No. C11-0116-1

In the Supreme Court of the United States

SAMUEL MILLSTONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR PETITIONER

TEAM 44

QUESTIONS PRESENTED

1. Whether ordinary negligence, a "failure to exercise the standard of care the standard of care that a reasonably prudent person would have exercised in the same situation," is a sufficient degree of culpability to merit criminal sanctions, including imprisonment, under the Clean Water Act, 33 U.S.C. § 1319, or whether requiring a higher degree of culpability better comports with the statute and the principles of criminal law.

2. Whether merely encouraging a potential witness to invoke his or her Fifth Amendment right against self-incrimination qualifies as "corruptly" persuading a witness under the federal witness tampering statute, 18 U.S.C. § 1512(b)(3).

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The opinion of the court of appeals, R. 3-21, is unreported. The relevant orders of the district court are unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered October 3, 2011, and this Court granted the Petition for Writ of Certiorari. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions – relevant portions of the Fifth Amendment to the United States Constitution, relevant portions of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1319(c)(1)-(2), 1321(b) (2006), relevant portions of the federal obstruction of justice statute, 18 U.S.C. § 1503 (2006), and relevant portions of the federal witness tampering statute, 18 U.S.C. § 1512(b)(3) (2006) – are reproduced in the appendix.

STATEMENT OF THE CASE

Following a chemical spill at Bigle Chemical Company's Windy River facility, the United States Attorney for the District of New Tejas charged Samuel Millstone with negligent violation of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c)(1)(A), and witness tampering, 18 U.S.C. § 1512(b)(3). R. 10. Mr. Millstone is the President and Chief Executive Officer ("CEO") of Sekuritek, a company that provided security for the Windy River facility. The Government alleged that Mr. Millstone's negligence in hiring, training and supervising Sekuritek personnel at the facility, as

well as his negligence in failing to inspect the Sekuritek vehicles at the facility, caused the chemical spill. R. 10. Further, the United States alleged that Mr. Millstone's suggestion that his former business partner, Reese Reynolds, invoke his Fifth Amendment right against self-incrimination, constituted tampering with a witness. R. 9. At trial, the jury convicted Mr. Millstone on both charges, and the district court denied his motion for a new trial.

Mr. Millstone appealed on two grounds. First, Mr. Millstone argued that "the district court improperly instructed the jury regarding the appropriate standard for a conviction under the CWA." R. 10. Specifically, Mr. Millstone objected to the instruction that only ordinary negligence, as opposed to criminal negligence, was a sufficient basis for conviction. R. 10. Second, Mr. Millstone argued that "a defendant cannot be found guilty of corruptly persuading a person to withhold information from the government merely by encouraging that person to exercise a right or privilege to do so." R. 10. The court of appeals affirmed the trial court, finding that ordinary negligence was a sufficient basis for criminal liability under the CWA and that a motivation by an improper purpose alone was sufficient for conviction uncer the federal witness tampering statute. Mr. Millstone petitioned for a writ of certiorari, which this Court granted.

Mr. Millstone founded Sekuritek in 2003 with Mr. Reynolds. R. 4. They started Sekuritek as "a security company that deployed trained security personnel using the latest technology." R. 4. Mr. Millstone served as Sekuritek's President and CEO, with responsibility for the firm's direct work with clients and oversight of

security operations, while Reynolds served as the firm's Vice President, with responsibility for sales and advertising. R. 4. Sekuritek proved a successful business, and within two years, the firm earned annual revenues over two million dollars. R. 5.

In 2006, Bigle Chemical Company brought its headquarters to Polis from the Republic of China (Taiwan), and built its new largest chemical plan on the Windy River. The 270-acre facility employed 1,200 staff members each shift, and earned the Company earned more than $2.4 million per day from its chemical production operations. R. 5. Upon opening the facility, Bigle Chemical Chairman and CEO Drayton Wesley made clear that he would not allow security breaches at the Windy River facility. R. 5 (quoting Mr. Wesley: "I will not risk the well being of this company by allowing an intruder or saboteur to cause a spill."). Aware of Sekuritek's reputation, Mr. Wesley hired Sekuritek on November 5, 2006 to provide security at the Windy River facility. R. 5. Bigle Chemical offered Sekuritek a ten-year contract worth $8.5 million, with security services to start December 1, 2006. R. 5. The contract required Sekuritek to hire security guards and to purchase new equipment including sport utility vehicles ("SUVs"). R. 5.

