Such rote assurances of fairness cannot be accepted—much less affirmatively elicited by the court—when a presumption of prejudice applies, precisely because juror promises of impartiality in that situation are subject to grave doubt. *Supra* at 2, 4-5. The proper course, if not to transfer venue, was to seek other jurors who, at a minimum, did not openly express such bias.

While ignoring Juror 63 and other overtly biased jurors, the Government does try to defend the seating of Juror 11—whose bias was patently obvious to *USAToday*—but the defense is unavailing. PB15-16. It is wholly irrelevant that Skilling did not exercise a peremptory strike (GB23) on him or any other juror. *See U.S. v. Martinez-Salazar*, 528 U.S. 304, 314-15, 316 (2000).[8] Nor is it correct that a few statements arguably indicating fairness (GB 23-24) cancel out his colorful litany of prejudicial comments (PB15-16).

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[8] Given the trial court's erroneous denial of cause challenges to multiple *other* jurors, the defendants were forced to exhaust peremptories on jurors who were even more blatantly biased. *See*, *e.g.*, JA 980a-983a, 996a-1002a.

Although "ambiguous and at times contradictory" voir dire responses may not establish prejudice *in the normal case*, GB24 (quotation omitted), that rule cannot obtain *in the unusual case* where pervasive hostility in the jurors' community raises presumptive doubts about their impartiality. In that situation, it is the prejudicial statements—not promises of fairness—that must be taken at face value.

Finally, there is no merit to the Government's suggestion that Skilling's "own actions" at trial demonstrate the lack of actual bias among seated jurors. GB21. When the court denied Skilling's motion to transfer because of the presumed bias of the entire juror pool, Skilling was left with the impossible task of attempting to identify the least biased of the presumptively biased jurors. Constrained in that way, Skilling not only made a contemporaneous cause challenge to Juror 11, as the Government acknowledges (GB23), he also later objected specifically to the seating of six other jurors (Jurors 20, 38, 63, 67, 78, and 84), as the Government acknowledged at the certiorari stage (BIO6).[9] He likewise objected to court's refusal to permit an extensive, individualized, non-public voir dire process that would have allowed the defense to better identify the effects of prejudicial community and media influences. PB10, SJA4sa. And while defense counsel did not question all jurors extensively, that fact hardly shows that

[9] The Government correctly declines to endorse the Fifth Circuit's erroneous conclusion (Pet. App. 64a) that Skilling "waived" any argument concerning other jurors' prejudice by not making a contemporaneous cause challenge to them. Skilling's central argument was that *all* jurors were presumptively prejudiced, an argument he preserved by repeatedly moving to change venue.

counsel were "satisfied" that the jurors were unbiased. GB21. To the contrary, when prejudice was self-evident on the face of the questionnaires, counsel were "satisfied" that *prejudice had already been established*, and they had no burden to inquire further, especially if a presumption applied. In short, Skilling's actions did nothing to indicate his agreement that voir dire produced a jury that was actually impartial.

* * * *

Due process does not and could not require perfection in the criminal trial process. But because the process of identifying genuinely impartial jurors is imperfect in the best of conditions—given the need to rely to some extent on jurors' own claims about their opinions—due process requires courts at least to avoid *easily avoidable* conditions that increase the probability that jurors will be prejudiced.

At every juncture, however, the trial court chose (at the urging of the special Enron Task Force and over Skilling's strong objection) the procedural course most likely to produce a biased jury. And for no good reason. There was no legitimate reason to refuse transfer to some other community that did not suffer the economic impact and sense of shame and betrayal from Enron's collapse. There was no legitimate reason to forge ahead with the original 283 jurors after they were poisoned by Causey's last-minute guilty plea. There was no legitimate reason to limit courtroom voir dire to just five hours, and a minuscule fraction of the 4.5 million Houston-area residents. And there was no legitimate reason to accept jurors who openly expressed the very prejudice voir dire is supposed to avoid, when so many other

potential jurors might have been chosen.

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

The Government's brief virtually concedes that Skilling's honest-services-based convictions must be reversed. To save § 1346 from invalidation, the Government repeatedly insists that two categories of "paradigmatic" pre-*McNally* cases limit the statute's reach and provide notice to the public and constraints on prosecutors.

