No. 04-368

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Arthur Andersen LLP's conviction for witness tampering under 18 U.S.C. § 1512(b) (2000) must be reversed because the jury instructions upheld by the Fifth Circuit misinterpreted the elements of the offense.

RULE 29.6 STATEMENT

Petitioner Arthur Andersen LLP is a limited liability partnership. It has no parent corporation and no publicly held company owns stock in the partnership.

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The opinion of the U.S. Court of Appeals for the Fifth Circuit (Pet. App. 1a-34a) is reported at 374 F.3d 281.

JURISDICTION

The Fifth Circuit affirmed the conviction on June 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix to the Petition for Certiorari (Pet. App. 63a-77a) reproduces the text of 18 U.S.C. §§ 1503, 1505, 1512, and 1515.

STATEMENT OF THE CASE

This case arises out of the conviction of Arthur Andersen LLP ("Andersen") for witness tampering. The Fifth Circuit affirmed the conviction, on the theory that Andersen engaged in "corrupt[] persua[sion]" in violation of 18 U.S.C. § 1512(b) (2000) when it encouraged employees to comply with the firm's standard document retention policy in the month before the SEC initiated a formal investigation into Enron Corporation. Pet. App. 2a-7a, 25a. That policy required Andersen employees to prepare and retain final work papers that fully and accurately document their audit conclusions, and then to discard unnecessary drafts and notes. Andersen employees who compiled the Enron work papers did not seek to excise damaging facts or to conceal knowledge of a crime, and they genuinely believed that compliance with the policy prior to initiation of an SEC proceeding and receipt of a subpoena was lawful and proper.

For more than a century, it had been settled law that destruction of documents prior to the initiation of judicial or agency proceedings is not obstruction of justice. The Government accordingly sought to circumvent the limits on the crime of obstruction by indicting Andersen for "witness tampering" under 18 U.S.C. § 1512, which prohibits attempts to "kill," "threaten[]," or "corruptly persuade[]" potential witnesses. In the Government's view, it was

perfectly lawful for Andersen's employees to comply with the document retention policy themselves, whatever their motive might be, prior to the start of a proceeding. But it was criminal "corrupt[] persua[sion]" to urge *others* to comply with the policy if the request was even partially motivated by an intent to "impede the fact-finding ability" of some possible future investigation. The Fifth Circuit agreed. That expansive and illogical interpretation of the statutory language criminalizes common conduct undertaken without any consciousness of wrongdoing. This Court should reverse the conviction and remand with instructions to enter a judgment of acquittal. Arthur Andersen did not commit a crime.

Proceedings In The District Court

1. Andersen was indicted on March 7, 2002, in the Southern District of Texas. JA 134.[1] The indictment charged a single count of witness tampering, alleging that between October 10 and November 9, 2001, Andersen "corruptly persuade[d]" its employees to destroy documents with the intent to impair their availability in an "official proceeding[]," in violation of 18 U.S.C. §1512(b)(2) (2000). JA 139.[2] Andersen objected to the jury instructions concerning two key elements of the offense. First, the court instructed the jury that the phrase "knowingly … corruptly persuades" means any persuasion even partially motivated by an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" even if "Andersen honestly and sincerely believed that its

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[1] Citations to "R." refer to the record filed in the Fifth Circuit, "Tr." to the trial transcript in the district court, "GX" to the Government's exhibits, "DX" to Arthur Andersen's exhibits, "JA" to the Joint Appendix, and "Pet. App." to the Appendix to the Petition for Certiorari.

[2] The statute authorized ten years imprisonment if the defendant "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to … cause or induce any person to … alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(2)(B) (2000).

conduct was lawful." JA 212-13. Andersen repeatedly objected, and requested a standard instruction defining "corruptly" to require proof of improper means of persuasion or inducement to unlawful acts, and at the very least consciousness of wrongdoing. *See* R. 146, 431, 440, 912, 917; Tr. 4316. At every turn, however, the Government opposed any wording that might permit the jury to consider whether Andersen possessed anything resembling traditional *mens rea*—presumably because it could not possibly prove that Andersen used wrongful means or asked employees to engage in unlawful acts.[3]

Second, the district court instructed the jury that the term "official proceeding" included the SEC's performance of any "investigative functions" whether "formal [or] informal," (JA 211) and told them that an "official proceeding" includes a "proceeding *or* [an] investigation." JA 213 (emphasis added). Andersen objected because both the obstruction statute and the SEC's own regulations define official proceeding in a way that excludes informal investigations conducted by the staff—who have no power to subpoena documents or compel testimony until a formal investigation is begun by a vote of the Commission. JA 144; R. 426-29; Tr. 571, 574-75. In addition, Andersen proposed instructions designed to require the jury to find a close nexus between an employee's reminder to follow the document retention policy and a future SEC proceeding. JA 143; R. 424-26, 938-39; Tr. 4339-45. The district court instead instructed the jury that the Government did not have to prove that the "corrupt persuader" had any

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[3] The Fifth Circuit Pattern Jury Instruction for Section 1503, which the Court relied upon when endorsing the Government's requested instruction (R. 917), defined corruptly as "knowingly and *dishonestly*, with the specific intent to subvert or undermine the integrity of the court proceeding." *See* Fifth Circuit Pattern Jury Instruction 2.67 (2001) (emphasis added). The Government insisted on significant departures from the pattern instruction: excluding "dishonestly," and adding "impede" to the phrase "subvert or undermine." Tr. 4316-19, 6310-16. Andersen requested "dishonestly" and objected to "impede" (Tr. 4316-17; 6311-12), but the Court sided with the Government. JA 212.

particular proceeding in mind or knew that a future proceeding or subpoena was likely. The jury was told: "The Government *need only prove* that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." JA 213 (emphasis added).[4]

The jury regarded the case against Andersen as close and difficult. It deliberated for seven full days, repeatedly sought guidance from the court, and then declared itself deadlocked. Tr. 6695; R. 208-18. The court delivered an *Allen* charge (Tr. 6813-16) and after three more days of deliberation, the jury returned a guilty verdict. Pet. App. 2a. Andersen moved for a judgment of acquittal, on substantially the same grounds as presented herein (R. 1370-79), which the district court denied. R. 1449-52.

Evidence at Trial

Andersen was responsible for auditing Enron's publicly filed financial statements. On November 8, 2001, Enron announced a restatement of its income for preceding periods. Tr. 4583. Later that day, the SEC disclosed to Andersen that it had begun a formal investigation of Enron and issued a subpoena seeking access to Andersen's records. The Government contended at trial that certain Andersen partners had engaged in unlawful witness tampering by "corruptly persuad[ing]" employees to comply with the firm's document retention policy through communications made between October 10 and October 26, 2001.[5] It also asserted post-trial that an in-house lawyer "corruptly persuade[d]" a colleague to "alter" a document by

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[4] The Government even objected to Andersen's request for an instruction that the proceeding had to relate to Enron, and again the Court sided with the government. R. 1122, 1142; Tr. 6296-99.

[5] Although the indictment period reached to November 8, the last act of "corrupt persuasion" identified by the Government in either the closing statements or their briefs to the Fifth Circuit occurred within a few days after October 23. *See* Tr. 6434.

suggesting edits to his draft memorandum. JA 215-16.

The Fifth Circuit's opinion summarizes evidence that the jury might have relied upon to conclude that one of these Andersen partners (the "corrupt persuaders") requested compliance with the document retention policy, at least in part, for the purpose of "imped[ing] the fact-finding ability" of a future SEC proceeding. The record demonstrates, however, that Andersen must be acquitted if the jury should have also been required to find solicitation of unlawful acts, persuasion through improper means, consciousness of wrongdoing, or knowledge that an SEC subpoena was probable at the time of the relevant conduct. The central evidence germane to those issues follows.

1. As noted above it was not obstruction of justice for any individual employees to discard documents themselves during this period. And the jury could not have found that Andersen employees asked coworkers to violate the law by concealing criminal activity at Enron. Although some Andersen employees regarded Enron's financial reporting as "aggressive" (Tr. 1119, 5530), they uniformly testified that they did not know until after the alleged acts of corrupt persuasion that Enron had engaged in criminal conduct. *See, e.g.*, Tr. 866-67, 1228, 1315-16, 1330-31, 2021-23, 3287-88.

That testimony is corroborated by the Government's own allegations concerning Enron's collapse. The Government has never charged Andersen (or any Andersen partner) with any violation of the securities laws in connection with Enron. It has instead filed a series of indictments against Enron executives charging that they lied to the public and to Andersen. *See, e.g.*, Superseding Indictment, *United States v. Causey, Skilling, and Lay*, No. H-04-25 (S-2), at ¶ 5 (S.D. Tex. Jul. 7, 2004). Enron executives employed "secret oral side-deals, back-dated documents, disguised debt, material omissions, and outright false statements," and made "false statements to auditors." *Id.* ¶¶ 28, 107-09. Within days of discovering one of these "secret … side-deals" concerning a special purpose entity named "Chewco," Andersen directed Enron to restate its

earnings and issue a press release. Tr. 5924-32, 6131-33.[6]

2. There was also substantial evidence that Andersen employees did not know that an SEC proceeding seeking Andersen documents was probable at the time they requested compliance with the policy.

First, Andersen employees were aware that the SEC was likely to request information *from Enron* during the fall of 2001 but they did not expect the SEC to initiate proceedings against Andersen, or to seek access to Andersen's audit files, unless Enron had to restate its earnings. JA 158-89; Tr. 1445-49, 5896, 6087.[7] The accuracy of this expectation was borne out by events.

SEC staff in Fort Worth began an undisclosed "matter under inquiry" ("MUI") concerning Enron in August of 2001 based on a Wall Street Journal article. As part of this inquiry, the SEC sent a letter to Enron on October 17, seeking voluntary disclosure of information concerning transactions between Enron and related parties. *See* JA 103-06. Andersen first learned of this SEC inquiry when Enron forwarded Andersen a copy of the letter on October 19. Pet. App. 6a.[8] The SEC's request for information was not directed to Andersen, and there was no evidence that Andersen discarded documents Enron needed to respond to this informal inquiry.[9]

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[6] The Government conceded in its closing that Enron withheld from Andersen critical information concerning Chewco. Tr. 6386; *see also* Tr. 2021-22 & 2031-32, 5919-20.

[7] Andersen did not expect the SEC to seek access to its records if Enron merely had to restate its balance sheet (JA 204-05), an event of far less significance to investors than an income restatement.

[8] An SEC witness testified that the MUI concerned Enron, not Andersen (Tr. 567-69), and that "[m]ore than half" of the SEC's informal inquiries "are closed without becoming a formal investigation" authorized by the Commission. Tr. 518.

[9] The securities laws and regulations did not require Andersen to maintain any documents prior to the receipt of the subpoena. Tr. 563-64, 582. The SEC later promulgated Rule 2-06 of Regulation S-X pursuant to Section 802 of the Sarbanes-Oxley Act to regulate auditor document retention. *See* 148 Cong. Rec. S7419 (daily ed. July 26, 2002).

