No. 08-

IN THE

Supreme Court of the United States

JEFFREY K. SKILLING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL M. PETROCELLI
(*Counsel of Record*)
M. RANDALL OPPENHEIMER
MATTHEW T. KLINE
DAVID J. MARROSO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
7th Floor
Los Angeles, California 90067
(310) 553-6800

WALTER DELLINGER
JONATHAN D. HACKER
IRVING L. GORNSTEIN
MEAGHAN MCLAINE
RYAN W. SCOTT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

Blank Page

QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDING

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

Respondent is the United States of America, appellee below.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

Blank Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey K. Skilling respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

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 The relevant opinions of the U.S. District Court for the Southern District of Texas are unpublished.

JURISDICTION

The Fifth Circuit entered judgment on January 6, 2009. A petition for rehearing was denied on February 10, 2009 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted at App. 159a.

STATEMENT OF THE CASE

A. Factual Background And Trial

In late 2001, the seventh-largest company in America, Enron Corporation, went bankrupt in a matter of weeks. App. 2a. The bankruptcy was catastrophic for Houston, where the company was based, and it elicited immediate calls for retribution. The President convened a special investigative team, the Enron Task Force, to find criminal wrongdoing at Enron.

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

Petitioner Jeffrey Skilling was a longtime Enron executive, serving as its President and COO for several years before assuming the position of CEO from February to August 2001. *Id.* He was indicted in 2004 along with Enron Chairman and CEO Ken Lay and Enron Chief Accounting Officer Richard Causey. App. 18a. The cornerstone of the indictment was the conspiracy count, Count One, which alleged an overarching conspiracy to commit wire or securities fraud. *Id.* The remaining counts—securities fraud, making false statements to Enron's auditors, and insider trading—alleged conduct flowing from that conspiracy. *Id.*; R:881-902.[1]

The government took some time to settle on what crimes, if any, had occurred at Enron, R:13292—other than secret looting by the company's CFO Andrew Fastow. Skilling was in no way implicated in Fastow's theft, R:21622-27, 21685, and prosecutors later admitted that the case against Skilling was plagued by "fundamental weaknesses," because he "took steps seemingly inconsistent with criminal intent," there were "no 'smoking gun' documents," and prosecutors relied heavily on cooperating witnesses who had "marginal credibility." John C. Hueston, *Behind the Scenes of the Enron Trial*, 44 Am. Crim. L. Rev. 197, 197-98, 201 (2007).

---

[1] Citations to "R" and "SR3" refer to the record and supplemental record in the court of appeals; "JKS" refers to exhibits below; "JQ" refers to prospective juror questionnaires; "Pet. C.A. Br." refers to petitioner's appellate brief.

As it did in other Enron prosecutions, the government focused on alleged acts of "honest services" fraud in prosecuting Skilling. It told the jury that this case was "not about what caused the bankruptcy of Enron," R:36449, or even about "greed," R:37006-07, 37065. The government instead alleged that Skilling took assertedly inappropriate measures to maintain or improve Enron's stock price, in violation of his fiduciary duties of "honesty," "candor," "loyalty," and "honest services." R:14751, 14757-58, 14784, 14799-800, 15114-15, 15864-67, 21224-25, 22769-70, 29610-11, 32262-64, 36522, 36568, 37013-14, 37043, 37065. The allegedly improper actions included business decisions that, according to the government, exposed Enron to an irresponsible level of long-term risk in exchange for a short-term stock-price benefit. R:21239, 22848, 22843.

Skilling challenged the government's case at every turn, presenting evidence showing, for example, that the subject transactions and business decisions were lawful, the risks were fully vetted by outside advisors and the Enron Board, his alleged misstatements were accurate, and all relevant information was disclosed to investors. Pet. C.A. Br. 24-58. The government responded by emphasizing its theory of honest-services fraud—as opposed to securities fraud or deprivation-of-property wire fraud—as a basis for convicting Skilling for conspiracy to commit wire fraud. It argued that whatever else the evidence showed, Skilling at least had violated his duties of "honesty and candor," "loyalty to [Enron's] employees and to investors," and "trust placed in [him]." R:14784, 14799-800; *accord* R:29610-11 ("we're here to decide" whether Skilling "breached

[his] duties and obligations to [Enron's] shareholders and employees"); R:15114-15; R:21224-25; R:29610-11; R:32262-64; R:36568; R:37013-14, 37043. In closing argument, the government declared that Skilling and Lay committed honest-services fraud because they violated a duty to Enron's "employees"—a duty the government described as "a duty of good faith and honest services, a duty to be truthful, and a duty to do their job, ladies and gentlemen, to do their job and do it appropriately." R:37065.

Of critical importance here, the government argued that Skilling committed every alleged act of misconduct with the specific intent to advance Enron's interests—by increasing reported earnings, maintaining an investment-grade credit rating, and improving the price of Enron's stock. R:843-44, 848-49, 852-53. According to the indictment, each alleged act of misconduct was intended "to achieve [Enron's] desired financial reporting results" so that "Enron could present itself more attractively," R:853-54; "to protect Enron" from having to report losses, R:854-55; to "generate earnings and cash flow" and "ensure that Enron met analysts' expectations," R:856-58; and "to report ... higher earnings" and "boost Enron's stock price," R:863; *see* R:860-72. Government witnesses agreed that Skilling was utterly dedicated and loyal to Enron. R:24548-49 ("had the best interests of Enron in mind" and was "fighting for [his] company"), 15954 ("a true believer in Enron"), 18025 ("very committed to the company"), 22986 ("[r]eally dedicated to the company"). As the court of appeals recognized, "Enron created a goal of meeting certain earnings projections," and Skilling's actions were aimed at achieving that goal. App. 27a.

The government did not contend, and the record did not suggest in any way, that Skilling intended to put his own interests ahead of Enron's. To the contrary, the government's stated theory was that its evidence needed only to show—and did only show—"a material violation of a fiduciary duty that defendants owed to Enron and its shareholders." R:41327-28.