But then the Government gives the game away to Skilling, twice asserting that Skilling's conduct does *not* fall within the paradigmatic honest-services caselaw it cites. GB17 (Skilling's conduct was not "classic form" of nondisclosure honest-services fraud); GB49 (Skilling's case does not involve "prototypical" conduct "characteristic of nondisclosure honest-services cases"). Nothing else is required to conclude that Skilling's honest-services convictions cannot survive the Government's constitutional defense of the statute. The Government will not quite say so, but its one-paragraph defense of Skilling's convictions (GB50) speaks volumes. It is almost beside the point that the Government's constitutional defense fails on its own terms, for even if the statute can remain standing, Skilling's convictions cannot.

### A. Section 1346 Is Unconstitutionally Vague

Section 1346 has no discernible meaning on its face to the public it governs or the prosecutors who wield it. The Government nevertheless contends that the statute can be judicially limited to "two categories of conduct" on which there was "a solid consensus" among appellate decisions prior to

*McNally v. U.S.*, 482 U.S. 350 (1987): (1) "acceptance of bribes or kickbacks," and (2) self-dealing, which it carefully defines as "the taking of official action by the employee that furthers his own undisclosed financial interest while purporting to act in the interests of [his employer]." GB42-44.[10] The Government's effort to salvage § 1346 fails.

1. The Government's theory by its terms would not read § 1346 to criminalize all acts constituting fraudulent deprivation of "*the* intangible right of honest services" that predated *McNally*. The Government instead argues that the two categories it defines simply reflect paradigmatic *examples* of a crime with a broader but inadequately defined reach. The Government thus is not asking for a judicial *construction* of the crime described in the statute, but a judicial *limitation* on it. In that sense, the Government treats § 1346 like a crime of "doing wrong," which under the Government's approach could be permissibly applied to paradigmatic acts, like murder, that everyone can agree clearly constitute wrongdoing. But such statutes are wholly unenforceable—not because there are no acts that clearly fall within their terms, but because their sweep is so broad and standardless that they give

[10] The Government takes an irrelevant detour (GB39-42) into what it labels the "three elements" of honest-services fraud—breach of a loyalty duty, deception, and materiality. Even the Government does not contend that *every* case involving the three elements constitutes honest-services fraud—the Government instead insists that only two specific categories of conduct are encompassed by § 1346, even though an infinite amount of basic employee misconduct would satisfy all three elements. Nor does the Government cite any case, pre- or post-*McNally*, holding that the three elements are necessary or sufficient to prove honest services fraud.

prosecutors "too much discretion in *every* case." *City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring).

The Government's approach to § 1346 differs from the approach applied in *U.S. v. Kozminski*, 487 U.S. 931 (1988), where the Court resolved vagueness concerns relating to 18 U.S.C. § 241 by "construing" it "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." *Id.* at 941. The Court's construction of the statute was not an artificial limitation divorced from its text or history, but instead rested specifically on the term "conspire" as it had been previously construed. *U.S. v. Guest*, 383 U.S. 745, 753-54 (1966); *cf. Screws v. U.S.*, 325 U.S. 91, 104 (1945). By contrast, the Government does not argue that either Congress, or any court prior to *McNally*, understood that "honest-services fraud" meant *only* bribes/kickbacks and official action in furtherance of an undisclosed personal financial conflict. The Government simply describes them as paradigmatic situations in which convictions were upheld, and it excludes other situations merely to save the statute from itself. But if the broad and vague crime of honest-services fraud is to be confined to its paradigmatic examples, writing a statute to achieve that objective is a task for Congress, not this Court.

2. The Government's theory that § 1346 encompasses only two paradigmatic categories is also belied by the statute's prosecution history. PB43-44. The Government does not deny the long record of opportunistic prosecution, but instead attempts to justify it as routine Department of Justice practice. GB49. That is no defense, and in any event, it is not

routine for the Department to take more than *two decades* to decipher a significant criminal statute's core elements. And if, as the Government suggests, experienced prosecutors could not accurately ascertain the meaning of pre-*McNally* caselaw without guidance from the Solicitor General (GB49), there is no reason to think anyone else could either.

Moreover, the Government's position on the meaning of the statute has changed dramatically since the Solicitor General began to articulate it: in less than one year, the Solicitor General has gone from asserting that conduct intended to advance the interests of third parties is "clearly proscribed" by § 1346 to claiming it is clearly *not* proscribed. *Compare Sorich* BIO 17 (conduct "clearly proscribed") *with Black* Oral Arg. Tr. 46 (§ 1346 does *not* reach undisclosed financial interest of fiduciary's "adult son" because "core of the pre-*McNally* cases involve personal conflicting financial interests") *and* GB44 (§ 1346 only reaches defendant's "own financial interests" in self-dealing cases).