On October 30, the SEC commenced a formal investigation of Enron and sent a second letter to Enron identifying disclosures that it believed "Enron should provide to the public," but the letter did not request production of documents from Enron or Andersen. JA 122. Nor did it give Andersen any reason to expect a request for its documents. The SEC did not contact Andersen or request access to its records until Enron restated its income on November 8 as an outgrowth of the Chewco revelations. GX 1108C; Tr. 4583. As the SEC official handling the MUI explained at trial, he had not requested information from Andersen prior to that date because the SEC only needed information from the auditor in the event of a restatement. Tr. 783-84.

Second, Andersen did not become aware of the facts that precipitated Enron's income restatement, and thus the SEC's subpoena, until the first week in November. Commencing in September of 2001, a team of Andersen partners that included David Duncan, the lead engagement partner for Enron, was evaluating potential problems with Enron's financial statements. Pet. App. 4a; Tr. 4543. Until the last few days of October, the consultation team's central concern was Enron's use of a particular accounting methodology to measure potential impairment of notes received from entities known as the Raptors. Tr. 1353-55, 2307, 4535-38, 4577; Pet. App. 3a-4a. Andersen recognized that the impairment issue had the potential to require an income restatement, but employees testified without exception that they could not predict the outcome because it depended on the results of calculations using alternative methodologies. Tr. 959, 1794, 4580, 5424-25. Once a permissible methodology was applied, the Raptors' impairment issue turned out to be a "non-event" because no restatement was necessary. Tr. 4529-30, 5645-46. Duncan testified that he was fairly sure that the Raptors issue would not require a restatement more than a week before he requested compliance with the policy. Tr. 1794-95.

Very late in October, however, Andersen began to discern other potential problems. Tr. 2031, 2056, 1934. On November 2, 2001, Andersen received documents from Enron's counsel which established that Enron had concealed from Andersen secret side-deals concerning Chewco. Tr. 6148-49. Andersen completed its evaluation of this issue on November 5; concluded that a restatement was necessary; and required Enron to file a form 8-K announcing that restatement. Tr. 5918-25.[10] A jury accordingly could have found that Andersen did not believe that an SEC subpoena was probable until at least a week *after* the acts at issue.

3. A properly instructed jury could not have found that any of the Andersen partners whose conduct is at issue used improper means of persuasion or had any consciousness of wrongdoing.

Nancy Temple. Nancy Temple was an in-house lawyer in Chicago who was asked to join the consultation team charged with resolving the Raptors issues. Pet. App. 4a. Temple had been a litigation partner at Sidley & Austin before joining Andersen's Chicago office. She was not indicted but nevertheless became "the most central individual" in the Government's case and in the Fifth Circuit's opinion. Tr. 2538; Pet. App. 4a-7a.

Temple was asked to advise the consultation team concerning the proper procedure for correcting a memorandum in the audit work papers. The memorandum erroneously stated that the Professional Standards Group ("PSG") had concurred with the engagement team's conclusion that Enron's methodology for measuring the Raptors' impairment complied with accepted accounting principles. Temple consulted the document retention policy and directed the engagement team to retain the original erroneous version in the work papers, and to document

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[10] The 8-K, filed on November 8th, also disclosed a restatement of Enron's balance sheet that was required due to a "good faith mistake" by Enron. Tr. 2033-34, 2020. This balance sheet reclassification concerned a reduction in shareholder equity that Enron had already announced on October 16. Tr. 1844.

corrections in supplemental memoranda so that there would be "a trail from the old memo to the amended memo." Tr. 2440-41; GX NT1009.

Shortly after providing this advice concerning the need for accurate documentation, Temple sent two emails that the Government characterizes as criminal acts of "corrupt[] persua[sion]." On October 12, she sent an email to the Practice Director for Andersen's Houston office stating that "[i]t might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy." JA 94. The Practice Director forwarded her email to David Duncan. The second email, which contained only a link to the retention policy, was sent on October 19 to John Stewart, a PSG partner. GX 1019A. Stewart testified that he did not take this email as "any message … to destroy documents," but rather as "a courtesy" because he had mentioned that he did not have a copy.[11] Tr. 5498. A PSG partner, Amy Ripepi, also testified that, on an October 20 conference call, Temple reminded participants "to make sure to follow the policy." Pet. App. 6a. Ripepi explained that "[i]n my mind" this suggestion was "a follow-on from the conversations that we had had earlier about the need to … get accurate documentation into the record." Tr. 1471.[12]

There is simply no evidence that Temple believed that there was anything wrongful about these requests. Temple's colleagues told the jury they had no cause to question her integrity, and emphasized that she instructed them to ensure that the firm's accounting and its work papers were entirely accurate. Tr. 4522, 4525-26, 4608-12,

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[11] Stewart explained that he had met with Temple earlier in the month to discuss the retention policy because he wanted to retain some preliminary materials. Temple offered to preserve the documents for him, and did so. Tr. 5458-63, 5491-95, 5498.

[12] She also testified that the participants only anticipated a "Comment Letter" from the SEC, which she described as simply questions from SEC lawyers or accountants that *never* request access to an accounting firm's documents. Tr. 1447-49; *see also* Tr. 2493-94, 2649-50, 5889.

5512-13, 5909-15, 5957-58. Moreover, the document retention policy she reminded her colleagues to follow protected the integrity and accuracy of audit work records by requiring preservation of any documents an experienced auditor would require to understand the audit performed. JA 45-46.[13] It required preservation of "[i]nformation having relevance to our opinion or findings" (JA 47), while calling for destruction of "drafts and preliminary versions … superseded workpapers" (*id.)*, and "gratuitous comments or personal information." *Id.* at 45.[14]

Nor is there evidence that Nancy Temple intended to exceed the bounds of the law when she sent Duncan an email on October 16 suggesting that he revise a draft memorandum. JA 95. Duncan's memorandum, labeled a "first draft," memorialized Andersen's doubts about whether Enron should characterize certain charges as "non-recurring" in a press release. JA 100-01. Temple recommended deletion of "language that might suggest we've concluded the release is misleading." JA 95. But that suggestion was validated by Duncan's own testimony that the consultation team *had not* "concluded" that the release was "misleading"—a term with legal significance under the securities law. Tr. 1798, 1363-64. Nor did her edits hide

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[13] She explained in an October 14 email that compliance with the policy by discarding preliminary drafts serves the firm's legitimate interests by "mitigat[ing] the risk of confusion at a later date." DX 476.

[14] The policy called for retention of all documents under certain circumstances. Although the retention policy (JA 42-92) and an Andersen policy relating to notification of the law department (JA 28-41) used several verbal formulations, it was reasonable to read the policy to permit destruction of extraneous documents until Andersen was either served with a subpoena or notified that it would be sued. *See, e.g.*, JA 65 (retention policy: "In the event [Andersen] is advised of litigation or subpoenas"); *id.* at 44 ("threatened litigation"); JA 29 (notification policy distinguishing between when litigation "has been threatened" and when it "is judged likely to occur"). And that is how the head of the Enron engagement team, the head of the Houston practice group, and the employees who attended the October 23rd meeting understood the policy. *See* Tr. 1665, 3331; GX 1010B.

Andersen's concerns: she retained sentences advising that "[Andersen] had strong concerns that the presentation of the charges as non-recurring could be misconstrued or misunderstood by investors," and only proposed removal of a reference to past SEC actions based on press releases. JA 98-99 (draft reflecting Temple's edits). Far from evidencing any effort to cover up anything regarding the press release, Temple's email instead promised further consultation "within the legal group" (JA 95), and she actually consulted with outside counsel on the subject. GX 1018C.

The jury also could have found that Temple did not believe that an SEC subpoena was probable when she engaged in these allegedly corrupt acts between October 12 and October 20. There is certainly ample evidence that Temple took steps throughout October to prepare for possible proceedings in the event the Raptors' issues required an income restatement, but there is also ample evidence that she was only preparing for the *possibility* of an SEC proceeding. On October 12, Temple entered the Enron matter into Andersen's internal tracking system. Under the category of "Type of *Potential* Claim" she selected the designation "Professional Practice — Government/Regulatory Investigation" from a list of several options. JA 127 (emphasis added). Her entry explained, however, that the issue of concern related to the accounting for the Raptors and that the firm was still "reviewing acceptable alternatives and determining whether restatement is necessary." JA 126.[15]

David Duncan. Duncan pled guilty to witness

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[15] On October 9, Temple prepared notes stating that "some SEC investigation" was "highly probable." Pet. App. 5a; JA 93. At most, these notes might suggest that she expected the informal investigation of Enron that she learned about ten days later. They do *not* suggest that she believed that a formal investigation involving Andersen was "probable." To the contrary, the notes confirm that there was only a "reasonable possibility" of a "restatement." Absent a restatement, a formal investigation would not be "highly probable." *See supra* at 6-8 & n.9.

tampering and testified for the Government at Andersen's trial. Tr. 1665-67. The Government viewed Duncan's October 23 meeting with his managers as "the main impetus for the destruction." Tr. 6432. At that meeting Duncan told managers to complete their audit files and bring them into compliance with the document retention policy. Tr. 1891-92. Duncan explained that his team's compliance had been "irregular" due to the press of time (Tr. 1883), and that he understood the importance of completing the work papers in accordance with the policy. JA 156-57. Managers in attendance testified that they did not interpret his comments as a direction to hide facts (Tr. 3325, 4965-66), and the fact that the request for compliance was discussed openly at a general meeting, where the SEC's informal inquiry was also discussed, itself belies any consciousness of wrongdoing on Duncan's part.[16]

Duncan acknowledged that he thought there was some "potential" that the "SEC might want some of our documents" (Tr. 2478-80) and that this "potential" was "on my mind at the time I instructed people to do this." Tr. 1907-08.[17] But he also told the jury that he believed that urging compliance with the policy "was perfectly appropriate … because [Andersen] had neither been sued nor served with a subpoena" (JA 160; *see also* JA 159; Tr. 2001-04, 2087), and that he regarded a "large part of the exercise" as "mak[ing] sure we [had] the complete picture [in the workpaper documents] in case the SEC wants to look at this one day." JA 162. He nevertheless pled guilty

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[16] Duncan repeatedly characterized the documents he discarded as "extraneous," not work papers (JA 164-66), giving as examples prior drafts, "[r]epetitive memos," and "[m]eeting agendas." JA 167. He testified that early drafts are written by "less experienced" persons, and they were to be deleted because they could be "misleading" and "confusing." Tr. 2069-70.

[17] Duncan never testified that he expected an SEC subpoena or considered it "probable." He repeatedly testified that he believed it no more than a "possibility" until early November. Tr. 1780, 1860, 1904-05, 1908, 1919, 2050, 2480.

because the Government convinced him that his conduct could violate § 1512(b) without consciousness of wrongdoing. Tr. 2004-05.