Due to the time constraints, Mr. Millstone and Mr. Reynolds made changes in Sekuritek's hiring, training and bidding processes. R. 6. While Sekuritek typically hired only experienced personnel, Sekuritek hired some inexperienced personnel to meet Bigle Chemical's demands. R. 6 n.2. Sekuritek also shortened its three-week training course to one week, with three weeks of "on the job" training. R. 6 & n.2.

Mr. Reynolds purchased equipment and vehicles suitable for use at Bigle Chemical. R. 6. Mr. Reynolds performed a "cursory review of potential vendors" for the SUVs and chose "a relatively unproven company." R. 6. Federal investigators later discovered that the company Reynolds contracted with "had a reputation for shoddy workmanship," and that its SUVs had a history of malfunctions, including uncontrolled acceleration caused by sticking gas pedals. R. 9. Sekuritek began work at the Windy River facility just after Thanksgiving in 2006. R. 6. Mr. Millstone visited the facility periodically, and through January 2007, Sekuritek exceeded Bigle Chemical's expectations. R. 7.

On January 27, 2007, Josh Atlas, a new Sekuritek guard, thought he saw an intruder while patrolling the Windy River facility. R. 7. Mr. Atlas "floored the pedal" of his SUV to get to the possible intruder, but its gas pedal stuck and the vehicle accelerated out of control into a storage tank, sparking a massive explosion. R. 7. Mr. Atlas's actions violated Sekuritek policy, which instructed personnel to stop their vehicles when within 100 yards of chemical tanks and approach suspected intruders on foot. R. 9. Though not specifically discussed in training, the policy appeared in a manual issued to all Sekuritek staff with instructions to read the policies contained therein. R. 9.

The fire that resulted spread quickly, and chemicals started spilling into the Windy River. R. 7. Emergency responders had difficultly getting to the fire because of a security wall that Sekuritek had erected. R. 7. The effects of the explosion and spill killed twenty-three people, destroyed homes and land, and devastated local

business. R. 7-8. Authorities estimate that the incident caused nearly $1.25 billion in damage. R. 8.

The federal investigation of the chemical spill focused primarily on Mr. Millstone and Mr. Reynolds. R. 9. As the investigation proceeded, Mr. Millstone met with Mr. Reynolds to determine the best course of action. R. 9. At that meeting, Mr. Reynolds suggested he would cooperate with the investigation. R. 9. Mr. Millstone admonished Mr. Reynolds, and reminded Mr. Reynolds that if the Government approached him, he could invoke his Fifth Amendment right against self-incrimination. R. 9. Eventually the government granted Mr. Reynolds immunity in exchange for his testimony, R. 10 n.9, and the United States Attorney for the District of New Tejas brought charges against Mr. Millstone as previously discussed.

SUMMARY OF ARGUMENT

This case presents two examples of government overreaching. First, the government seeks to deprive a citizen of his liberty because of a crime committed with ordinary negligence. Second, the government seeks to punish the innocuous persuasion of witnesses, without proof of actions that are wrongful independent of their motivation. The Government bases these actions on faulty interpretations of the relevant statutes and inaccurate applications of the relevant doctrines that deprives citizens of their right to due process of law.

First, the plain language of the Clean Water Act instructs that criminal negligence, not merely ordinary negligence, is a required element of the offense

under § 1319(c)(1)(A). When interpreting a statute, this Court first examines the plain language of the statute, and if the plain meaning can be determined by reading the statutory language in context, the examination ends. Section 1319(c) provides for "[c]riminal penalties," which provides context for what form of negligence is required to violate the CWA. The plain meaning of the term "criminal negligence" is found in the Model Penal Code and other sources, including sources cited by the court of appeals. Criminal negligence requires the government prove a gross deviation from the applicable standard of care, among other requirements. When § 1319(c)(1)(A) is read in context, criminal negligence is the class of negligence the plain language of the statute requires.

The court of appeals held that the plain meaning of "negligence" in § 1319(a)(1)(A) is ordinary negligence – *any* failure to observe the applicable standard of care. This interpretation produces absurd results, which this Court should avoid by interpreting the CWA to require criminal negligence. The history and tradition of criminal law require the government to prove intent as an element of every offense – a requirement not met by showing ordinary negligence. This Court may avoid this absurd result by interpreting the CWA to require criminal negligence, just as the circuit courts have done with the federal involuntary manslaughter statute, and as the Third Circuit Model Criminal Jury Instructions have done with all negligent federal offenses. The court of appeals' attempt to demonstrate that Congress could have required a higher level of culpability because it did so in a CWA provision for civil penalties is inapposite. Preliminarily, the

comparison rests on the absurd suggestion that Congress would deprive a citizen of liberty on a lower standard than it would deprive a citizen of money for a civil fine. Further, this Court explicitly cautioned against examining civil and criminal culpability requirements in light of one another because they are simply incomparable.