3. Prosecutors can shift so easily because pre-*McNally* caselaw provides no clear meaning to constrain them. The Government fails to show otherwise. For instance, the Government asserts that the cases clearly established that no state-law violation is required, but they just as clearly did *not* establish what source of law *does* apply. PB40. The Government contends that only one "outlier" case, *U.S. v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), identified contemplated economic harm as an element of honest services fraud (GB47), but the Government misreads the cases (PB40-41), and itself has previously described *Lemire* as a "thoughtful opinion" reflecting a proper understanding of the honest-services crime.

U.S. Br. in *Carpenter v. U.S.*, No. 86-422, at 32. The Government argues that the cases recognized potential differences between private-sector and public-sector cases (GB47), but that merely restates the problem: the cases did not clearly establish *what those differences are*. PB41. Finally, the Government's argument that there was no conflict over an "official action" requirement depends entirely on its assertion that *U.S. v. Bush*, 522 F.2d 641 (7th Cir. 1975), involved official action (GB48), but the Government itself previously described *Bush* as a case in which the defendant did *not* "take any action in his public capacity." *U.S. v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998).

4. Finally, the pre-*McNally* caselaw does not even support the Government's theory as to the irreducible minimum core of cases universally accepted as honest-services fraud. It is true that every case involving a bribe or kickback was recognized as honest-services fraud, but that is manifestly not true for "self dealing" cases, which raise a host of unanswered definitional questions. *See infra* Part II.B.1.&2. Adopting the Government's two categories thus would do nothing to cure the statute's vagueness problems.

### B. If Not Invalidated, Section 1346 Should Be Limited To Bribes And Kickbacks

If the Court decided to impose some limitation on § 1346 to "avoid the constitutional question[s]" that would be raised given the statute's inherent vagueness, *Jones v. U.S.*, 529 U.S. 848, 858 (2000), it should confine the statute solely to bribes and kickbacks. Especially given the Rule of Lenity, the Court should reject the self-dealing category proposed by

the Government.

1. A bribe/kickback category would not itself be vague, but a self-dealing category would be. A statute limited to bribes/kickbacks might be understood as borrowing the elements of federal bribery statutes and applying them to both public and private actors. *See* 18 U.S.C. § 210. That construction would resolve the confusion in the circuits relating to the source of the elements of the honest-services duty (federal bribery statutes), the need for a showing of contemplated economic harm (no), the possible difference between public and private sector standards (no), and the need for official action (yes).

Self-dealing, however, would be irredeemably vague. The Court would have to resolve multiple core questions without any statutory guidance. *See U.S. v. Kincaid-Chauncey*, 556 F.3d 923, 948-49 (9th Cir. 2009) (Berzon, J., concurring). These include:

- when officials have conflicting interests—*i.e.*, only when they personally stand to benefit?, when a family member or other individual stands to gain?, and if the latter, who in particular (spouse, minor child, adult child, parent, sibling, close friend)?
- when it is permissible for an official to act on a conflict—*i.e.*, is consent required, or is disclosure sufficient?, and if the latter, to whom must disclosure be made, in what form, and when?
- whether there is a requirement of contemplated economic harm, whether the standards of public and private officials should be the same, and whether official action is required.

Finally, the Court would have to invent a new materiality standard for public-sector cases. Information normally is material if it has "a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *U.S. v. Gaudin*, 515 U.S. 522 (1995). That standard cannot be applied coherently in the public sector because the victim is the general public, which has no authority to make the relevant decision. The Government suggests that deception in legislative-action cases "will be material it if makes a difference in the way the public or other officials assess whether the office-holder has placed his self-interest above that of the public." GB41-42. But where this standard comes from, how "the public's" assessment of the legislator's motives is determined, and what standard would apply to other public officials, the Government does not say.

2. In addition, unlike bribery and kickbacks, the separate self-dealing category defined by the Government was not a "paradigmatic" example of an honest-services violation prior to *McNally*. Successful prosecutions involving non-bribery/kickback self-dealing were rare, and successful prosecutions in which the court embraced the Government's theory of self-dealing were rarer still.[11] Thus, if § 1346 cov-

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[11] Of the 13 "self dealing" cases identified by the Government (GB44 n.5), three actually involved bribes or kickbacks. *U.S. v. Holzer*, 816 F.2d 304 (7th Cir. 1987); *U.S. v. Dick*, 744 F.2d 546 (7th Cir. 1984); *U.S. v. Brown*, 540 F.2d 364 (8th Cir. 1976). Three others *reversed* convictions, either rejecting or failing to endorse the Government's self-dealing theory. *U.S. v. Kwiat*, 817 F.2d 440 (7th Cir. 1987); *U.S. v. Ballard*, 663 F.2d 534 (5th Cir. 1981); *Epstein v. U.S.*, 174 F.2d 754 (6th Cir. 1949). While the remaining seven affirmed convictions, most did not reflect—much less give notice of—the Government's

ers only "paradigmatic" cases, self-dealing would not qualify.