Attendees understood that the SEC was conducting an informal investigation of Enron, but nevertheless shared Duncan's view that it was proper to comply with the policy at this time. *See*, *e.g.*, JA 159; Tr. 3330-31, 3350, 4900. Consistent with Duncan's guidance, they attempted to "complet[e] [the] audit documentation" by "making sure everything that went into the accounting issues and the conclusion was documented and available in the work papers." Tr. 4918. The concern was "one of inclusion rather than exclusion." *Id.* Although the team shredded a very large volume of documents in the process of compiling the work papers over the course of the next week, employees testified that they did not seek to destroy or fail to preserve any harmful information; the types of documents shredded were routine and extraneous.[18] As one manager explained, once an audit file had been properly compiled, "it's all in the audit work papers" so "you don't need" anything else. Tr. 3336.[19] The Government, after interviewing dozens of Andersen witnesses, calling many at trial, and having access to all of Andersen's files including copies of preserved and recovered emails, never identified a single document of importance to its inquiry that was not preserved. Indeed, in its closing statement, the Government told the jury there was one such document (Tr. 6385-86), but the court had to issue a curative instruction when Andersen pointed out that the document had actually been preserved and produced to the SEC. Tr. 6456-57, 6459-60, 6472-73.

The Government has suggested that its cooperating

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[18] Andersen proffered evidence at trial that the volume of shredded documents represented less than 3% of the records retained by the engagement team. Tr. 5468-71; R. 1115-16. The district court held this evidence inadmissible and the Fifth Circuit affirmed. Pet. App. 7a-9a.

[19] Employees would incorporate the content of important notes and emails into file memoranda or preserve them directly in the work papers. *See* Tr. 3335-36, 4693-99.

witness may have knowingly engaged in wrongdoing because two Andersen employees raised concerns about document retention with him in late October. Both of these discussions occurred *after* Duncan's requests for compliance with the policy, and the individuals involved did not form the impression that Duncan believed that his conduct was improper.[20]

Tom Bauer. Tom Bauer was an Enron engagement partner who requested his managers to comply with the document retention policy at a meeting on the morning of October 23, 2001. Tr. 3236-37. Patti Grutzmacher testified that a few days after this meeting, she asked Bauer about priorities, and got the impression that compliance with the policy was a high priority. Tr. 3242-43. Her testimony makes clear, however, that she understood requests to comply with the policy to mean that she should be completing her audit files to help provide accurate information and *not* "keeping documents away" from the SEC. Tr. 3348-50. She testified that she "didn't have anything that [the SEC] would find troubling or anything to hide." Tr. 3369-70. Indeed, Bauer made clear to

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[20] On October 26, John Riley—an Andersen partner and former SEC official—was in the Houston office, heard the shredder running, and told Duncan that it would not be a good time to be shredding lots of documents. JA 198-99. Duncan explained that they were only shredding "routine" materials and Riley made no further comment. Tr. 5901-03. Riley confirmed that he was not retaining all of his own documents at the time and that he regarded the conversation as "innocuous." JA 206-09. There was no evidence that any non-routine materials were destroyed. On October 31, David Stulb, a forensics investigator for Andersen, met with Duncan. He recalled seeing Duncan pick up a document, quote the words "smoking gun" from its cover email, and start to remove the email, saying "we don't need this." JA 178-82; Tr. 3867-69. Stulb explained, however, that the incident was "innocuous" and Duncan was "appreciative" of Stulb's caution that the document should be preserved and did not appear to think "he had done anything wrong." JA 181-87. Duncan testified that he did retain a copy of the memo in his files. Tr. 2341; *see also* Tr. 4430-40 (multiple copies of the memo were produced to the Government). Stulb further testified that he called Temple to tell her Duncan needed guidance on document retention, but did not recount the incident that made him think Duncan needed guidance. JA 191-92.

Grutzmacher that documents should be discarded only when the policy called for it, explaining to her on a separate occasion, but "in the same general time frame," that "if he ever talked to us about getting rid of documents that it would always be along the lines of being in compliance with the firm's retention policy." Tr. 3244. Grutzmacher made clear that she did not believe that she was being asked to do something wrong (Tr. 3248-49), and another manager in Bauer's group confirmed that he did not understand the request as a coded order to destroy documents. Tr. 5009-13.

Michael Odom. On October 10, 2001, Odom, the practice director for the Houston office, spoke at a general training meeting attended by eighty-nine Andersen employees, only ten of whom were on the Enron engagement team. Tr. 3197-98. At that meeting, Odom discussed the document retention policy briefly and told managers that "when there's litigation outstanding," no documents may be destroyed, "but if [documents are] destroyed in the course of the normal policy and litigation is filed the next day, that's great." GX 1010B. The Fifth Circuit acknowledged that Odom's "remarks were unrelated to Enron." Pet. App. 27a. Yet the jury may have relied on this evidence to convict. After having declared themselves deadlocked and being given an *Allen* charge, the jury asked to view a videotape of Odom's presentation (Pet. App. 27a), and was permitted to do so. Tr. 6834.[21]

Proceedings On Appeal

The Fifth Circuit concluded that the district court properly interpreted the elements of the offense.

The Fifth Circuit held that "corruptly" should be defined "in terms of improper purpose despite the dim light it casts upon its meaning, its circularity aside." Pet. App. 19a. The Court was "unwilling to follow the Third Circuit's lead in

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[21] The Government also attributed acts of corrupt persuasion to Lawrence Reiger, another Andersen Partner, because he sent two emails discussing the document policy. Tr. 6430-31. Neither discussed Enron or was circulated to the Enron engagement team, and one was sent ten days after the period covered by the indictment. GX 1015A; GX 1120A.

imposing a requirement for an additional level of culpability on Section 1512(b)." *Id.* at n.17. The Court also reasoned that consciousness of wrongdoing is irrelevant to a finding of "corrupt[] persua[sion]" because "knowledge of one's violation is not an element of § 1512(b)(2)." Pet. App. 29a.

The Fifth Circuit also rejected Andersen's challenge to the "official proceeding" instructions. It recognized that it had previously described the nexus mandated by § 1512 to require proof of an "'intent to affect … some particular federal proceeding that is ongoing or is scheduled to be commenced in the future.'" Pet. App. 26a (quoting *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.), *cert. denied*, 501 U.S. 1209 (1991)). It nevertheless characterized that statement as "dicta" (*id.*), and found it sufficient that this case was "tried on the theory" that Andersen intended to impede "a proceeding of the SEC." *Id.* at 27a-28a. The Court did not address Andersen's further argument that the instructions erroneously defined an "official proceeding" to include informal SEC investigations, except to acknowledge that "[p]ossible proceedings" only "became a reality on November 8, 2001" when Andersen received a subpoena. Pet. App. 5a.

SUMMARY OF ARGUMENT

It is plain as day that the Government did not charge Andersen with obstruction of justice for discarding documents during the relevant time period because no official proceeding of the SEC was pending. This Court has held for more than a century that "a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct." *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (citing *Pettibone v. United States*, 148 U.S. 197, 207 (1893)).

The United States attempted to evade that settled law by instead charging Andersen with "witness tampering," on the remarkable theory that although it was perfectly lawful for Andersen to have a document retention policy that preserved only the final audit work papers, and perfectly lawful for Andersen's employees and professionals to follow

that policy, it was somehow a serious felony for Andersen's in-house attorney and supervisors to remind its employees of the policy. The Government also argued that Nancy Temple's proposed edits to David Duncan's draft memorandum constituted criminal "witness tampering," because in its hindsight view the SEC would have wanted to see Duncan's first draft. It invoked 18 U.S.C. § 1512, which criminalizes killing, intimidating, threatening, and "knowingly … corruptly persuad[ing]" any person with the intent to make evidence unavailable to an official proceeding. Its theory, accepted by the courts below, was that all persuasion is "knowingly … corrupt[]" and criminal if it is motivated in part by a desire to impede the fact-finding ability of a potential future government proceeding, even if the speaker does nothing more than politely urge the listener to engage in lawful conduct. That interpretation is seriously flawed.

First, the Government's basic premise is simply wrong. There is nothing inherently "corrupt" or wrongful about an intent to impede future government fact-finding within the bounds of the law. Americans regularly engage in a wide range of conduct designed in part to influence or limit the information that reaches government proceedings; that is one of the reasons that our legal system is frequently described as "adversary." Some cases decided under 18 U.S.C. § 1503 have permitted a presumption that acts specifically intended to interfere with the fact-finding of a *pending judicial proceeding* are inherently "corrupt." But that is not settled law even under § 1503, and outside that unique context this Court has recognized that there is nothing "obviously evil" or "inevitably nefarious" about acting "for the specific purpose of depriving the Government of … information" that it has sought to obtain. *Ratzlaf v. United States*, 510 U.S. 135, 144-46 (1994). Extending a presumption of that nature to the federal agency context "would undoubtedly criminalize some innocent behavior" and violate both Due Process fair warning principles and the First Amendment. *United States v. North*, 910 F.2d 843, 882

(D.C. Cir.), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

Second, it would be an extremely poor reading of this statute. The word "corruptly" can have either a transitive meaning (by means of "corrupting" another person) or an intransitive one (motivated by a "corrupt" purpose). The *only* argument for an intransitive reading in §1512 is the flawed analogy to § 1503. "Corruptly persuades" appears in § 1512 in a list of unlawful *means*, not *purposes*. It is thus more naturally read to prohibit only persuasion that "corrupts" the listener by inducing her to accept a bribe or otherwise break the law. That is clearly more consistent with the obvious purpose of the statute, which is otherwise directed at killing, coercing, intimidating or harassing witnesses. And §1512 separately requires a specific intent to make documents or testimony unavailable to an official proceeding; defining "corruptly" as another purpose requirement thus makes little sense, and defining it as a purpose *to impede an agency's fact-finding ability* renders it superfluous. The Government's reading also produces a line between criminal and non-criminal behavior that is so arbitrary and absurd that it cannot be what Congress intended. And even if "corruptly" is given an intransitive meaning, the purpose that violates § 1512 must then include some consciousness of wrongdoing. Persuasion is not "knowingly … corrupt[]" if the speaker sincerely believes that it is not wrongful.

Third, like the traditional obstruction statutes, §1512 applies only when the defendant specifically intended to make documents or testimony unavailable to a particular *official proceeding*, defined as a judicial proceeding, "a proceeding before the Congress," or "a proceeding before a Federal Government agency which is authorized by law." 18 U.S.C. §1515(a)(1). Interference with the fact-finding ability of law enforcement or preliminary agency investigations is not sufficient. Neither is an abstract desire not to retain documents because they might be relevant to some possible future proceeding. As this Court recognized

in *Aguilar*, identifying true "corrupt" interference with an official proceeding thus requires careful attention to the "nexus" between the defendant's conduct and the proceeding alleged to have been obstructed. The instructions given here eliminated that nexus requirement.