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

As the trial approached, it became clear that the seismic effect of Enron's collapse on Houston—frequently compared by residents to the September 11 attacks, SR3:544-46—eliminated any possibility that Skilling could receive a fair trial there. Thousands of Houstonians had lost their jobs and retirement savings. SR3:847-50, 1445-48, 1899-900. The bankruptcy caused a severe economic downturn in the city generally, with businesses ranging from hotels to barbershops to the city's largest law firm suffering enormous losses. SR3:864, 933-37, 1197-99, 1201, 1205, 1219-21, 1229-33, 1243-51, 1258-61; 1267-69. One in three Houstonians reported that they personally knew someone harmed by Enron's collapse. R:2683, 2701. The government itself described the *entire community of Houston* as a "victim" of Skilling's alleged crimes. R:42161. Connections to Enron ran so deep that the entire local U.S. Attorney's Office recused itself from the investigation. SR3:608-12. Five judges on the Fifth Circuit recused themselves from this case.

The devastating impact of Enron's collapse on Houston and its residents was reflected in the non-

stop media coverage of the events, including blistering daily attacks on the executives—principally Skilling and Lay—deemed responsible for Enron's demise. The extent and scope of coverage can be fully understood only by reviewing the briefs and exhibits prepared below. Several exhibits summarizing and illustrating the coverage are reprinted at App. 141a-158a.

What follows is a sampling of the searing media attacks. One column in the *Houston Chronicle*, entitled "Your Tar and Feathers Ready? Mine Are," expressly demanded a "witch hunt." SR3:746-48. Houstonians guessed that Skilling and Lay had "stole[n] money from investors," "ripped off their stockholders for billions," and "destroyed a great corporation." SR3:522-30, 690-707. Skilling and Lay were compared to Al Qaeda, Hitler, Satan, child molesters, rapists, embezzlers, and terrorists and encouraged to "go to jail" and "to hell." SR3:511-30, 705-06. Some suggested they should face "the old time Code of the West." SR3:854. A local rap song (entitled "Drop the S Off Skilling") threatened Skilling's murder in grisly, personal terms. SR3:868-74. Polling showed that Houstonians routinely labeled Skilling a "pig," "snake," "crook," "thief," "fraud," "asshole," "criminal," "bastard," "scoundrel," "liar," "weasel," "economic terrorist," "evil," "dirty," "deceitful," "dishonest," "greedy," "amoral," "devious," "lecherous," "despicable," and "equivalent [to] an axe murderer," a man who had "no conscience," "stole from employees," and "swindled a lot of people." R:2686, 2727-55.

Skilling was pronounced guilty throughout Houston long before trial. When he appeared before Congress, his testimony was called "b.s." and "unbelievable." SR3:563-68. Claims of innocence were rejected as "ludicrous," "not credible," "distasteful," a "doofus defense," "smoke screen," and "fantasy world." SR3:515-16, 566-68, 602-06, 671-73; R:12066-67; JKS-8. When Skilling was indicted, the *Chronicle*'s headline proclaimed, "Most Agree: Indictment Overdue." SR3:728-30. The paper's negative coverage extended beyond news and business to articles on sports, education, music, and more. *E.g.*, SR3:805-43 ("If statistics do indeed lie ... then Shaquille O'Neal's are like former Enron CEO Jeff Skilling in front of a congressional subcommittee."); R:38388, 38927, 39209, 39212, 39653, 39831. One *Chronicle* columnist became the "chief tainter of potential jurors." R:40054-55. Prosecutors fueled the blaze, giving press conferences and interviews denouncing Skilling as a "corporate crook." SR3:1561; R:12592-94. Polling showed that Houstonians proclaimed Skilling "guilty as sin," and argued "he needs to pay the price," go to "jail for 20 years," and "be hanged." R:2686, 2727-55. A poll conducted by the government itself found that almost 60% of Houstonians already believed Skilling and Lay were guilty. R:4055, 4107-12.

After the Task Force's Arthur Andersen conviction was unanimously reversed by this Court and another Enron trial resulted in no convictions, Houstonians sought their retribution from Skilling and Lay. Their trial was described as the "Big One," the "showdown," and the "main event." SR3:623, 1712, 1936; R:39914, 40002. The *Chronicle* admonished:

"From the beginning, the Enron Task Force has had one true measure of success: Lay and Skilling in a cold steel cage." R:12263-65. Their trial was the "climax" of the "Enron disaster": "After more than four years of waiting, of allowing the hurt and anger and resentment to churn aside," the trial was to bring closure to Houston. R:39904, 39946-47.

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

Skilling moved to change venue. The district court denied the motion without hearing. R:4433-56. But the record starkly confirmed that the jury venire was as infused with bias as the broader community.

Questionnaires sent by the district court to potential jurors revealed the extent of prejudice. Of the 283 Houstonians who responded, 47% said they, their family, or friends had some connection to Enron or its bankruptcy; 86% had heard of or read about Enron-related cases; 80% demonstrated bias by expressing negative views of Skilling and Lay, negative opinions about the role they played in Enron's collapse, or general anger; 60% had an opinion about the cause of Enron's bankruptcy (almost always "greed," "accounting fraud," "lie[s]," and other "criminal" and "illegal activities" by upper management); 40% openly admitted that they could not be fair or might not be able to consider the evidence impartially; and 40% had an opinion about Skilling's and Lay's guilt or innocence. R:12058-95, 12375-89; R:12084 App. B, N, Q, R (sealed). When asked to express themselves in their own words, prospective jurors did so with venom—Skilling was "the devil," "to-

tally unethical and criminal," "the biggest liar on the face of the earth," "a high class crook" "without a moral compass" who "took everything he could" and "would lie to his own mother if it would further his own cause." R:12084 App. Q. He was "guilty as hell," "guilty—criminally and morally," "guilty without any doubt," and "guilty as sin—come on now." R:12084 App. Q, R. Accordingly, he and Lay should "be stripped of all their assets," "pay back every cent," "spend the rest of their lives in jail," "be reduced to having to beg on the corner and live under a bridge," "hang," "serve many years in prison," "be prosecuted to the maximum." R:12084 App. K, Q, R, S, T. According to a leading expert on jury behavior, only 18 of the 283 questionnaires did *not* raise doubts about the jurors' ability to be fair. R:13812-16, 13823-29, 39905-07.[2]

Based on these questionnaires, the government itself stipulated to striking 42% of the entire pool. R:11890-93, 13593-98. But many blatantly biased jurors remained. One juror came to voir dire and called for vengeance in open court: "I would dearly love to sit on this jury. I would love to claim responsibility, at least 1/12 of the responsibility, for putting these sons of bitches away for the rest of their lives." R:14411; *see* R:14407 ("they knew exactly what they were doing"), 14509-10 ("they stole money"), JQ-61 &

---

[2] As the Fifth Circuit noted (App. 57a), all these biases were reinforced when Skilling's co-defendant Richard Causey, who was featured in jurors' questionnaires, pleaded guilty just before trial. His plea was a major news event in Houston, and the media pronounced it the "linchpin" to proving Skilling's guilt. R:12267-373, 12391-92, 12514-90.