3. Interpreting § 1346 to cover bribery and kickback cases also would fill a significant gap in the mail- and wire-fraud statutes, because the receipt of bribes and kickbacks from third parties often does not result in money or property loss to the victim. By contrast, in pre-*McNally* cases, self-dealing invariably collapsed into money or property fraud. PB51-52.

The Government asserts that self-dealing does not necessarily result in money or property loss. GB45. But in *every* successful pre-*McNally* non-bribery/kickback self-dealing prosecution cited by the Government, the victim *did* suffer a money or property loss. GB44 n.5 (citing cases). When the Government failed to show a money or property loss, the conviction was reversed. *Id.*

Neither case offered by the Government as a counterexamples shows otherwise. In *U.S. v. Keane*, 522 F.2d 534, 551 (7th Cir. 1975), the city suffered a money or property loss, because Keane's properties were significantly more costly than other similar properties. And *U.S. v. O'Malley*, 707 F.2d 1240, 1243 (11th Cir. 1983) was a bribery case.

The Government also erroneously relies on Congress's intent to overrule *McNally* as support for its self-dealing category. GB45. *McNally* involved quid pro quo "kickbacks," 483 U.S. at 356, as the Government has acknowledged, *Weyhrauch* Oral Arg. Tr. 50. The Court described the scheme as self-dealing only in the sense that *any* kickback scheme

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current self-dealing theory.

constitutes a form of self-dealing. *Weyhrauch* GB25 n.7.

4. The Government complains that without a prohibition against self-dealing, a municipal official could vote to rezone property in which he has an undisclosed interest without fear of federal honest-services prosecution. GB45. But under the Government's theory, that same official would be insulated from prosecution under § 1346 as long as the undisclosed interest were held by his 21-year old son, or his mother, brother, or girlfriend. Section 1346 simply does not capture every unethical or blameworthy act. When it does not, state law and the watchful eye of the press and public remain as deterrents.

The Government also asserts that without a self-dealing prohibition, a state elected official could escape federal prosecution for voting against a tax increase that benefits someone from whom he is seeking employment. GB45. But the Government *can* prosecute that case, so long as it can establish that the vote was a quid pro quo for the employment opportunity. Otherwise, the conduct is *not* "core honest services fraud."

5. The Government's application of its proposed self-dealing category to Skilling's case demonstrates the continued manipulability of the statute under the Government's approach. In *Black* and *Weyhrauch*, the Government expressed the view that § 1346 prohibits only bribes/kickbacks and self-dealing, and that the latter category is implicated only when conflicting financial interests are "undisclosed." *Black* GB36; *Weyhrauch* GB45. That statement suggested that the Government would

concede that Skilling did not commit honest-services fraud, because Skilling's only alleged personal financial interests arose from Enron's linking of his compensation to Enron's stock value, an interest that was fully disclosed.

But the Government nevertheless argues that Skilling committed honest-services fraud. To bring Skilling's case within the statute's compass, the Government creates a third category of honest-services fraud, one that involves *disclosed* personal financial interests. The Government's cursory explanation of Skilling's honest-services liability (GB50) is hardly clear, but it appears to contend that while Skilling's "personal financial interests" were disclosed and generally aligned with Enron's interests, he put those interests in conflict when he took actions pursuant to his own disclosed compensation interest that were allegedly contrary to Enron's. Accordingly, in this new category, what the defendant apparently fails to disclose is his scheme to put his own compensation interests ahead of his employer's distinct interests. Not only is that standard itself vague on its own terms, but the Government's repeated acknowledgement that Skilling's case has no precedent in pre-*McNally* caselaw (GB17, 49) confirms that this special crime is its own new category, created for the first time in the Government's brief in this Court.

It is time for prosecutors to stop making up crimes under this statute. If § 1346 is not invalidated altogether, it should be limited to the single category of conduct universally recognized in the caselaw and hence largely immune from manipulation—quid pro quo bribes and kickbacks.

### C. Under The Government's Theory Of § 1346, Skilling's Convictions Must Be Reversed

Even if the Court accepts the Government's proposed self-dealing category, Skilling's convictions still must be reversed.