Finally, even if these questions were close, the rule of lenity requires that all ambiguities must be resolved in defendants' favor. The doctrine of constitutional doubt also forbids an interpretation of vague statutory language that would criminalize a broad range of innocent conduct, including constitutionally protected speech, without fair warning. A Senate Report on the Sarbanes-Oxley law, portions of which were passed because Congress recognized that Andersen's conduct was not clearly criminal under existing law, noted that "in the current Andersen case, prosecutors have been forced to use the 'witness tampering' statute … and to proceed under the *legal fiction* that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves."[22] Lenity and fair warning principles forbid criminal prosecutions based on "legal fictions." Whether particular conduct is criminal should never be debatable, or a surprise. The theory of this prosecution criminalized conduct commonly understood to be lawful, including the document retention policies in place at almost every American corporation or professional firm of any size. And the jury may well have rested its verdict on an email from Nancy Temple which "offered such common legal advice that the chairman of the American Corporate Counsel Association wrote in a letter to his members: 'Who amongst us has not thought: There but for the grace of God go I.'"[23]

None of these errors could be harmless. There is *no* evidence that any of the partners involved used unlawful

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[22] S. Rep. No. 107-146, at 7 (2002) (emphasis added).

[23] Dana E. Hill, Note, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under The Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519, 1552 (2004).

means of persuasion, urged anyone else to break the law, or believed that their conduct was wrongful. And the record also requires the conclusion that they did not believe that an SEC subpoena was probable at the time the acts of persuasion occurred. Indeed, there is no reason to assume that a jury that deliberated for ten days and declared itself deadlocked—despite a guilty plea for the same conduct entered by David Duncan—would have convicted if the instructions had been different in any material way.

This is not a case about big business or being tough on crime; it is about the right to conduct one's life and business in a manner understood to be lawful, and to receive fair warning when that law is changed. No one at Andersen had the "evil-meaning mind" necessary to justify criminal punishment. This conviction was secured by creative lawyering on the part of government prosecutors, at the expense of sound statutory interpretation, fair warning principles, and the basic goals and values of the criminal law. It did a great injustice to the tens of thousands of Andersen partners and employees who were permanently harmed by the firm's destruction. And it raises a cloud of doubt about routine advice that Americans give to colleagues, clients, family, and friends about how to protect their own interests within the bounds of the law. It must be reversed.

ARGUMENT

I. THE JURY WAS IMPROPERLY INSTRUCTED ON THE DEFINITION OF "KNOWINGLY ... CORRUPTLY PERSUADES"

A. An Intent To Impede Governmental Fact-Finding Is Not Inherently Corrupt

Under the definition of "knowingly ... corruptly persuades" used in this case, the jury was not required or even permitted to consider whether Andersen employees sought to induce unlawful acts, used improper means, or believed that their conduct was wrongful. The jury was instead instructed that it must find that any purpose to "impede the fact-finding ability" of a possible SEC

proceeding was "improper" and therefore corrupt *per se* within the meaning of § 1512(b). Pet. App. 48a-49a. The Fifth Circuit's decision to uphold that interpretation of the statute rested on the premise that "courts ha[ve] uniformly defined 'corruptly' in [18 U.S.C.] § 1503" this way. Pet. App. 23a. As set forth *infra*, the language and history of § 1512 foreclose this interpretation no matter what "corruptly" means in § 1503. But it bears emphasis at the outset that the Fifth Circuit is mistaken. A mere intent to impede the fact-finding ability of government proceedings has never been enough to make conduct (let alone truthful speech) criminal in this country. That common understanding stems from many sources, including the adversarial nature of our legal system, and long-standing limitations on the crime of obstruction that foreclose the Fifth Circuit's view.

First, it makes little sense to conclude that destruction of any potentially relevant documents prior to the pendency of a proceeding is inherently corrupt when Congress chose not to criminalize that conduct for the century preceding David Duncan's meeting with his managers. This Court held in 1893 under a predecessor to § 1503 that "while, with knowledge or notice of [a pending proceeding], the intent to offend accompanies obstructive action, *without such knowledge or notice the evil intent is lacking*." *Pettibone*, 148 U.S. at 207 (emphasis added). A defendant who intentionally interferes with a mere police investigation (whether by lying to the police or destroying documents) therefore "necessarily lack[s] the evil intent to obstruct" justice, *Aguilar*, 515 U.S. at 599, unless he knows that a judicial proceeding is pending and intended to obstruct *it*. When Congress adopted 18 U.S.C. § 1505 to address obstruction of congressional and agency proceedings, it imposed the same limitation: destruction of documents to impede a future agency proceeding *is not criminal* because the defendant must know that the proceeding is "pending."

Against that backdrop, Americans have long understood that it is not obstruction of justice to dispose of documents that might be of interest to some future official

proceeding.[24] Virtually all corporations and professional firms have adopted document retention policies that permit or require the periodic destruction of documents. *See* Brief for the American Institute of Certified Public Accountants as *Amicus Curiae*, at 17-18. Such policies serve multiple purposes, but one has always been to avoid the unnecessary retention of documents that could be taken out of context and used against the firm in possible future litigation or government investigations. *Id.* That is an intent to impede the fact-finding ability of a future proceeding, but until this case it has never been thought to be criminal.

Second, this Court has rejected the view that any intentional effort to impede fact finding is inherently corrupt, even when a proceeding is pending. In *Aguilar*, this Court held that the defendant was not guilty of a "corrupt[] endeavor" under § 1503 even though he lied to the FBI with the specific "intent to 'obstruct … the due administration of justice'" with knowledge of a pending grand jury proceeding. 515 U.S. at 600, 602. If lying to the FBI with the intent to obstruct a pending grand jury proceeding is not corrupt *per se*, then surely it is not inherently corrupt to comply with a document retention policy in advance of a proceeding without consciousness of wrongdoing, particularly one like Andersen's that required preservation of thorough and accurate work papers.

Aguilar also demonstrates that courts have not "uniformly" instructed juries in § 1503 cases that "corrupt" means an "improper purpose" to impede fact finding. Pet. App. 48a-49a. The jury in *Aguilar* was instead instructed

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[24] Discarding documents that the defendant knows to be evidence *of a crime* could be criminal prior to the initiation of formal proceedings. *See* 18 U.S.C. § 3 (providing that "[w]hoever, knowing that an offense against the United States has been committed, … assists the offender in order to hinder or prevent his apprehension" is guilty as an accessory after the fact). But it is not obstruction of justice—and there has never been evidence that Andersen had knowledge of criminal behavior by Enron when the alleged acts of "corrupt[] persua[sion]" occurred. *See supra* at 5-6.

that: "'An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or some other benefit to oneself or a benefit to another person.'" 515 U.S. at 616-17 (Scalia, J., dissenting); *see also United States v. Poindexter*, 951 F.2d 369, 385 (D.C. Cir. 1991), *cert. denied* 506 U.S. 1021 (1992) ("[c]ourts construing § 1503 have adopted a wide variety of interpretations" of "corruptly").

Third, any presumption that an intent to impede fact finding is inherently corrupt cannot reasonably be extended beyond the context of judicial proceedings. As the D.C. Circuit recognized in *North* under §1505, a rule that any intent to impede *congressional or agency* fact-finding is corrupt "would undoubtedly criminalize some innocent behavior" because congressional committees are "part and parcel of a political branch of government," and "there are myriad ways of 'impeding' or 'obstructing' congressional investigations that are not in themselves corrupt." 910 F.2d at 882-83. Judge Silberman posited the example of union officials who decide "not [to] provide *any* information to [a Congressional] committee unless legally compelled," in an effort to defeat unfavorable legislation. *Id.* at 942 (Silberman, J., concurring in part and dissenting in part). Judge Silberman thought such conduct plainly innocent, and ultimately concluded that a defendant does not act "corruptly" for §1505 unless he uses unlawful means or subjectively believes that his conduct was unlawful. *Id.* at 944.[25] The same must be true under §1512, which unlike

[25] The D.C. Circuit majority in *North* thought the jury should "appl[y] 'corruptly' according to its usual definitions," 910 F.2d at 882, such as "depraved, [or] evil," *id.* at 881. Judge Silberman agreed but found that the instructions actually given equated "corruptly" with a mere intent to obstruct. *Id.* at 942. Several years later Congress passed a statute providing that "[a]s used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. § 1515(b). But the "very narrow purpose" of that provision was to

§ 1505 applies even when agency or congessional proceedings are not pending.

Finally, the interpretation of "corruptly" adopted by the Fifth Circuit would criminalize a wide variety of common conduct that is intended to impede official fact-finding within the bounds of the law. In addition to the retention policies discussed above, the instructions given here would make any of the following into a felony:

- A mother's advice to her son that he should assert his Fifth Amendment privilege not to testify before a grand jury, because his testimony would incriminate him;
- A manager's instruction to a custodian of records not to comply with a voluntary request for documents from the SEC;
- A CEO's instruction to her company's general counsel to assert, not waive, the company's attorney-client privilege in response to an SEC subpoena;
- An attorney's advice to her client to answer only the question posed and not to volunteer information; or
- An in-house attorney's suggested deletions of potentially damaging statements in a draft memorandum prepared by a colleague.

Andersen respectfully submits that none of this conduct is inherently "corrupt," or even wrongful. Examples like these, and others in the briefs of the *amici* graphically demonstrate that the Fifth Circuit's interpretation of "corruptly persuades" must be rejected.[26]

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reverse the D.C. Circuit's holding in *Poindexter* that persuading someone to lie to Congress is "corrupt" but simply lying yourself is not. *See United States v. Brady*, 168 F.3d 574, 578 & n.2 (1st Cir. 1999); 141 Cong. Rec. S7752, S7754 (daily ed. June 6, 1995) (same). Whatever the meaning of that provision may be, Congress excluded Section 1512 from its scope.

[26] In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 406-07 (1999), for example, this Court rejected the Government's interpretation in part because it would have criminalized obviously innocent gifts of "jerseys given by championship sports teams each year during ceremonial White House visits," or "a high school principal's gift of

B. The Fifth Circuit's Interpretation Of "Corruptly" Is Inconsistent With The Plain Language, Structure, And Purpose Of § 1512

1. The Best Reading Of "Corruptly Persuades" Requires Proof Of Improper Means Or Inducements To Violate The Law

The adverb "corruptly" has two dictionary meanings. Persuasion might be accomplished "corruptly" because the speaker intends to "corrupt" the listener, or because the speaker's own motivations are "corrupt" in some other sense. The first is frequently called the "transitive" interpretation of "corruptly;" the second is "intransitive."[27] Andersen requested a transitive interpretation: that "corruptly persuades" means "corrupting" a witness by unlawful means of persuasion or by urging them to break the law. The courts below chose an intransitive one—specifically that any persuasion is corrupt if done for the purpose of impeding agency fact-finding. The transitive reading is, however, required by the text, structure, and purpose of the statute.

a. Although "corrupt" can mean simply "depraved, [or] evil" in a general sense, by far the more common modern usage is "of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements." *Webster's Third New International Dictionary* 512 (1986). In common parlance persuasion is corrupt if it "corrupts" a public

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a school baseball cap to the Secretary of Education."