R:14558-66 ("angry" about Enron; collapse caused by "criminal" behavior); JQ-74 & R:14585-93, 14602 ("angry" about Enron; Enron "is a wake-up call for large companies to watch out because they may not be able to get away with fraud anymore"; "[t]here is never enough money for the higher-ups so they have to steal it"); JQ-76 & R:14611-12 (Skilling "guilty of knowing what was happening to the company, but did nothing to let the employees know"); JQ-101 & R:14650-59, 14677-78 (Skilling "guilty" because of what juror saw on TV and read in Wall Street Journal; personally lost retirement savings). One juror statement captured the public's (and the media's) basic misunderstanding of the facts: "[I]f there was no fraud, then how did the company collapse?" R:14659.

Given the widespread impact of Enron's collapse on Houston, the extraordinary media coverage, and the pervasive bias in the venire openly exposed by the questionnaires, Skilling sought extensive, non-public, individualized voir dire to try to screen for inevitable juror bias. R:12067-74. The district court went the opposite direction, limiting total voir dire to just one day, conducting most questioning in front of other potential jurors and throngs of reporters, and twice chastising defense counsel for asking too many questions about potential prejudice because the court had prohibited "individual voir dire." R:11050-54, 11803-08, 14489, 14609-10. Just forty-six people were questioned, only for a few minutes each. Only seven were struck for cause, with one excused for hardship. R:14510, 14513, 14585, 14601, 14641, 14666, 14669.

Unsurprisingly, the individuals selected for Skilling's jury shared the broader community's prejudices. *E.g*, JQ-10 ("[c]ollapse was due to greed and mismanagement," Skilling is "suspect"), 11 ("greed" caused Enron's collapse), 20 ("angry" about Enron, "[n]ot enough corporate controls or effective audit procedures to prevent mismanagement," "the involuntary loss of the 401(k) savings made the most impact on me, especially because I have been forced to forfeit my own 401(k) funds to survive layoffs"), 38 ("angry" about Enron, "feel bad for those that worked hard ... only to have it all taken away"), 63 (Skilling "guilt[y]," "I think they probably knew they were breaking the law"), 64 ("angry" about Enron based on news reports), 87 (Enron collapse caused by "[g]reed," "[p]oor management," and "bad judg[ment]"), 90 ("The small average worker saves money for retirement all his life. It's not right for someone or anyone to take or try to take this part of his life away from him."), 113 ("someone had to be doing something illegal"). Several jurors knew former Enron employees who lost savings, and one said he may have owned Enron stock himself. JQ-10, 11, 64; R:14450, 14455-57, 14537-38, 14573-75. One juror exhibited such an obvious bias that even the national media noticed: "If Juror No. 11 is any indication: Look out, defense." Greg Farrell, *USA Today*, Feb. 6, 2006, at Money 2B.

Skilling challenged the entire jury, objected to seven seated jurors including Juror 11, objected to the court's failure to grant him additional peremptories, and objected to not being able to voir dire each juror fully. Jan. 30, 2006 Tr. at 3 (sealed); *see* R:14686-88. Every motion and objection was denied.

4. *The Media Frenzy Continues Through Trial And The Houston Jury Inevitably Convicts*

The commencement of trial in Houston on January 30, 2006, only exacerbated the media frenzy. The *Chronicle* covered "courtroom developments minute by minute, hour by hour," with various reporter-bloggers sitting in the courthouse and reporting live. 38897; *see* R:38897-98 ("[i]t was a reality show"), 38914-15, 38946-47, 40066-896; SR3:1691, 1701-09; App. 158a-162a. No detail was spared—including those held inadmissible at trial. R:39440 ("The Dirt That Jurors Won't Hear"). The government's case was described as "solid" and "damning," while the defense was ridiculed as "sweeping revisionism," "delusional," "laughable," and "absurd." R:38981, 39459-61, 39571, 39775-76, 39849, 40089. There was even a column directed specifically to the 12 jurors, warning them not to be "drawn in by the circular arguments and seductive logic" of the defense, and insisting that "common sense" compelled guilty verdicts. R:39886-87. In dismissing concerns about the intensely prejudicial publicity, the district court sharply underscored them, observing that it was simply "impossible to prevent jurors from reading about the case and listening and watching media reports." R:10951.

On May 25, 2006, the jury convicted Skilling on 19 counts: one count of conspiracy to commit securities or wire fraud (18 U.S.C. § 371); 12 counts of securities fraud (15 U.S.C. §§ 78j, 78ff, 17 C.F.R. § 240.10b-5); five counts of making false statements to auditors (15 U.S.C. §§ 78m, 78ff, 17 C.F.R. § 240.13b2-2), and one count of insider trading (15

U.S.C. §§ 78j, 78ff, 17 C.F.R. § 240.10b-5). App. 19a. The jury acquitted Skilling on nine counts of insider trading. App. 19a. The district court denied Skilling's request for a special verdict form. R:35899, 36020, 37189-94. Skilling was sentenced to 292 months' imprisonment, three years of supervised release, and $45 million in restitution. App. 19a. He has been incarcerated since December 2006.

B. Post-Trial And Appellate Proceedings

1. In the district court, Skilling had sought dismissal of the charges of "honest services" fraud, 18 U.S.C. § 1346, on the ground that the government did not allege that Skilling's conduct was intended to harm Enron or to obtain any personal gain, as in cases of bribery, kickbacks, or self-dealing. R:7330-31. The district court rejected his motion. R:8120. Just after he was convicted, however, the Fifth Circuit vindicated Skilling's position, reversing the Enron-related honest-services fraud conviction of a Merrill Lynch executive because his conduct, though wrongful, was not intended to line his own pockets but was instead intended to advance Enron's interests in maintaining its stock price. *U.S. v. Brown*, 459 F.3d 509, 522 (5th Cir. 2006). Because the improper honest-services theory was part of a general verdict, the court remanded to allow retrial of the defendant on charges uninfected by the honest-services count. *Id.* at 523, 531.