If this Court determines, however, that the court of appeals' interpretation is plausible, then the Court is confronted with an ambiguous statute susceptible to two plausible meanings. In the case of an ambiguous criminal statue, the rule of lenity requires that the statute be interpreted in favor of the defendants, in this case requiring criminal negligence under § 1319(c)(1)(A). Some ambiguous criminal statutes are construed differently, under the doctrine of public welfare statutes. The CWA does not fit into this doctrine, and accordingly punishing ordinary negligence under the CWA violates a defendant's due process rights. The court of appeals finding that the CWA constitutes a public welfare statute was in error. The CWA does not fit into the public welfare exception because the penalties prescribed are too great and the range of products regulated is too broad. The public welfare exception has been limited to statutes with minor penalties and to statutes that regulate a narrow category of dangerous products. The CWA prescribes harsh criminal penalties, including prison time, and the Act regulates a spectrum of products from dirt to industrial chemicals. The court of appeals ignored the confines of the doctrine and applied the doctrine where it has no place. When high criminal penalties are prescribed and the range of products regulated is too broad to put a

person on notice that he or she can be punished for mishandling them, the statute cannot fit into the narrow description of a public welfare statute.

Second, the court of appeals based its holding that Mr. Millstone tampered with a witness on reasoning that this Court has rejected. The court of appeals determined that when Mr. Millstone suggested to Mr. Reynolds that he invoke his Fifth Amendment right against self-incrimination, Mr. Millstone acted "corruptly," because he was motivated by an "improper purpose." This reasoning was based on an analogy between 18 U.S.C. §§ 1503 and 1512(b) – an analogy that this Court has found inapt. Further, the court of appeals overlooked that the federal witness tampering statute elsewhere requires a motivation by improper purpose. The court of appeals' holding is contrary to the plain meaning of the statute – that "corruptly" serves the purpose of characterizing the manner of persuasion at issue, not the defendant's motivation for persuasion. The court of appeals' reasoning impermissibly robbed the word "corruptly" of any independent meaning in the statute, rendering it surplusage.

The court of appeals' holding is contrary to the legislative history of § 1512(b) and this Court's interpretation of the statute. Congress sought to protect witnesses from certain types of persuasion, and accordingly added the adverb "corruptly" to the statute. Congress had already provided three options for the requisite motivation for tampering in § 1512(b)(1)-(3), and thus did not mean to duplicate its prior work when adding "corruptly" to the statute. Congress, in fact, rejected the court of appeals' reasoning when it declined to include such a broad interpretation

of "corruptly," similar to what the government now advocates. If this Court determines, however, that there is more than one plausible interpretation of "corruptly," then the statute is ambiguous and must be interpreted in Mr. Millstone's favor according to the rule of lenity.

Finally, the court of appeals' interpretation allows government overreaching into innocuous persuasion. This Court expressed concern that such overreach could occur if a standard as broad as the government's were given legal effect. A separate meaning must be given to the word "corruptly" in § 1512(b) to avoid this overreaching, and to ensure that the statute as enforced reflects its plain meaning and legislative intent, as well as the precedent of this Court.

ARGUMENT

I. STANDARD OF REVIEW

Both questions present issues of statutory interpretation. The circuit courts have unanimously held that questions of statutory interpretation are reviewed de novo.[1] Though this Court has not explicitly so stated, it has not held otherwise. The first question involves an statutory interpretation in the context of a jury

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[1] *See, e.g.*, *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 139 (1st Cir. 2006); *Raila v. United States*, 355 F.3d 118, 120 (2d Cir. 2004); *Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007); *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010); *United States v. Perez-Macias*, 335 F.3d 421, 425 (5th Cir. 2003); *Ammex, Inc. v. United States*, 367 F.3d 530, 522 (6th Cir. 2004); *APS Sports Collectibles, Inc. v. Sports Time, Inc.*, 299 F.3d 624, 628 (7th Cir. 2002); *Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 537 (8th Cir. 2006); *Hanousek v. United States*, 176 F.3d 1116, 1120-21 (9th Cir. 1999); *Russell v. United States*, 551 F.3d 1174, 1178 (10th Cir. 2008); *Burlison v. McDonald"s Corp.*, 455 F.3d 1242, 1245 (11th Cir. 2006); *Kaseman v. Dist. of Columbia*, 444 F.3d 637, 640 (D.C. Cir. 2006); *Murakami v. United States*, 398 F.3d 1342, 1346 (Fed. Cir. 2005).

instruction. *See* R. 10. Appellate courts review statements of law in a jury instruction like other questions of statutory interpretation, de novo. *See e.g., Badger v. Southern Farm Bureau Life Ins. Co.*, 612 F.3d 1334, 1339 (11th Cir. 2010). Courts will reverse convictions if the jury instruction incorrectly states the law. *See United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996). The second question involves statutory interpretation in the context of a a motion for acquittal. Appellate courts review such questions like other questions of statutory interpretation, de novo. *See, e.g.*, *United States v. Wagner*, 382 F.3d 598, 606-07 (6th Cir. 2004).