[27] *See, e.g.*, *Poindexter*, 951 F.2d at 379; *North*, 910 F.2d at 940-43 (Silberman, J., concurring in part and dissenting in part); *See* 3 *Oxford English Dictionary* 974 (2d ed. 1989) ("corruptly" may mean either "by means of corruption or bribery," i.e., by means of corrupting another, or simply acting "[i]n a corrupt or depraved manner"); *American Heritage Dictionary* 423 (3d ed. 1992) (two definitions of "corrupt": Transitive verb: "1. To destroy or subvert the honesty or integrity of"; Intransitive verb: "To become corrupt"); *Webster's Ninth New Collegiate Dictionary* 293 (1987) (Transitive verb: "1a. To change from good to bad in morals, manners, or actions; *also*: bribe"; Intransitive verb: "1a. To become tainted or rotten").

official (or other person vested with a public duty) by using unlawful *means* of persuasion—such as bribery and blackmail—or by persuading the official to break the law. That was the instruction used in *Aguilar*, and for many other federal obstruction and bribery statutes.[28] That reading is also consistent with what Justice Scalia has called the "longstanding and well-accepted" meaning of "corruptly" in the criminal law: "'an act done with the intent to give some advantage inconsistent with official duty and the rights of others.'"[29] Persuasion is not "corrupt" in that sense if it uses lawful means and does not advocate unlawful conduct or seek some unlawful advantage.

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[28] For example, the legislative history of 18 U.S.C. § 1517, which criminalizes "corruptly" obstructing the examination of a financial institution, makes it clear that "corruptly" means "'with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.'" H.R. Rep. No. 101-681(I), at 174 n.5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6580 n.5 (quoting 1 E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 34.08 (3d ed. 1978)). The statute punishing "corruptly imped[ing]" the FDIC, 18 U.S.C. § 1032, has the same meaning, H.R. Rep. No. 101-681(I), at 173 n.3, *reprinted in* 1990 U.S.C.C.A.N. at 6579 n.3 (quoting Devitt and Blackmar § 34.08), as did 18 U.S.C. §201(c)(3), the statute prohibiting corruptly bribing a public official (now § 201(b)). *See United States v. Strand*, 574 F.2d 993, 996 (9th Cir. 1978). And other federal bribery statutes define "corruptly" to mean soliciting the "violation of some duty owed to the government or to the public in general." *United States v. Rooney*, 37 F.3d 847, 852-53 (2d Cir. 1994). "Corruptly" in the Foreign Corrupt Practices Act similarly requires a violation of official duty. *See Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber*, 327 F.3d 173, 182 (2d Cir. 2003).

[29] *Aguilar*, 515 U.S. at 616 (Scalia, J., dissenting in part, concurring in part) (quoting *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir.), *cert. denied*, 449 U.S. 825 (1980)); *see also Black's Law Dictionary* 311 (5th ed. 1979) (definition of "corruption"). After an exhaustive study of the § 1503 case law, the D.C. Circuit concluded in *Poindexter*, 951 F.2d at 385, that the best reading "would reach only a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty."

That reading is also required by *ejusdem generis*.[30] "[C]orruptly persuades" appears in § 1512(b) in a list of prohibited acts: "[w]hoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to …." Every other item in the list is plainly a specific *wrongful act* directed at a witness, not a reference to the defendant's purpose—and every one of them is wrongful for reasons independent of the defendant's goal of keeping information away from an official proceeding. *Ejusdem generis* thus indicates that "corruptly persuades" is also a reference to wrongful conduct—such as bribing a witness or urging them to lie.

That reading (or some similar limiting construction) is also required by 18 U.S.C. §1515(c), which provides that "[t]his chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." That provision was captioned a "Rule of Construction as to Legal Representation" in the statute, confirming (as the plain language indicates) that it is a guide to interpretation, not an affirmative defense. Pub. L. No. 99-646, § 50(b), 100 Stat. 3592, 3605 (1986). As explained in depth in the briefs for the National Association of Criminal Defense Lawyers ("NACDL") and the New York Association of Criminal Defense Lawyers as *Amicus Curiae*, defining "corruptly persuades" to mean any speech motivated in part by a desire to impede official fact-finding would criminalize much proper legal representation.

b. The structure of § 1512 and the other obstruction statutes also requires a transitive reading of "corruptly."

First, as the Third Circuit recognized in *United States v. Farrell*, 126 F.3d 484, 490 (3d Cir. 1997), "the 'improper purposes' that justify the application of § 1512(b) are already

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[30] *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). If all the words in the list are similarly specific then the proper canon is *noscitur a sociis*, but the interpretive point is the same. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

expressly described in the statute." In addition to "knowingly … corrupt[]" persuasion, § 1512(b) also requires one of several specific intents—such as an intent to "influence … the testimony of any person in an official proceeding," or "to … alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(1), (2)(B). Since the necessary purposes are expressly described, interpreting "corruptly" as just another "purpose" requirement makes little sense.

That problem is compounded when "corruptly" is specifically defined as a purpose to "impede the fact-finding ability of an official proceeding." Treating statutory terms "essentially as surplusage" is disfavored "in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf*, 510 U.S. at 140-41. The Fifth Circuit asserts that an intent to impede an agency's fact-finding ability somehow "implies a degree of personal culpability beyond a mere intent to make documents unavailable" to that agency, but never explains how. There is simply no space between an intent to deprive the SEC of documents that it is interested in and an intent to impede the SEC's "fact-finding ability"—but even if there were, that would be slicing the onion so finely that it cannot possibly be what Congress intended, especially since "corruptly" carries such powerful connotations. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 29-31 (2001) (rejecting statutory interpretation on surplusage grounds, even though section might still serve an "independent function" in "'rare and egregious' cases," because canon disfavors interpretations rendering sections "'insignificant, if not wholly superfluous'").

Second, 18 U.S.C. § 1515(a)(6) provides that "the term 'corruptly persuades' does not include conduct which would be misleading conduct but for a lack of a state of mind." If "corruptly" means the use of unlawful means or persuasion to break the law, then § 1515(a)(6) makes perfect sense; it clarifies that unintentionally lying to a witness is not a

wrongful means sufficient to make persuasion corrupt. But if the Government's intransitive interpretation is correct and any persuasion is "corrupt" if motivated by a desire to impede an agency's fact-finding ability, § 1515(a)(6) becomes truly bizarre. That section must provide a defense for some defendants whose persuasion would otherwise be corrupt; otherwise it would be a nullity. Under the Government's interpretation, therefore, § 1515(a)(6) would have to provide a defense for someone who accidentally lies to a witness even if their purpose is to impede agency fact-finding. But *telling the truth* to impede agency fact-finding would remain criminal. So a defendant who thinks he is telling the truth to impede an official proceeding has committed a crime if he is right, but not if—entirely unbeknownst to him—he happens to be wrong? That violates the canon against absurd constructions.[31] A transitive reading of "corruptly" avoids this interpretive train wreck entirely.

Third, § 1512(d) creates a misdemeanor punishable by less than a year in prison for "[w]hoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from" testifying at an official proceeding or reporting a crime to law enforcement. It would be surprising for Congress to make "dissuad[ing]" a person from testifying by intentional harassment a mere misdemeanor, but *politely persuading* them not to testify, with no harassment, into a ten-year felony.[32]

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[31] It also makes criminality turn on facts the defendant does not know, contrary to *Morrissette v. United States*, 342 U.S. 246, 270-71 (1952), and creates an arbitrary impossibility defense for a defendant who believes he has done the thing the law forbids (i.e., tell the truth), contrary to *Osborn v. United States*, 385 U.S. 323, 333 (1966).

[32] The felony section technically requires a specific intent to "cause or induce any person to … withhold testimony … from an official proceeding," 18 U.S.C. § 1512(b)(2)(A), while the misdemeanor could be read to punish any harassment that *in fact* "dissuades any person from … attending or testifying in an official proceeding," *id.* § 1512(c). But that is a very slender reed on which to hang nine years in prison. It would be much more reasonable to conclude that Congress intended the felony to cover persuasion that was, in itself, more culpable than mere harassment:

Finally, the instructions in this case rendered the overall scheme of the federal obstruction statutes as they existed in 2001 positively nonsensical. Although it was not a crime for David Duncan to discard documents, and it was not a crime for his secretary to discard documents, it somehow became a felony for David Duncan to hand a document to his secretary and politely ask her to discard it. A distinction like that could be rational only if it turned on something independently wrongful about involving the secretary. The instructions given here make criminality turn on the involvement of a second person, but then strip that fact of any moral relevance to the supposed crime. That is precisely why Congress recognized that the use of the witness tampering statute here rested on a "legal fiction."

"[C]orruptly persuade[s]" in § 1512(b) is "merely one strand of an intricate web of regulations" governing conduct intended to obstruct proceedings. *See Sun-Diamond*, 526 U.S. at 409. The rest of those provisions are carefully cabined by pending proceeding requirements (§§ 1503, 1505), limitations to information that is known to be evidence of a crime (§§ 1511, 1512(b)(3)), or requirements of inherently wrongful means such as murder (§§ 1512(a), 1513(a)). "Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Absent a text that clearly requires it," this Court "ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits." 526 U.S. at 412.

The Government has consistently argued that the arbitrariness introduced by its interpretation of § 1512 merely reflects a "gap" in the statutory scheme that Congress has since "closed" with Sarbanes-Oxley. Of course that commits the classic error of relying on subsequent legislative history to interpret the product of an earlier Congress. And the fact that Congress felt a need to pass sweeping new statutes demonstrates its understanding that

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such as bribing a witness or urging perjury.

Andersen's conduct was not criminal under existing law—and that this was essentially an *ex post facto* prosecution. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).[33] More profoundly, though, it just is not fair or accurate to describe the fact that David Duncan could lawfully discard documents on his own in 2001 as a technical oversight—a "gap" that needed to be "closed." The *Pettibone* rule that even purposeful interference with government fact-finding is not obstruction prior to the onset of a pending proceeding had been the law for a century. Congress had plenty of chances to change it but chose not to, probably because (as this Court recognized in *Aguilar*) the pending proceeding and "nexus" requirements supply much of the *mens rea* for the crime and help confine it to some reasonable bounds. Those requirements are not drafting errors; they reflect a fundamental judgment about the line between criminal conduct and legitimate self-defense under the law.