A senior Enron executive achieved the same result in *U.S. v. Howard*, 517 F.3d 731 (5th Cir. 2008). Describing *Brown* as limiting § 1346 to conduct intended "to promote [the employee's] own interests instead of the interests of the employer," *id.* at 735,

the Fifth Circuit held that a flawed honest-services theory infected all the counts of conviction of Enron Broadband's CFO, whose conduct also was allegedly intended to maintain or improve Enron's stock price, *id.* at 737-38.

2. After his conviction, Skilling sought bail pending appeal, relying largely on *Brown*. The district court agreed that *Brown* was "likely to result in a reversal or an order for a new trial on Skilling's conviction for conspiracy charged in Count One." R:41893. That count charged honest-services fraud as one of three possible objects of the conspiracy, but the jury's general verdict made it "impossible to tell on which of the various objects of the conspiracy the jury based Skilling's conviction." R:41897; *see Hedgpeth v. Pulido*, 129 S.Ct. 530, 532 (2008) (under *Yates v. U.S.*, 354 U.S. 298 (1957), general verdict that includes legally incorrect theory must be reversed unless government proves that legally flawed theory did not affect convictions). The district court held, however, that Skilling's remaining 18 counts of conviction were uninfected by the flawed honest-services charge, and thus denied Skilling's motion for bail. R:41898-906.

Skilling sought relief from the Fifth Circuit. Judge Higginbotham addressed the motion in chambers, concluding that *Brown*'s construction of § 1346 created "serious frailties" in 14 counts of conviction, which were connected to the conspiracy count by the jury instructions and the government's trial theory. App. 140a. But Judge Higginbotham held that the remaining five counts were uninfected by the honest-

services theory, and thus denied Skilling's bail request. *Id.*

3. a. Relying on *Brown*, *Howard,* and precedents from the Second and Seventh Circuits similarly construing § 1346, Skilling argued on appeal that his conduct, even if wrongful in some way, was not the crime of honest-services fraud, because the government conceded that his acts were not intended to advance his own interests instead of Enron's. The Fifth Circuit court agreed that Skilling's acts were not intended to harm Enron or to obtain personal benefit at Enron's expense. App. 27a. But instead of reversing Skilling's conviction on that basis, the Fifth Circuit held that those facts were categorically irrelevant to an honest-services prosecution. App. 23a-25a. The panel construed *Brown* as holding that an employee can escape an honest-services fraud conviction for a breach of fiduciary duty only when the employee was specifically authorized by a supervisor to commit the act in question. App. 26a. Absent such specific authorization (which the court found lacking here, although the government never sought an instruction requiring the jury to find the conduct unauthorized), the court concluded that the only pertinent elements of § 1346 are a material breach of a state-law fiduciary duty and resulting harm to the employer (both of which it concluded had been proved). App. 29a.

b. Skilling also argued that pretrial publicity and pervasive community prejudice deprived him of a fair trial. The Fifth Circuit agreed that the district court had erred in not recognizing that Skilling was entitled to a "presumption of prejudice" arising from

"pervasive community bias against those who oversaw Enron's collapse" and "inflammatory pretrial publicity in the Houston area." App. 59a-60a. The court held that Skilling had "demonstrate[d] an extreme situation of inflammatory pretrial publicity that literally saturated the community in which his trial was held." App. 55a (quotation omitted). "The district court," moreover, "seemed to overlook that the prejudice came from more than just pretrial media publicity, but also from the sheer number of victims [of Enron's collapse]." App. 58a.

Despite recognizing the pervasive community bias, the Fifth Circuit held that the failure to change venue was not reversible error, because the government had adequately "rebutted any presumed prejudice," App. 54a—even though the district court itself never applied the presumption. The court concluded that the district court's one-day voir dire sufficed to rebut the presumption of prejudice because the court admonished jurors not to seek vengeance against Enron's officers, warned them not to necessarily trust what they read in newspapers, and looked jurors "in the eye" to assess their credibility. App. 62a-67a.

In particular, the court held that voir dire showed that Juror 11—the juror whose bias was so obvious *USA Today* proclaimed, "Look out, defense," and whom Skilling specifically challenged for cause—was not "unconstitutionally prejudiced." App. 63a, 64a-67a. Despite Juror 11's almost cartoonishly biased comments, *infra* at 36, the court held the government had rebutted the presumption because the district court said it "'looked him in the eye'" and ac-

cepted statements he made asserting his impartiality. App. 66a-67a.

c. While affirming Skilling's convictions, the panel held that the district court misapplied a "financial institutions" enhancement, and remanded for resentencing. App. 131a-135a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE MEANING AND ENFORCEABILITY OF 18 U.S.C. § 1346

A. Circuit Decisions Are Squarely In Conflict Over Whether § 1346 Includes A "Private Gain" Requirement

1. The honest-services fraud statute, 18 U.S.C. § 1346, makes it a felony for a public or private employee to use the mail or wires to deprive his employer of its "intangible right" to the employee's "honest services." The statute was enacted 20 years ago in response to *McNally v. United States*, 483 U.S. 350 (1987), which held that the mail fraud statute could not be read as encompassing the judicially-created doctrine of honest-services fraud. *Id.* at 360-61.

In enacting § 1346, however, Congress did nothing to specify the meaning of "the intangible right of honest services," leaving the statute on its face "vague and undefined," *U.S. v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008), with "little guidance as to the conduct it prohibits," *U.S. v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003). As Justice Scalia recently observed: "Without some coherent limiting principle to define what 'the intangible right of honest ser-

vices' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. U.S.*, 129 S.Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

Although the federal circuits have now "spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles," "[n]o consensus has emerged." *Id.* at 1309. There is instead "wide disagreement among the circuits as to the elements of the 'honest services' offense." *U.S. v. Rybicki*, 354 F.3d 124, 162 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting); Daniel C. Cleveland, Note, *Once Again, It Is Time to "Speak More Clearly" About § 1346 and the Intangible Rights of Honest Services Doctrine in Mail and Wire Fraud*, 34 N. Ky. L. Rev. 117, 125-26 (2007) (§ 1346 only "muddied the waters" and triggered "a number of circuit splits").