II. THE PLAIN LANGUAGE OF THE CLEAN WATER ACT INSTRUCTS THAT THE GOVERNMENT MUST PROVE CRIMINAL NEGLIGENCE, A LEVEL OF CULPABILITY GREATER THAN ORDINARY NEGLIGENCE, TO WIN A CONVICTION UNDER § 1319(c)(1)(A)

Contrary to the plain language of the statute and the principles of criminal law, the court of appeals below interpreted § 1319(c)(1)(A) of the codified Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(1)(A) (2006), to require that a defendant act with only ordinary negligence to merit the imposition of criminal penalties, including imprisonment. R. 11-12. The CWA provides, in relevant part:

> § 1319. Enforcement
>
> . . . .
>
> (c) *Criminal penalties*
>
> (1) Negligent violations
>
> Any person who--
>
> (A) negligently violates [certain CWA requirements] . . .
>
> . . . .

> shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

33 U.S.C. § 1319(c)(1) (emphasis added). Under the court of appeals' interpretation, criminal sanctions are warranted when a defendant "fail[s] to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." R. 11 (quoting Black's Law Dictionary (1996)). This Court should reverse the court of appeals and interpret the statute to require criminal negligence, as defined by the Model Penal Code, because such an interpretation better comports with the plain language of the statute and does not result in the absurd outcome that the court of appeals' interpretation compels.

A. The Plain Language of the Clean Water Act Requires a Level of Culpability Greater than Ordinary Negligence

The plain language of the CWA compels a finding that ordinary negligence is an insufficient ground for criminal conviction under § 1319(c). When statutory language is plain and unambiguous, this Court will enforce the statute according to its terms. *Dodd v. United States*, 545 U.S. 353, 359 (2005); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200 (1976). However, the plain meaning of statutory language depends on the context of the language in question. *Ernst & Ernst*, 425 U.S. at 201; *see also Gonzales v. Carhart*, 550 U.S. 124, 152 (2007). Section 1319(c)(1)(A) punishes anyone who "negligently violates" certain provisions of the CWA. 33 U.S.C. § 1319(c)(1)(A). The section

specifically provides for "[c]riminal penalties."[2] *Id.* § 1319(c). Thus, contextually, the plain language of the statute penalizes *criminal negligence*.

Criminal negligence is a higher standard than ordinary tort negligence. "In interpreting statutory texts courts use the ordinary meaning of terms." *Gonzales*, 550 U.S. at 152; *see also Russello v. United States*, 464 U.S. 16, 21 (1983). The Model Penal Code provides the ordinary meaning of criminal negligence:[3]

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Model Penal Code § 2.02(2)(d) (1962); *see also* Black's Law Dictionary (9th ed. 2009) (defining criminal negligence as "[g]ross negligence so extreme that it is punishable as a crime"). The "gross deviation from the standard of care" required to prove criminal negligence exceeds the standard the court of appeals employed, which was a simple "failure to exercise the standard of care" as would be required to prove

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[2] "[S]tatutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." *Fla. Dep"t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (quoting *Porter v. Nussle*, 534 U.S. 516, 528 (2002)); *see also Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 529-30 (1947). Here, the heading "[c]riminal penalties" provides context to the statutory language.

[3] "[F]ederal courts often look to the Model Penal Code for guidance with respect to mental state concepts." Third Circuit Model Criminal Jury Instructions, Instruction 5.09 cmt., at 33-34 (2011). For examples, see *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 n.18 (2007); *Liparota v. United States*, 471 U.S. 419, 423 n.5 (1985); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978).

ordinary tort negligence. *Compare* Model Penal Code § 2.02(2)(d), *with* R. 11, *and Hanousek v. United States*, 176 F.3d 1116, 1120-21 (9th Cir. 1999) (quoting Black's Law Dictionary 1032 (6th ed. 1990)); *cf. United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000) ("Gross negligence describes a degree of culpability far more serious than tort negligence." (internal quotation marks omitted)).