In the Victim and Witness Protection Act of 1982 ("VWPA"), Pub. L. No. 97-291, 96 Stat. 1248, which added § 1512, Congress recognized that certain forms of conduct directed at potential witnesses are unfair *to the witnesses themselves*, and for that reason ought to be criminal prior to the point at which traditional obstruction law intervenes to protect the fact-finding ability of official proceedings. The Government twisted that statute in this case to prosecute conduct that has nothing to do with witness tampering, and

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[33] Those new statutes also may not prove to be as broad as the Government suggests. The new § 1512(c) punishes anyone who "corruptly … influences … any official proceeding, or attempts to do so" with 20 years in prison. As Judge Silberman correctly recognized in *North* when interpreting similar language in § 1505, if simply *influencing* a congressional or agency proceeding for the purpose of impeding it is a crime, then "we might as well convert all of Washington's office buildings into prisons." 910 F.2d at 942. The word "corruptly" is plainly insufficient to provide fair warning of criminality in those circumstances, and such an interpretation would be a blatant violation of the First Amendment. Judge Silberman correctly concluded that "corruptly" in § 1505 must require unlawful means or actual consciousness of wrongdoing. The same will prove true of § 1512(c).

thereby created a large and arbitrary hole in the traditional limitations on the crime of obstruction. To then turn around and pretend that those limitations were a puzzling but inconsequential "gap" in the statutory scheme is an audacious sleight of hand.

c. The transitive interpretation of "corruptly" is also much more consistent with the obvious purpose of the statute. Section 1512 is labeled "[t]ampering with a witness, victim, or an informant," and prohibits a variety of wrongful acts directed at potential witnesses with the intent to prevent their testimony or to make evidence unavailable to an official proceeding. It punishes killing or attempting to kill a witness, "us[ing] physical force or the threat of physical force," knowingly intimidating, threatening, misleading, or "corruptly persuad[ing]" a witness, and "intentionally harass[ing]" a witness. The obvious purpose of this statute is to protect victims and witnesses from being intimidated, harassed, or "corrupted"—not to punish defendants whose conduct is wrongful, if at all, only for reasons that have nothing to do with that conduct's effect on a potential witness.

The legislative history confirms what is plain on the face of the statute. The hearings that produced the VWPA were focused on "[t]he problem of victim and witness intimidation." S. Rep. No. 97-532, at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2521. As the name suggests, the statute's purpose was "to strengthen existing legal protections for victims and witnesses of Federal crimes." *Id.* at 9. The Senate Judiciary Committee Report stresses in particular that under prior law a "victim or witness has little hope of protection from the government if he is harassed or threatened by the defendant out on bail, or the defendant's friends or family; or if the convicted criminal, after serving his time, decides to retaliate." *Id.* at 10. It goes on to explain that "Section 1512 applies to offenses *against witnesses*, *victims*, *or informants* which occur before the witness testifies." *Id.* at 14 (emphasis added).

The witness protection purpose of §1512 is even more striking because the original version of the VWPA *did* contain a broad obstruction of justice provision that would have criminalized conduct because of the defendant's motive to obstruct rather than because of the conduct's effect on witnesses. *See* S. 2420, 97th Cong., §1512(a)(3), 128 Cong. Rec. S3856 (daily ed. Apr. 22, 1982). That clause would have applied to "[w]hoever … does any other act … with intent to influence improperly, or to obstruct or impair the … administration of justice." *Id.* But that broad obstruction provision was deleted from the final bill because, as Senator Heinz explained, it was "*beyond the legitimate scope of this witness protection measure*." 128 Cong. Rec. 26,810 (1982) (emphasis added).

The later addition of "corruptly persuades" to §1512(b) does not reflect a change in the nature or purpose of the statute. The original VWPA deleted all of the specific references to witnesses from §1503. The Second Circuit and others concluded that witness tampering could henceforth be prosecuted *only* under §1512. Since §1512 criminalized only violence, coercion and deception, non-coercive, non-misleading witness tampering therefore was suddenly no longer a crime at all, even if it involved plainly wrongful acts like urging or even bribing a witness to lie in an already pending proceeding. *See United States v. Hernandez*, 730 F.2d 895, 898-99 (2d Cir. 1984).

In response, Congress amended § 1512 in 1988 to add "or corruptly persuades" to the list of conduct prohibited by § 1512(b). Senator Biden explained that the new language was necessary because, in the Second Circuit, "promising to pay a witness for giving false testimony is not a crime." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988). He emphasized that, while other Circuits allowed prosecutions under § 1503 for "the *corruption of a witness* by some means other than those stated in section 1512," in the Second Circuit "non-coercive *corruption of witnesses* [could not] be prosecuted under any obstruction of justice statute." *Id.* (emphasis added). Senator Biden explained that "corrupt persuasion"

would "include preparing false testimony for [a] witness, or offering a witness money in return for false testimony." *Id.*

Nothing in the legislative history suggests that Congress intended to break from the VWPA's clear purpose of protecting witnesses, or that it intended to enact the omnibus obstruction clause that it had stricken from the original bill.[34] Instead, the language and history of the 1988 amendment suggest that Congress simply intended to protect witnesses from attempts to "corrupt" them as well as from attempts to coerce or intimidate them.

2. Conduct Undertaken With An Honest And Reasonable Belief That It Is Not Wrongful Is Not "Knowingly Corrupt"

Andersen also requested an instruction that conviction for corrupt persuasion requires proof that the defendant knew that his conduct was "wrongful." The district court rejected that instruction, and told the jury that Andersen should be convicted even if it "honestly and sincerely believed that [its] conduct was lawful." R. 1253.

The plain language, "knowingly … corrupt[]," at the very least requires some consciousness of wrongdoing. The intransitive meaning of "corrupt" is "depraved, evil: perverted into a state of moral weakness or wickedness." *Webster's Third New International Dictionary* 512 (1986). A person who sincerely and reasonably believes that his conduct is not wrongful is not depraved or evil—and he

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[34] The Fifth Circuit relied heavily on a single statement by Senator Biden that "corruptly persuades" was designed to "include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." Pet. App. 22-23a. But Senator Biden did not say that "corruptly persuades" was designed to duplicate all of the ways that §1503 might be violated by persuasive conduct; he said its purpose was to ensure the same "protection of witnesses." That supports a transitive reading. And the instructions given in this case in fact make § 1512 into a *radical expansion* of § 1503, by criminalizing conduct that has always been lawful. In addition, every decision mentioned by Senator Biden, whether prosecuted under § 1503 or the pre-amendment § 1512(b), involved independently wrongful efforts to influence witnesses. *See* Pet. 23 n.23.

certainly is not *knowingly depraved or evil*. "Persuasion," even when motivated by a desire to impede official fact-finding, is not so inherently wrongful that such a state of mind could be imputed by law. *Supra* § I(A). And if the usual meaning of "corruptly" in the criminal law is an "'intent to give some advantage inconsistent with official duty and the rights of others,'" *Aguilar*, 515 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) (quoting *Ogle*, 613 F.2d at 238), a person does not act "knowingly … corruptly" unless, at a minimum, he believes that the advantage he seeks is in fact inconsistent with a public duty. Judge Silberman concluded in *North* that under the ordinary meaning of "corrupt" in § 1505 a jury "must be permitted to consider, at the very least, evidence tending to show that the defendant believed that the nature of his conduct (as opposed to its underlying justification) was appropriate—that is, in accordance with the law." 910 F.2d at 944. Surely the same is true under § 1512(b), which requires conduct that is not just "corrupt" but "knowingly … corrupt[]." That insight does not violate the traditional rule that ignorance of the law is no excuse; at most it simply recognizes that some general knowledge of law is embedded in the statute's *mens rea*. *Liparota v. United States*, 471 U.S. 419, 425 (1985); *Bryan v. United States*, 524 U.S. 184, 196 (1998) (requiring general consciousness of unlawfulness "does not carve out an exception to the traditional rule that ignorance of the law is no excuse").

In any event, the usual presumption against "ignorance of the law" defenses assumes that criminal statutes are not interpreted so broadly that a person could be convicted in the absence of some fair warning—from the conduct, surrounding context, or plain language of the statute—that the line into criminal behavior was being crossed. When that danger is present, this Court has not hesitated to require subjective knowledge of unlawfulness.

The statute at issue in *Ratzlaf* punished "willfully" structuring currency transactions for the specific "purpose of evading a financial institution's reporting requirement"

with respect to cash transactions over $10,000. 510 U.S. at 136. The Government argued there that the mere "purpose to evade the reporting requirement," and thereby deprive the Government of information that it needed to combat money laundering, was enough to "ensure that the defendant acted with a wrongful purpose" and hence "willfully." *Id.* at 143. But this Court recognized that the Government's interpretation conflated "willfully" with the statute's separate specific intent requirement, and therefore violated the canon against superfluous constructions. It also squarely rejected the argument that an intent to "depriv[e] the Government of the information that [the reporting requirement] is designed to obtain" is sufficient for criminality. *Id.* at 144. This Court therefore interpreted the statute to require knowledge that structuring is unlawful. "[W]e are unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring." *Id.* at 146.[35]

This case is remarkably similar. The Government again claims here that facially innocent conduct is criminal because of the defendant's "bad purpose." It argues that a purpose to impede the Government's fact-gathering ability is inherently bad or improper. It again denies that a criminal "bad purpose" requires any consciousness of wrongdoing. And it again ignores that its interpretation of the required "bad purpose" duplicates a specific intent requirement found elsewhere in the statute. It does not matter that § 1512(b) uses the *mens rea* term "corruptly" rather than "willfully."

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[35] In *Bryan*, this Court interpreted a statute criminalizing "willfully" dealing in firearms without a federal license. This Court again stated that "a 'willful' act is one undertaken with a 'bad purpose,'" and concluded that "'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" 524 U.S. at 191-92 (quoting *Ratzlaf*, 510 U.S. at 137). This Court rejected the defendant's argument that specific knowledge of the federal licensing requirement was required; it was enough if "the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Id.* at 193.

In *Ratzlaf*, the Court required proof of the defendant's specific knowledge of the structuring law (not merely general consciousness of wrongdoing as argued here), and it did so based on fair warning principles, the canon against superfluous constructions, and the rule of lenity. This Court acknowledged that "'willful' … is a 'word of many meanings,' and 'its construction [is] often … influenced by its context.'" 510 U.S. at 141 (citation omitted) (alterations in original). "Corruptly" is just as flexible and, if anything, conveys greater consciousness of wrongdoing than "willfully" does. And this Court has even held that statutes that do not use the term "willfully" can require specific knowledge of the law. *See, e.g.*, *Liparota*, 471 U.S. at 426 ("knowingly").

C. The Fifth Circuit's Interpretation Of "Corruptly" Violates The Rule Of Lenity And The Doctrine Of Constitutional Doubt

Andersen respectfully submits that the conclusions above are the best reading of the plain language of § 1512(b), in light of its structure, purpose, and place in the statutory scheme. But if those conventional interpretive tools leave any doubt, it must be resolved in Andersen's favor.

1. The Obvious Ambiguity Of "Corruptly Persuades" Must Be Resolved By Lenity

The rule of lenity requires that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). That rule "is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). As the brief for the Washington Legal Foundation and Chamber of Commerce of the United States as *Amici Curiae* points out, that rule also minimizes disruptive conflicts over the interpretation of criminal statutes.