2. This case implicates a square circuit conflict over one of "the principal devices the Courts of Appeals have used in an effort to limit § 1346": whether a conviction requires proof that the employee's conduct was intended to obtain "private gain." *Sorich*, 129 S.Ct. at 1310-11. Three circuits now hold that the statute does *not* require proof of private gain, in direct conflict with decisions of two other circuits and considered dicta in a third.

a. The Seventh Circuit has held that 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." *U.S. v. Bloom*, 149

F.3d 649, 656-57 (7th Cir. 1998). Such "misuse of position" for personal gain is "the line that separates run of the mill violations of state-law fiduciary duty ... from federal crime." *Id.* at 655. Applying that rule in *U.S. v. Thompson*, 484 F.3d 877 (7th Cir. 2007), the Seventh Circuit reversed a § 1346 conviction based on a violation of state procurement rules in awarding a travel contract, because even though the conduct was unlawful, the employee "did not bilk the state out of any money or pocket any of the funds that were supposed to be used to buy travel," but instead sought "to pursue the public interest as [she] understood it." *Id.* at 882, 884.

Similarly, the en banc Second Circuit has held that § 1346, "when applied to private actors"—law-firm partners in that case—"means 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." *Rybicki*, 354 F.3d at 141-42 (emphasis added).

Finally, the Sixth Circuit has agreed that § 1346 is "anchored upon the defendant's misuse of his [position] for personal profit." *U.S. v. Turner*, 465 F.3d 667, 676 (6th Cir. 2006) (quotation omitted).

b. The Third and Tenth Circuits, on the other hand, have explicitly rejected any requirement of private gain. *See U.S. v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003) (rejecting private-gain requirement as "adding an element to honest services fraud which the text and structure of the fraud statutes do not justify"); *U.S. v. Panarella*, 277 F.3d 678, 692 (3d

Cir. 2002) (rejecting private-gain requirement as lending "little clarity" to § 1346).

The Fifth Circuit in this case also squarely rejected a requirement of private gain (or "personal benefit"). App. 26a-27a, 29a. The panel agreed that Skilling's conduct was intended to advance his employer's interests, App. 27a-28a, but held that it is categorically irrelevant under § 1346 that a defendant "lacked the requisite intent to ... harm the victims or to obtain personal benefit." App. 23a (quotation omitted). Instead, to establish a § 1346 violation, the government need prove only "(1) a material breach of a fiduciary duty imposed under state law ... (2) that results in a detriment to the employer," unless the employee was specifically authorized by a supervisor to commit the act. App. 29a.

c. That conclusion cannot be reconciled with the decisions discussed above. It is most directly in conflict with *Bloom* and *Thompson*, which rejected § 1346 charges specifically because—as here—the government did not allege or prove that the defendant's conduct was intended to achieve any private benefit distinct from the benefits awarded by the employer for pursuing the employer's goals. Although "it is linguistically *possible* to understand 'private gain' as whatever adds to the employee's income or psyche," *Thompson* explains, the rule of lenity counsels a narrower reading, and the "history of honest-services prosecutions is one in which the 'private gain' comes from third parties who suborn the employee with side payments, often derived via kickbacks." 484 F.3d at 884. Where the employee's only benefit is employer-designed compensation, the

benefit is not truly "private" to the employee, but is the employer's *own* benefit, which it shares with the employee to encourage performance. Thus, "neither an increase in salary for doing what one's superiors deem a good job, nor an addition to one's peace of mind, is a 'private benefit' for the purpose of § 1346." *Id.*

In short, if Skilling had been prosecuted in the Seventh Circuit, the honest-services fraud charge would have been flatly barred by the private-gain requirement applied in that Circuit's decisions. This case thus crystallizes the circuit conflict over that requirement. And it presents the conflict much more cleanly than did *Sorich*, where the Seventh Circuit *did* find that the defendant sought "private gain," because he intended his acts to benefit third parties *rather than* his employer. *U.S. v. Sorich*, 523 F.3d 702, 709-11 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1308 (2009). Because there is no allegation here that Skilling sought to advance private interests instead of Enron's, this case is an ideal vehicle for resolving the conflict over the "private gain" limitation on honest-services fraud.[3]

---

[3] The government argued below that even if its honest-services theory was legally flawed, the error was harmless because the convictions could have rested on other theories. That argument has no bearing here. The district court specifically found that the error, if there was one, was *not* harmless as to the conspiracy count, and Judge Higginbotham indicated that the error infected 13 other counts as well. *Supra* at 14. The Fifth Circuit expressly declined to address the issue given its conclusion that the honest-service theory was not legally erroneous. App. 29a. Where the court below has not addressed a government claim that an asserted legal error is harmless, this

B. The Proper Construction Of § 1346 Is An Important Question

The fact that corporate employees are subject to different criminal liability standards in different circuits is reason enough to warrant immediate review, but the need for resolution of the conflict is especially acute given the rapidly escalating significance of § 1346 in the federal prosecutorial arsenal.

Honest-services fraud has become increasingly important in white-collar criminal prosecutions in recent years. Section 1346 prosecutions by the DOJ's Public Integrity Section are constantly increasing,[4] as are the number of fraud convictions obtained pursuant solely to an "honest services" theory.[5]

Use of the honest-services fraud cudgel is only going to expand going forward. The FBI's mortgage-fraud caseload has doubled in the last three years, with some 2,000 active investigations and more than 560 corporate fraud investigations. *Oversight of the Federal Bureau of Investigation: Hearing Before the*

Court's "normal practice" after correcting the error is to remand for the lower court to address the government's harmless-error argument "in the first instance." *Neder v. U.S.*, 527 U.S. 1, 25 (1999); *see Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993).

[4] *See, e.g.*, Public Integrity Section, U.S. Dep't of Justice, *Reports to Congress on the Activities and Operations of the Public Integrity Section* (1998 & 2007), *available at* http://www.usdoj.gov/criminal/pin/.

[5] *See, e.g.*, U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* tbl.17 (1998-2008), *available at* http://www.ussc.gov/annrpts.htm (sentences under U.S.S.G. § 2C1.7 (2004) (repealed)).

S. Comm. on the Judiciary, 111th Cong. (2009). The Department of Justice, President, and Congress have all announced a push to increase resources directed at investigating and prosecuting acts deemed to be financial fraud. David Segal, *Financial Fraud Rises as Target for Prosecutors*, N.Y. Times, Mar. 12, 2009, at A1, A19; Office of Mgmt. & Budget, *A New Era of Responsibility* 81 (2009); S. 386, 111th Cong. § 3 (2009). The honest-services theory will play a key role in these cases. Brian Walsh & Tiffany Joslyn, *Congress's Hammer: Another Criminal Law*, Heritage Found. (2009), *available at* http://www.heritage.org/press/commentary/ed030409c.cfm. And given the national nature of the alleged frauds, the government is sure to forum-shop its honest-services prosecutions into circuits with the broadest constructions of § 1346.