1. At the very least, § 1346 requires the jury to find that the defendant acted for private gain distinct from normal compensation, especially given the Rule of Lenity. The Government asserts that there is no private-gain requirement. GB50-51. But it cites no pre-*McNally* case upholding a conviction for honest-services fraud that lacked private gain. Private gain was even more paradigmatic in pre-*McNally* caselaw than bribes and kickbacks—*every* case involved the pursuit of private gain. PB53.

The Government also argues that Skilling sought private gain in the form of his disclosed stock-sale compensation incentives. GB52. But no pre-*McNally* case suggested that an employee who pursues ordinary compensation is acting for private gain, and the requirement makes no sense in the private sector. PB55-56; *see U.S. v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007).

2. The self-dealing category described by the Government rejects the private gain requirement for undisclosed financial conflicts—the "critical element" is that the defendant *had* an "undisclosed personal conflicting financial interest" in the transaction, not whether he acted in pursuit of that interest. GB50. Even leaving aside the latter omission, the Government's self-dealing category by definition excludes Skilling's convictions: his financial interest in Enron's increased share value was disclosed. Nor was

the jury instructed to find the "critical element" of an "undisclosed personal conflicting financial interest." That should end the matter.

As discussed, however, the Government tries to salvage Skilling's convictions by implicitly transforming its self-dealing category into yet another category involving acts taken pursuant to *disclosed* financial interests. GB50. That third category has no place in the statute. The Government itself concedes that acting pursuant to one's own disclosed compensation interest is *not* a paradigmatic example of honest-services fraud (GB17, 49), which is enough to exclude it from § 1346 on the Government's own theory. To be clear: there is no example or even hint of it in pre-*McNally* or post-§ 1346 caselaw. The crime is not "paradigmatic"—it is nonexistent.

In any event, the adoption of the Government's special new category could not salvage Skilling's convictions: the jury was never instructed to find that he acted pursuant to a disclosed financial interest at Enron's expense. Reversal is required.[12]

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[12] The Government does not argue that the failure to instruct on its new theory was harmless beyond a reasonable doubt. Nor could it. Prosecutors insisted to jurors that the case was *not* about "greed" on Skilling's part. PB3. The Government now suggests that the jury nevertheless might have found that Skilling intended to inflate Enron's stock value so he could sell his shares at supra-market prices, but the jury was never asked to make such a finding, and the trial record did not compel such a finding. PB2-3.

### D. The Government Fails To Show That The Error Of Skilling's Honest-Services Convictions Was Harmless Beyond A Reasonable Doubt

The Government contends that even if the jury was improperly allowed to consider the honest-services object of the conspiracy count, that error is harmless beyond any reasonable doubt. According to the Government, the honest-services object it fought so hard to preserve at trial was actually meaningless surplusage, because the trial record shows that jurors could have found Skilling of the honest-services fraud object only if they also found him guilty of the securities-fraud object. GB52. The district court and Judge Higginbotham correctly rejected this argument. Pet. 14.

The Government's argument fails at the threshold because its claims about the trial record are wholly unsupported by any citations to the trial record. A party's "failure to cite or refute the record not only waives [the] complaint on appeal but demonstrates the lack of evidence in the [party's] favor." *Messer v. Meno*, 130 F.3d 130, 135 (5th Cir. 1997).

And the record does confirm that the presence of the flawed honest-services object was not harmless. Skilling C.A. Reply 29-37; Skilling Rule 28(j) Ltr., Mar. 25, 2008. The Government at trial asserted an honest-services fraud theory *wholly distinct from securities fraud*—a theory (which consumed weeks of the trial) that Skilling failed to do his job "appropriately" by exposing Enron to too much risk and making other decisions that, while fully disclosed and thus by definition not securities fraud, nevertheless could make the company look bad (so-called "Wall

Street Journal risk"). Skilling C.A. Reply 33-37; PB2-3.

Although the Government's factual recitation is gerrymandered to ignore this distinct honest-services theory, the Government's harmless-error argument concedes that the securities-fraud evidence only *partly* overlapped with the honest-services evidence. GB53. The Government thus necessarily cannot show that the conspiracy conviction rested *only* on the securities-fraud theory, rather than the distinct, legally-flawed honest-services theory. In fact, given the glaring weaknesses of the Government's substantive securities-fraud case against Skilling, *see* Skilling C.A. Reply 1-14; 33-37, it is very possible—indeed likely—that jurors convicted Skilling for conspiracy based on the honest-services object, and then relied on the *Pinkerton* instruction the Government obtained to find him vicariously liable for securities fraud committed by *others*, such as Fastow and Causey, *id.* at 39-45. Because the Government cannot refute that possibility, it cannot show that including the honest-services object was harmless.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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