The phrase "corruptly persuades" in §1512(b) is, at a

minimum, ambiguous. *See Farrell*, 126 F.3d at 487 ("Without any definitional assistance, we find the phrase 'corruptly persuades' to be ambiguous."); *Poindexter*, 951 F.2d at 378 ("[O]n its face, the word 'corruptly' is vague …."). Even the Fifth Circuit conceded that "corruptly persuades" is ambiguous, and that the court's "improper purpose" gloss casts only a "dim light … upon its meaning, its circularity aside." Pet. App. 19a. And even if "corruptly" unambiguously meant an "improper purpose," it *certainly* does not unambiguously mean a purpose "to impede the fact-finding ability of an official proceeding." That would be a remarkable expansion of prior law. *Supra* § I(A). A transitive reading of "knowingly … corrupt[] persuasion[]" and a basic consciousness of wrongdoing requirement are at least as rational as the interpretation adopted below. The rule of lenity therefore requires them.

2. The Instructions In This Case Criminalize Innocent Conduct Without Fair Warning

The first essential of due process of law is that no one can be punished without "fair warning … in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954). If an otherwise vague statute "can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." *Id.* at 618.

For more than a century, it was clearly settled law that discarding documents prior to the onset of official proceedings is not obstruction of justice. The instructions here reversed that result, and also criminalized a great deal of persuasive conduct that a reasonable person would not have understood to be wrongful. *Supra* § I(A). To Andersen's knowledge no one has *ever* been prosecuted for requesting edits to a draft memo. Yet commentators

believe that is exactly what the jury had in mind when it returned its verdict.[36] The Government explicitly argued in its post-trial briefing that Nancy Temple's proposed edits to a draft memorandum were sufficient to support conviction *standing alone*, that that conduct "figured prominently in the trial and in the government's jury addresses" and that it was "thoroughly developed at trial through several witnesses." JA 215. The United States proudly asserted that "[d]uring the summations of the government, Temple's creation of the misleading memorandum was explicitly and repeatedly addressed and argued, among other proof of Andersen's guilt," and that "the jury was explicitly asked to pay particular attention to [Temple's edits] as 'devastating proof'" of criminality. JA 216 & n.6.

The spare phrase "knowingly … corruptly persuades," buried in a "witness tampering" statute that otherwise criminalizes only violent, coercive or deceptive conduct, is clearly insufficient to give Andersen notice that such a radical change in the law had occurred. If there is any doubt on that point, it is supplied by the public reaction to this prosecution. As the briefs of various *amici* make clear, this case was a great shock to corporate America and to the practicing bar. And the legislative history of Sarbanes-Oxley recognizes both that this prosecution was based on a "legal fiction," *supra* at 22 and accompanying text, and that additional legislation was necessary to ensure that conduct like Andersen's would be criminal.[37] The new §§ 1519 and 1520 cannot be smuggled into § 1512 and applied *ex post* to convict Andersen for conduct lawful at the time.

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[36] *See* Hill, *supra* n.23, at 1552-53; *see also* Brief for the NACDL as *Amicus Curiae*, at 5-7; Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. Times, June 18, 2002, at A23.

[37] *See, e.g.*, 148 Cong. Rec. S7419 (daily ed. July 26, 2002) ("Had such clear requirements and policies been established at the time Andersen was considering what to do with its audit documents, countless documents might have been saved from the shredder."); S. Rep. No. 107-146, at 7 (2002) ("[T]he current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected.").

3. The Fifth Circuit's Interpretation Of "Corruptly Persuades" Raises Grave Concerns Under The First Amendment

The Government's expansive interpretation of § 1512(b) raises "grave and doubtful constitutional questions" of both overbreadth and vagueness under the First Amendment.[38]

Advocacy intended to affect the outcome of a proceeding is protected by the First Amendment. *See, e.g.*, *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911-15 (1982). Interpreting "corruptly" to require only an "improper purpose," or a purpose to impair the fact-finding ability of a government proceeding, does not save the statute. Just as "evidence of anticompetitive intent or purpose alone cannot transform" protected speech into an antitrust violation, *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993), communication intended to persuade someone to do something legal does not lose First Amendment protection because the speaker's purpose is to influence or impede an investigation. This Court has not hesitated to reverse convictions for contempt by publication, even though the publishers plainly intended to affect the outcome of a judicial proceeding. *See*, *e.g.*, *Craig v. Harney*, 331 U.S. 367, 369-70, 374-75 (1947); *Bridges v. California*, 314 U.S. 252, 271-78 (1941). And, as the D.C. Circuit observed in *North*, attempting to persuade a member of Congress not to pursue an investigation is protected by the Constitution and is not corrupt even though it plainly involves "endeavoring to impede or obstruct the investigation." 910 F.2d at 882.

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[38] *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). By arguing that the statute failed to give fair warning, Andersen raised the doctrine of constitutional doubt below. Although Andersen did not raise First Amendment arguments below, they are merely another reason to apply the doctrine of constitutional doubt. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

The Fifth Circuit's interpretation would criminalize a broad range of protected speech, including core political speech.[39] "[C]orruptly" must be narrowly confined to the use of unlawful means, such as bribery, or unlawful ends, such as urging another person to violate the law. This Court has drawn a similar line between protected communications and activities that may give rise to liability in other areas.[40]

Defining "corruptly" to mean "improper purpose" also fails to "furnish a sufficiently ascertainable standard of guilt." *Herndon v. Lowry*, 301 U.S. 242, 261 (1937). "Improper" can mean, among other things, "[n]ot suited to circumstances or needs," "unsuitable," "indecorous" or "incorrect." *American Heritage Dictionary* 648 (2d ed. 1982). Like the Fifth Circuit, Pet. App. 19a, the district court apparently agreed that "improper purpose" is too vague and provided an additional gloss "for this case." But a crime defined by terms that are so indefinite that courts must change their meaning on a case-by-case basis is void for vagueness. *See Ashton v. Kentucky*, 384 U.S. 195, 198-99

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[39] *E.g.*, *supra* § I(A). These concerns constitute a proper basis for reversal. *See Clark v. Suarez Martinez*, 125 S. Ct. 716, 724 (2005) (invoking constitutional doubt "whether or not those constitutional problems pertain to the particular litigant before the Court"); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) ("[A] litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.").

[40] For example, provisions of the National Labor Relations Act ("NLRA") intended to prevent neutral third parties from becoming involved in labor disputes only prohibit communications that involve improper means or illegal ends. In order to avoid a serious First Amendment question, this Court concluded that peaceful distribution of handbills intended to persuade consumers to boycott a secondary employer's business did not violate the NLRA. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578-79 (1988). But the Constitution protects neither a union's use of improper means, such as coercion to induce a secondary boycott, *see Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982); *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 616 (1980), nor its efforts to encourage illegal activity such as a secondary strike, *see Int'l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 705 (1951).

(1966) ("[S]ince the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it … leaves to the executive and judicial branches too wide a discretion in its application.") (internal quotation marks and citations omitted); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[W]e cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.").

II. THE JURY WAS IMPROPERLY INSTRUCTED ON THE REQUISITE NEXUS TO AN OFFICIAL PROCEEDING

Even if the jury was properly instructed on the term "corruptly persuades," reversal is still required. Although § 1512 deliberately relaxes the traditional pending proceeding requirement to protect witnesses, the section still must be interpreted to require proof of some meaningful "nexus" to some particular official proceeding. Otherwise the distinction between impeding an actual "official proceeding" and impeding *possible* proceedings or mere law enforcement investigations simply collapses. *Aguilar*, 515 U.S. at 601-02. The district court nevertheless instructed the jury that an "official proceeding" includes "all the steps and stages in the agency's performance of its government functions, and it extends to administrative as well as investigative functions, both formal and informal," and that it was enough if "Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, … whether or not that proceeding had begun or whether or not a subpoena had been served." R. 1253. Those instructions stripped § 1512(b) of any "nexus" requirement at all, and contaminate the jury's specific intent finding as well.

A. The Jury Instructions Failed To Require Proof Of Any Meaningful Nexus To An Official Proceeding

Andersen sought to require proof of a genuine nexus between its conduct and some real "official proceeding" in several ways. Because the Fifth Circuit appeared to hold in *Shively*, 927 F.2d at 812-13, that a defendant could not be

convicted under § 1512(b) without proof of "intent to affect … some particular federal proceeding that is ongoing or is scheduled to be commenced in the future," Andersen requested an instruction phrased in those terms. *See United States v. Frankhauser*, 80 F.3d 641, 652 (1st Cir. 1996) (characterizing the quoted language as the holding).[41] The Fifth Circuit concluded in this case, however, that this language in *Shively* was dicta.

The Fifth Circuit instead held that any nexus required by the statute was satisfied because it was clear "[t]hat the SEC was the feared opponent and initiator of a proceeding, and not some other shadowy opponent." Pet. App. 28a. But that reading does little to confine the breadth of the statute. Businesses in regulated industries will often be able to predict which agency might investigate them. Under the Fifth Circuit's reasoning, the "fear[]" of a possible proceeding would seemingly be sufficient to criminalize virtually any effort to influence or impede the flow of information to the Government. Even though the proceeding need not be "pending or about to be instituted at the time of the offense," 18 U.S.C. § 1512(e)(i), this Court should at the very least require proof that the defendant believed that some particular proceeding was likely to occur in the near future.

That interpretation is required by the language of the section, which draws a line of demarcation between the intent to withhold information from "an official proceeding" and an intent to "prevent the communication … of information" to a "law enforcement officer." 18 U.S.C. §§ 1512(b)(1), (3). It is also required by this Court's reasoning in *Aguilar*. This Court held in *Aguilar* that, even when a judicial proceeding was pending, it was "far [too] speculative" to conclude that deliberate deception of two FBI agents would have the "natural and probable effect" of

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[41] When the district court rejected that instruction, Andersen proposed other alternatives designed to require some proof of nexus. *See* R. 1122-23 ("particular proceeding"); (a proceeding "relating to Enron").

obstructing justice absent proof that Judge Aguilar knew it was "likely" or "probable" that those agents would actually testify before the grand jury. 515 U.S. at 601. His belief that they "might or might not" testify (and of course he knew they often do), was insufficient to satisfy the "nexus" requirement implied by the statute. *Id.* at 602. By analogy, Section 1512 should at least require proof that a defendant charged with "corruptly persuad[ing]" a witness believed that an official proceeding was "probable."[42] Absent such proof, Andersen was in Judge Aguilar's shoes: it did not know that its conduct would have the "probable" effect of obstructing that proceeding.

Finally, the rule of lenity and fair warning principles require that any ambiguity concerning the nexus issue must be resolved in Andersen's favor. Section 1503 is not unconstitutionally vague primarily because the pending proceeding and nexus requirements narrow its application. But § 1512 applies to agency and congressional proceedings—a context in which interference is much less clearly wrongful, *see, e.g.*, *North*, 910 F.2d at 882—and relaxes the pending proceeding requirement. Without a meaningful nexus requirement it would present grave constitutional problems, particularly if, as in this case, "corruptly" is not given a strong independent meaning.