C. The Fifth Circuit's Construction Of § 1346 Is Incorrect And Renders The Statute Unconstitutionally Vague

The Fifth Circuit erred in holding that a conviction under § 1346 is valid even where the defendant did not seek to elevate material private interests over his employer's. Even that limitation may not suffice to save the statute from unconstitutional vagueness, but it at least establishes *some* reasonably clear and intelligible boundary to the statute. It also reflects the pre-*McNally* understanding of honest-services fraud Congress sought to adopt in § 1346.

1. As Justice Scalia recently observed, the statute on its face sweeps in a breathtaking range of conduct. *Sorich*, 129 S.Ct. at 1310. The phrase

"honest services" itself provides no clear guidance as to "how far the intangible rights theory of criminal responsibility really extends." *Bloom*, 149 F.3d at 656; *see Sorich*, 523 F.3d at 707 (§ 1346 is "amorphous and open-ended"); *Urciuoli*, 513 F.3d at 294 ("the concept of 'honest services' is vague and undefined"); *Brown*, 459 F.3d at 520 (§ 1346 is a "facially vague criminal statute"); *Murphy*, 323 F.3d at 116 ("the plain language of § 1346 provides little guidance as to the conduct it prohibits"); *U.S. v. Handakas*, 286 F.3d 92, 105 (2d Cir. 2002) ("the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited"), *overruled in part by Rybicki*, 354 F.3d at 144; *U.S. v. Brumley*, 116 F.3d 728, 736 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting) (§ 1346 is "general, undefined, vague, and ambiguous").

There is a "serious argument" that, as Justice Scalia put it, "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 of unethical conduct." *Sorich*, 129 S.Ct. at 1310. And because the notion that courts can "discover[]" whether conduct is criminal using common-law reasoning is "utterly anathema," *Rogers v. Tennessee*, 532 U.S. 451, 476-77 (2001) (Scalia, J., dissenting), there is an equally serious argument that § 1346 is unconstitutionally vague. *See Rybicki*, 354 F.3d at 156 (Jacobs, J., joined by Walker, Cabranes, & B.D. Parker, JJ., dissenting).

It should not be the task of federal courts to save a facially vague and unenforceable statute from it-

self. Only Congress can properly demarcate the boundaries of honest-services fraud. *McNally*, 483 U.S. at 360.

2. Several lower courts, however, have sought to resolve the problem of the statute's facial ambiguity by reading into the text limitations on "honest services" fraud. The "private gain" requirement is among the clearest of those limitations, and it is drawn directly from the pre-*McNally* cases that created the concept of honest-services fraud. *McNally* itself stated the rule: "Under [the prior honest-services] cases, a public official owes a fiduciary duty to the public, and misuse of his office *for private gain* is a fraud." *Id.* at 355 (emphasis added).

Applying a private-gain limitation to honest-services fraud is the only way to even arguably "avoid the constitutional question" raised by the vagueness of the phrase "honest services." *Jones v. U.S.*, 529 U.S. 848, 858 (2000). Absent that limitation, the statute is nothing more than a common-law fiduciary-breach statute, impermissibly criminalizing whatever wrongful or unethical corporate acts a given prosecutor decides to attack. *Brown*, 459 F.3d at 521-22; *Bloom*, 149 F.3d at 654.

Construing the statute so broadly serves no useful purpose and undermines important federalism interests. Where a defendant's conduct is unlawful in some other way, but is intended to advance the employer's interests, other civil and criminal laws *already* exist to prevent and punish such conduct. *Brown*, 459 F.3d at 522 n.13. And because the fiduciary duties allegedly breached in honest-services cases are (as here) typically subject to state-law con-

trol, criminalizing such breaches—especially in the absence of a distinct federal interest in preventing the use of interstate wires for unlawful private gain—disrupts the federal-state balance in regulating the employer-employee relationship. *Jones*, 529 U.S. at 858.

To minimize federal intrusion into this area of traditional state regulation and give some notice of the acts subject to criminal sanction, this Court should grant review and hold that § 1346 is limited to a specific category of wrongful acts: those intended to advance the employee's private interests rather than the employer's.

II. THE COURT SHOULD GRANT REVIEW TO ADDRESS THE PRESUMPTION OF JURY PREJUDICE ARISING FROM PRETRIAL PUBLICITY AND COMMUNITY PASSION

Applying a long line of this Court's precedents addressing the effects of inflammatory pretrial publicity on the jury pool, the Fifth Circuit correctly held that, given the massive pretrial publicity and extraordinary community passion aroused by Enron's collapse, the trial court should have applied a "presumption of prejudice" in determining whether jurors in the Houston venue could be impartial. The Fifth Circuit failed, however, to apply the consequence of that presumption dictated by this Court's precedents, *viz.*, automatic reversal of the conviction.

The court of appeals instead held that the government could—and did—rebut the presumption of prejudice by showing through voir dire statements that "an impartial jury was actually impanelled." App. 55a, *see* App. 62a-67a. That holding conflicts

with multiple decisions of this Court, and implicates a square conflict in the federal circuits and state supreme courts over the meaning of those decisions.

A. The Court Of Appeals Correctly Determined That Pervasive Media Coverage And Community Passion Created A Presumption Of Prejudice

This Court has long held that when "the influence of the news media" in "the community at large" is sufficiently pervasive, a presumption of prejudice arises requiring a change of venue or reversal of the conviction. *Murphy v. Florida,* 421 U.S. 794, 799 (1975); *see Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Estes v. Texas*, 381 U.S. 532, 550-51 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963); *see also Mu'Min v. Virginia*, 500 U.S. 415, 429-30 (1991).

Applying those decisions, the Fifth Circuit here correctly determined that a presumption of prejudice should have been applied to the jurors who adjudicated Skilling's guilt. App. 56a-60a. The "immense volume of coverage" included so much "inflammatory pretrial material," App. 56a, as to "literally saturate[] the community in which [Skilling's] trial was held," App. 55a. And it was "more than just pretrial publicity"—because the "collapse of Enron affected countless people in the Houston area," the community was infused with "non-media prejudice" as well. App. 58a. The widespread, persistent, and scathing demonization of Skilling by the Houston media far exceeded the editorial commentary in this Court's jury-prejudice cases, *supra* at 5-8, 12; polling by both the defense and the government revealed strong ma-

jorities of potential jurors expressing open bias, *supra* at 6-8; and questionnaires returned by venire members confirmed the breadth and intensity of the hostility toward Skilling, *supra* at 8-11.

As more generally elaborated above, *supra* at 5-12, the community passion surrounding the prosecution of Jeff Skilling and Ken Lay—the two executives Houstonians deemed personally responsible for Enron's devastating collapse—was as dramatic as any in U.S. criminal trial history. If a presumption of juror prejudice applies in any case, it had to apply in this one, as the court of appeals understood. App. 56a.

B. The Fifth Circuit's Decision Allowing Rebuttal Of The Presumption Of Prejudice Conflicts With Decisions Of This Court, Four Other Circuits, And Numerous State Supreme Courts

Despite holding that a presumption of juror prejudice applied, the Fifth Circuit upheld the district court's finding that the jurors were *actually* unbiased and that Skilling's trial in Houston was therefore fair. The court of appeals held that when the presumption arises, the government may—and did here—rebut the presumption of prejudice by showing "from the *voir dire* that an impartial jury was actually impanelled." App. 55a (quotation omitted); *see* App. 62a-67a. That holding implicates multiple decisional conflicts warranting certiorari.

1. *The Decision Below Conflicts With This Court's Decisions Addressing The Presumption Of Prejudice*

The decision below conflicts directly with this Court's precedents reversing convictions on the basis of a presumption of prejudice without inquiring into whether voir dire rebutted the presumption. *Supra* at 27.[6] While the precedents recognize that not all pretrial publicity compels such a presumption, *e.g.*, *Mu'Min*, 500 U.S. at 429-30, this Court has consistently acknowledged that when a "presumption of prejudice in a community" *does* arise from the "wave of public passion" surrounding the events of a trial, "the jurors' claims that they can be impartial *should not be believed.*" *Id.* (quoting *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)) (emphasis added); *see Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) (a "juror may have an interest in concealing his own bias" or "may be unaware of it").

The Court has thus repeatedly construed its precedents as requiring reversal without a showing of actual prejudice, because when publicity and community hostility are pervasive enough to give rise to a presumption of community prejudice, the

---

[6] In *Rideau*, the Court applied the presumption and reversed the conviction "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury." 373 U.S. at 727. In *Estes*, after finding that prejudice from pretrial publicity in the case was "inherent," the Court found it unnecessary to undertake "a careful examination of the facts in order to determine whether prejudice resulted." 381 U.S. at 543. And the Court in *Sheppard* likewise did not inquire into actual prejudice after finding pretrial publicity to be "inherently prejudicial." 384 U.S. at 363.

actual effect of such factors on individual jurors "cannot be ascertained." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986); *see U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006); *Chapman v. California*, 386 U.S. 18, 43-44 (1967) (Stewart, J., concurring in the judgment).

The decision below cannot be reconciled with that rule. Despite correctly recognizing that a presumption of prejudice arose from pervasive community and media bias, the court of appeals nevertheless assumed it was appropriate to trust juror statements during voir dire to rebut the presumption. But it is precisely those statements that become unreliable when prejudice is presumed, according to this Court's cases. The Fifth Circuit's holding conflicts directly with those precedents.

2. *The Federal Circuits And State Supreme Courts Are Squarely Divided Over Whether The Presumption Of Prejudice Can Be Rebutted*

The decision below also conflicts with decisions of multiple federal circuit and state supreme courts, which have followed this Court's decisions in holding that a presumption of prejudice, once established, cannot be rebutted by juror assurances of impartiality at voir dire. The Fifth and Eleventh Circuits, however, have read this Court's decisions differently, and have held that the presumption of prejudice is rebuttable through voir dire.

a. The Fifth Circuit's decision in this case allowing rebuttal of the presumption is consistent with the Eleventh Circuit's decision in *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (en banc),

which relies on an earlier Fifth Circuit decision, *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980). According to *Campa*: "Once the defendant puts forth evidence of the pervasive prejudice against him, the government can rebut any presumption of juror prejudice" by pointing to statements at voir dire. *Id.* at 1143.

b. Four other circuits have held the opposite: a finding of presumed prejudice *requires* a change of venue, and failing that, reversal of the conviction.

The Third Circuit—in an opinion by then-Judge Alito—held in *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001), that "[w]here media or other community reaction to a crime or a defendant engenders an atmosphere so hostile and pervasive as to preclude a rational trial process, 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*." *Id.* at 299 (emphasis added; quotation omitted). As then-Judge Alito explained in another opinion for the en banc court, the presumption cannot be rebutted by voir dire statements precisely because "the community and media reaction" is "so hostile and so pervasive as to make it apparent that even the most careful *voir dire* process would be unable to assure an impartial jury." *Flamer v. Delaware*, 68 F.3d 736, 754 (3d Cir. 1995) (en banc) (quotation omitted).

The Fourth Circuit has likewise held that when pretrial publicity "is so inherently prejudicial that trial proceedings must be presumed to be tainted," the trial court *must* "grant a change of venue *prior to jury selection*." *U.S. v. Higgs*, 353 F.3d 281, 307 (4th

Cir. 2003) (emphasis added); *accord U.S. v. Bakker*, 925 F.2d 728, 732 (4th Cir. 1991).

The Ninth Circuit also has held that "a court *must* grant a motion to change venue" if the defendant establishes that pretrial publicity was "sufficient" to raise "a presumption of prejudice." *Daniels v. Woodford*, 428 F.3d 1181, 1210-11 (9th Cir. 2005) (emphasis added). Once the presumption is established, the voir dire record is irrelevant. *Id.* at 1211-12; *accord U.S. v. Maad*, 75 F. App'x 599, 601 (9th Cir. 2003).