B. The Jury Was Improperly Instructed That An Official Proceeding Was Already Pending

The district court greatly magnified that error by affirmatively instructing the jury that the informal SEC inquiry into Enron that was pending during the relevant

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[42] Andersen did not propose that precise formulation, although it did cite *Aguilar* to the district court. JA 197. Regardless, a defendant who clearly explains why an instruction is incorrect need not guess precisely what instruction an appellate court will ultimately adopt. *See United States v. Jones*, 909 F.2d 533 (D.C. Cir. 1990); *see also* 2A Charles Alan Wright, *Federal Practice and Procedure* § 487 (3d ed. 2000) ("It is a grave error to submit a case to a jury without accurately defining the offense charged and its elements. Such an error is not excused or waived by failure to request a proper instruction.").

time period was itself an "official proceeding." That conclusion is inconsistent with settled law, the language and structure of §1512, and the SEC's own regulations. It effectively removed the nexus issue from the jury, and also contaminates the jury's finding that Andersen specifically intended to impede the fact-finding ability of an "official proceeding."

A distinction between judicial proceedings and mere police investigations has always been central to the law of obstruction. "Official proceeding" for § 1512 is defined as:

> (A) a proceeding before a judge or court of the United States, …; (B) a proceeding before the Congress; (C) a proceeding before a Federal Government agency which is authorized by law; or (D) a proceeding … before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person ….

18 U.S.C. § 1515(a)(1). That definition is plainly designed to preserve the traditional distinction. Subsection (A) includes proceedings "before a judge or court" but pointedly *not* law enforcement investigations. As a matter of plain language a "proceeding *before* a Federal Government agency" must mean a formal proceeding empowered to hear testimony and act, and "authorized by law" indicates that the agency must take some official action first. Congress knows how to criminalize interference with any "matter within the jurisdiction" of a federal agency when it wants to. *See* 18 U.S.C. §§ 1519, 1001(a).

The language of § 1512 further confirms that Congress intended to preserve the traditional distinction. Section 1512 is rife with references to "witness[es]," "testimony," subpoenas, admissibility, and similar language associated with formal proceedings. And § 1512(a), (b), and (c) all criminalize conduct intended to interfere with the flow of information to an "official proceeding" without regard to what that information is, but then separately provide that interfering with the communication of information to a "law enforcement officer" is criminal only if it relates, *inter alia*,

to "the commission or possible commission of a Federal offense." Congress surely did not intend to give the informal inquiries of junior agency staffers greater protection from interference than it gave to FBI agents enforcing the criminal law.

The SEC's own regulations define a "proceeding" as "any agency process initiated … [b]y an order instituting proceedings." 17 C.F.R. § 201.101(a)(9). An "order instituting proceedings" means "an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing." *Id.* § 201.101(a)(7). Such an order gives specifically identified members of the SEC staff the authority, which they would not otherwise have, to subpoena witnesses and administer oaths. *See* 15 U.S.C. §§ 77t(a), 77s(c), 78u(a)(1) & (b), 80a-41(b), 80b-9(a) & (b). Prior to that point an informal investigation by agency staff is limited to voluntary requests for the production of documents and the cooperation of witnesses. *See* 17 C.F.R. § 202.5. It is also called a "matter under inquiry," which clearly evokes the distinction between "matters" and "proceedings" used throughout the Code. *Compare* 18 U.S.C. § 1505 *with id.* §§ 1001, 1519.

Reviewing courts have consistently held that the line between a simple staff investigation and a true proceeding "before" a federal agency turns on the power to subpoena documents and compel testimony. The leading case on what constitutes a "proceeding" of the SEC under §1505 held that it encompasses "any investigation directed by a formal order of the Commission, at which a designated officer takes testimony under oath." *United States v. Batten*, 226 F. Supp. 492, 494 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965). The power to compel testimony distinguished such hearings from the "mere police investigation[s]" that have never been covered by the obstruction laws. *Id.* That rule has been consistently followed under § 1505 for proceedings of the SEC and other agencies. *See United States v. Senffner*, 280 F.3d 755, 761 (7th Cir.), *cert. denied*, 536 U.S. 934 (2002); *United States v. Kelley*, 36 F.3d 1118, 1127 (D.C.

Cir. 1994). The statutory definition in §1512 requires it even more clearly. And, again, any remaining doubt on that point must be resolved by lenity and fair warning principles.

III. THE INSTRUCTIONAL ERRORS IN THIS CASE REQUIRE REVERSAL

A. Andersen Is Entitled To An Acquittal Under Any Proper Definition Of "Corruptly"

The Fifth Circuit's limited harmless error analysis assumed that the instructions as given correctly defined the elements of the crime. The Government has never disputed, however, that reversal is required if the instructions defined the offense incorrectly. Instructional errors involving either "misdescriptions," "omissions," or conclusive presumptions about an element of a criminal offense implicate constitutional rights, and require reversal unless they are harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 10 (1999); *see also O'Neal v. McAninch*, 513 U.S. 432, 435, 442 (1995) ("possible jury 'confusion' arising out of a trial court instruction about the state of mind necessary for conviction" is "an error of constitutional dimension"). Under any defensible interpretation of the phrase "knowingly … corruptly persuades," Andersen is entitled to acquittal as a matter of law.

If the correct reading of "corruptly" is transitive, there is simply *no* evidence that anyone at Andersen used unlawful means of persuasion or otherwise "corrupted" another person by persuading them to commit a crime. *Supra* at 5-6. The Government *never argued otherwise*, and thus has waived any argument that Andersen is not entitled to acquittal as a matter of law under the transitive meaning. *See* Brief for the United States at 73-92 (5th Cir. May 27, 2003).[43] In addition, "knowingly … corrupt[]" persuasion

[43] The Fifth Circuit nevertheless included a confusing reference to possible harmless error by stating that "[o]n the facts of this case, that the jury was not required to find a violation of an independent legal duty did not have a substantial and injurious effect on the verdict." Pet. App. 24-25a. But the court did not suggest that there was evidence (let alone overwhelming evidence) that an Andersen employee persuaded a

requires consciousness of wrongdoing. There is no evidence from which a reasonable jury could conclude beyond a reasonable doubt that any of the alleged "corrupt persuaders" believed that their conduct was wrongful. To the contrary, the Government's own cooperating witness repeatedly told the jury that he believed that his conduct was "entirely appropriate." JA 159. Indeed, it is irrational to conclude that Andersen supervisors would have openly influenced dozens of employees to comply with the policy if they had understood it to be wrongful or unlawful. There was *no* surreptitious behavior of the type that might have permitted a jury to infer consciousness of wrongdoing in the absence of direct evidence. *See, e.g.*, *Bryan*, 524 U.S. at 189.

Finally, if this Court were to conclude that the meaning of "corruptly" should be left to the jury or given an unadorned dictionary meaning like "depraved," "evil," or "wicked," then Andersen is at the least entitled to a new trial. The district court's "intent to impede the fact-finding ability of an official proceeding" gloss improperly instructed the jury that it had to presume Andersen's conduct "corrupt" if it found certain predicate facts. *See Neder*, 527 U.S. at 10. That error could not be harmless on this record.

B. The Incorrect Nexus And Official Proceeding Instructions Independently Require Reversal

Even if the jury was properly instructed on the definition of "corruptly," the errors in the nexus and official proceeding instructions would independently require acquittal, or at a minimum, a new trial.

The Fifth Circuit acknowledged that "without some limiting sights" on the nexus issue this statute criminalizes maintaining *any* document retention policy. Pet. App. 27a. For the same reason it also criminalizes legal advice, like Nancy Temple's, suggesting edits to a draft document. The Fifth Circuit concluded, however, that "[w]herever the permissible reach of this statute may finally be drawn, it is

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colleague to violate the law. Instead it just repeated that the instructions were correct and did not render "corruptly" superfluous. *Id.*

beyond this case" because "[t]his case was tried on the theory that Andersen intended to undermine, subvert, or impede a proceeding of the SEC"; because "[t]he government did not suggest that a records retention program violated the Act"; and because the fact "[t]hat the SEC was the feared opponent … was clear at every step." *Id.* at 27-28a. The court then quoted from the prosecution's opening statement to show "how the case was tried." *Id.*

The court's assertion that the Government never argued that mere maintenance of a records retention program violates § 1512 is incorrect. It did, repeatedly. Indeed, the prosecutors argued in closing statements that a brief overview of Andersen's retention policy, given at a training meeting at which 89% of the attendees were not working on the Enron engagement, was culpable "corrupt[] persua[sion]." Tr. 6432-33. The jury asked to see that videotape during their deliberations, Pet. App. 27a, and was permitted to do so. Tr. 6834

The Fifth Circuit's analysis also confuses Andersen's awareness that an "official proceeding," if it were to occur, would be conducted by the SEC with awareness that an SEC investigation was in fact scheduled, particular, likely, probable—or whatever other formulation appropriately captures the requirement that a mere awareness of possible future proceedings is not sufficient for criminality. Quoting the prosecution's *allegation* in its opening statement that Andersen "knew that the SEC was coming," Pet. App. 28a, does not make it so, and does not qualify as any coherent form of harmless error analysis.

The court's failure to require any kind of nexus instruction is not harmless. The evidence showed that Andersen did not believe an income restatement (and thus a formal SEC investigation involving Andersen) was probable until *after* all of the alleged acts of corrupt persuasion occurred. *Supra* at 6-12. Indeed, the Government could not even get its own cooperating witness, David Duncan, to testify that he believed that an SEC proceeding was "probable" at the time of his supposedly criminal acts. The

most Duncan could say was that he believed there was a "possibility" that the SEC "might" want to see Andersen documents in the future. *See supra* n.17. As in *Aguilar*, a jury simply could not conclude beyond a reasonable doubt that Duncan had the requisite knowledge to commit the offense and thus Andersen should be acquitted. [44]

If there were any doubt concerning the need for reversal, however, it is dispelled by the court's erroneous definition of "official proceeding," which wrongly instructed the jury that an official proceeding was ongoing throughout the relevant time period. Having obtained the incorrect instruction, the Government played it to the hilt—beginning its closing by telling the jury that "an official proceeding includes both an informal and formal inquiry of the SEC" and that there was no dispute "that there was an SEC proceeding ongoing at the time the document destruction occurred." Tr. 6352; *see also* Tr. 6419. Against that backdrop there is no way to know whether the jury concluded that Andersen intended to "impede the fact-finding ability" of an actual "official proceeding," or merely of the informal investigation that was already ongoing. That error entirely removed the nexus issue, and the specific intent issue as well, from the jury. It cannot possibly be harmless beyond a reasonable doubt.

CONCLUSION

The conviction must be reversed, and remanded with instructions to enter a judgment of acquittal or, at the very least, to grant a new trial.

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[44] Even if a properly instructed jury could find at a new trial that Nancy Temple believed that an SEC proceeding involving Andersen was "probable," there is no basis for a retrial because the jury could not find that Temple had a "corrupt" purpose. Whatever interpretation of "corruptly" this Court adopts, it cannot permit the punishment of "lawful, bona fide, legal representation services." 18 U.S.C. § 1515(c). Permitting conviction on the basis of Temple's legal services would do just that. Because there is insufficient evidence to establish that the conduct of one of the "corrupt persuaders" satisfies all of the elements of the crime, when properly defined, Andersen must be acquitted. R. 6343-44.

Respectfully submitted,

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