Finally, the Tenth Circuit held that a finding of presumed prejudice cannot be rebutted by jury statements at voir dire. *U.S. v. McVeigh*, 153 F.3d 1166, 1182 (10th Cir. 1998). When a defendant carries the heavy burden of showing presumed prejudice, the court explained, "we simply cannot rely on jurors' claims that they can be impartial," and thus the publicity must be considered "prejudicial as a matter of law." *Id.* (quotation omitted); *accord Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2006).

c. Numerous state supreme courts have likewise held that juror statements at voir dire cannot rebut a presumption that the jurors were prejudiced by inflammatory pretrial publicity. *People v. Leonard*, 157 P.3d 973, 993-94 (Cal. 2007) (when facts establish presumption of prejudice, "the trial is so fundamentally unfair that the ensuing conviction must be reversed without regard to the strength of the prosecution's case or the prospective jurors' protestations of neutrality during voir dire"); *Ruiz v. State*, 582 S.W.2d 915, 921 (Ark. 1979) ("the trial court did the best possible job that could have been done under

the circumstances," but prejudicial publicity so saturated community that "the patience of Job, or the wisdom of Solomon, would have not been sufficient to erase the predetermined facts and opinions" of the jurors); *State v. Clark*, 442 So. 2d 1129, 1134-35 (La. 1983) (applying presumption and holding reversal warranted with no need to examine voir dire); *Johnson v. State*, 476 So. 2d 1195, 1211 (Miss. 1985) ("in some circumstances, pretrial publicity can be so damaging, the presumption so great, that no voir dire can rebut it"); *accord DeRosa v. State*, 89 P.3d 1124, 1135 (Okla. Crim. App. 2004); *Commonwealth v. Frazier*, 369 A.2d 1224, 1230 (Pa. 1977); *State v. Laaman*, 331 A.2d 354, 357 (N.H. 1974).

d. If Skilling had been prosecuted in the Third, Fourth, Ninth, or Tenth Circuits, or in any of the foregoing states, he would have been entitled on appeal to a new trial *as a matter of law*, given the presumption of prejudice correctly recognized by the decision below. In the Fifth Circuit, however—as in the Eleventh—the government can rebut the presumption on the basis of juror promises of impartiality. The result is that Skilling now faces more than 20 years in prison for a conviction that would be *categorically unlawful* in other jurisdictions. That intolerable and unjust conflict should be resolved.

C. Even If The Presumption Were Rebuttable, The Fifth Circuit Legally Erred In Concluding That The Government Carried Its Burden

Assuming the presumption of prejudice can be rebutted at all, the court of appeals committed two

important legal errors in holding that the government rebutted the presumption here.

1. The court first improperly deferred to the trial court's determinations about whether individual jurors were actually prejudiced. App. 62a-66a. Those determinations are legally meaningless because they were made on the erroneous assumption that community passion surrounding the case was not severe enough to warrant a presumption that jurors were influenced by such passion. App. 56a; *see Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (appellate court cannot defer to factual findings made on basis of erroneous legal standard). Because the trial court failed to presume prejudice, it did not compel the government to affirmatively establish that each potential juror was actually unprejudiced by the pervasive community and media bias. The trial court instead put the burden on Skilling to prove specific prejudice, and even then denied him the individual voir dire necessary to fully explore each juror's influences and potential biases. *Supra* at 10-11, 16-17. If the trial court had started from an assumption that every potential juror was prejudiced, voir dire necessarily would have been more probing, the record of actual prejudice certainly would have been more extensive, and the court's determinations about actual prejudice likely would have been very different.

2. The court of appeals (and obviously the trial court) also failed to apply the proper legal standard in determining whether the government's evidence from voir dire rebutted the presumption of prejudice. If rebuttal is allowed, the government should be re-

quired to prove "beyond a reasonable doubt" that no seated juror was actually affected by the media and community bias. *Chapman*, 386 U.S. at 24. For example, "a showing that none of the twelve jurors impanelled had ever been exposed, first or second hand, to the inflammatory publicity" might suffice in an appropriate case. *Mayola*, 623 F.2d at 1001. Absent that showing, however, the court must rely only on jurors' own statements and assurances, which simply are not reliable when bias and hostility have pervaded the jurors' community.

The Fifth Circuit did not apply the *Chapman* standard, explicitly or implicitly, but instead found the government had rebutted the presumption simply because the trial court concluded from the jurors' own statements that they could be impartial. App. 62a-67a. The court of appeals' analysis focused on Juror 11—whose statements reflected only the most egregious example of the bias evident among jurors.[7] Juror 11's statements included the following:

---

[7] Other jurors also made indefensible statements, such as: Skilling was "guilty"; "I think they probably knew they were breaking the law"; and there were "[n]ot enough corporate controls or effective audit procedures to prevent mismanagement." *Supra* at 11. Further confirming the erroneous legal standard it applied, the court of appeals declined to consider these jurors because Skilling did not specifically challenge each individually for cause. App. 64a. But if a presumption of prejudice applied, then the burden was on the *government* to prove that none of the jurors was actually prejudiced. Skilling should not have been required to invoke and satisfy "for cause" dismissal standards. In any event, Skilling *did* explicitly challenge the entire panel as prejudiced. *Supra* at 11.

- All CEOs are "greedy" people who "stretch[] the legal limits." R:14457, 14460.
- "I'm not going to say that they're all crooks, but, you know ..." and "some get caught and some don't." R:14457-58.
- Lay was "greedy"; when asked whether the defense would "have to bring forward some kind of proof to remove that from your mind," he replied: "I don't hardly know how you could do that." R:14460.
- When asked whether he would assume that the defendants "must have done something illegal," he replied "[n]o, not necessarily," but then added "I'm not sure" and "there's a lot of stuff that goes on that we don't know about that." R:14461.
- He had a close working relationship with a former Enron employee who "[a]bsolutely" lost money in his 401(k) as a result of the collapse. R:14455-56.
- "Anyone from Billy Sol Estes"—the defendant in this Court's *Estes* venue precedent—"to T. Boone Pickens, it's all greed. All the way up." R:14457.

Despite these statements, the court of appeals concluded that the government had rebutted the presumption that Juror 11 was prejudiced, because the district court "looked at him in the eye" and "heard all his questions." R:14462; *see* App. 66a. If that is the standard for rebutting the presumption of prejudice, this Court's decisions holding that due

process requires the presumption in appropriate cases have no meaningful force.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DANIEL M. PETROCELLI
(*Counsel of Record*)
M. RANDALL OPPENHEIMER
MATTHEW T. KLINE
DAVID J. MARROSO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
7th Floor
Los Angeles, California 90067
(310) 553-6800

WALTER DELLINGER
JONATHAN D. HACKER
IRVING L. GORNSTEIN
MEAGHAN MCLAINE
RYAN W. SCOTT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

May 11, 2009

Blank Page