The court of appeals below, as well as the Ninth Circuit in *Hanousek*, incorrectly ascribed the definition of *ordinary negligence* to the general term *negligence*, overlooking the imposition of "[c]riminal penalties" in § 1319(c). Each court quoted Black's Law Dictionary in making this determination. *See* R. 11, *Hanousek*, 176 F.3d at 1120-21; *accord United States v. Ortiz*, 427 F.3d 1278, 1281-84 (10th Cir. 2005). If the Ninth Circuit had turned the page in Black's, it would have found the correct definition of criminal negligence. *See* Black's Law Dictionary 1033 (6th ed. 1990). The edition of Black's cited by *Hanousek*, in fact, lists nine different varieties of negligence, differentiated by their degree of culpability.[4] The current edition of Black's lists seventeen varieties.[5] Thus, context is needed to arrive at the applicable definition of negligence in any particular case. As discussed,

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[4] *See* Black"s Law Dictionary 1032-34 (6th ed. 1990) (defining active negligence, criminal negligence, culpable negligence, gross negligence, hazardous negligence, ordinary negligence, passive negligence, slight negligence, and willful, wanton or reckless negligence).

[5] Black"s Law Dictionary 1133-35 (9th ed. 2010) (defining active negligence, advertent negligence, casual negligence, criminal negligence, culpable negligence, gross negligence, hazardous negligence, inadvertent negligence, ordinary negligence, passive negligence, reckless negligence, simple negligence, slight negligence, supine negligence, wanton negligence, willful and wanton negligence, and willful negligence).

context dictates that *criminal negligence* is the correct standard in § 1319(c)(1)(A) cases. *Accord United States v. Pardee*, 368 F.2d 368, 374 (4th Cir. 1966) ("[T]he amount or degree or character of the negligence to be proven in a criminal case is gross negligence."). In context, the plain language of the Clean Water Act requires the government prove a gross deviation from the standard of care.

B. The Court of Appeals' Interpretation of the Clean Water Act Results in Absurd Outcomes

The court of appeals found that the plain language of § 1319 allowed ordinary negligence to serve as a basis for criminal liability, but this holding compels an absurd result. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *see also Dodd*, 545 U.S. at 359; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994). Courts must particularly avoid interpretations that result in an absurdity "so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930); *see also Barnhart*, 534 U.S. at 450. Criminalizing ordinary negligence shocks common sense because it is inconsistent with centuries of common law holding that crimes must be committed with intent. Further, the court of appeals' suggestion that § 1319(c)(1)(A) must be defined *in pari materia* with § 1321(b)(7)(D) results in an absurd outcome because it allows courts to imprison defendants at a lower standard than would be needed for the assessment of civil penalties.

1. Requiring Only Ordinary Negligence Compels an Absurd Result Because the Principles of Criminal Law Require More

This Court has long "adhered to the central thought that wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 251-52 (1952); *see also X-Citement Video*, 513 U.S. at 70-71; *Liparota v. United States*, 471 U.S. 419, 424-26 (1985); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978); *infra* Part III.B. Ordinary negligence, which the court of appeals defined as a "failure to exercise the standard of care," R. 11, describes a lack of consciousness or intent, and is accordingly outside the conception of crime as intentional that "took deep and early root in American soil," *Morissette*, 342 U.S. at 251-52. Further, criminalizing ordinary negligence frustrates the criminal law goal of "protect[ing] those who [a]re not blameworthy in mind from conviction." *Id.* at 252. Allowing ordinary negligence to serve as a basis for criminal liability under § 1319 runs contrary to traditional principles of criminal law. *See infra* Part III.B (discussing the history and tradition of criminal law). This result shocks common sense, and accordingly the court of appeals' interpretation compels an absurd result. *See Crooks*, 282 U.S. at 59-60.

In a corollary example, the federal involuntary manslaughter statute penalizes "the commission . . . without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112. The reference to "due caution" approximates the standard for ordinary negligence. *See United States v. Keith*, 605 F.2d 462, 463-64 (9th Cir. 1979). *Compare* 18 U.S.C. § 1112, *with* R. 11. Though this Court has not had occasion to consider the issue, the appellate courts considering

involuntary manslaughter cases have uniformly held that to prove the offense the government must prove gross negligence, not just ordinary negligence.[6] Thus, in the area of involuntary manslaughter the courts have elevated language suggesting an ordinary negligence standard to require gross negligence, in order to better comport with the principle that "the amount or degree or character of the negligence to be proven in a criminal case is gross negligence." *Pardee*, 368 F.2d at 374. Because holding otherwise is contrary to the principles of criminal law, it would "shock the general moral or common sense" and would produce an absurd result to apply an ordinary negligence standard. *Crooks*, 282 U.S. at 59-60.

Interpreting the statute to require criminal negligence is consistent with the legislative purpose of § 1319[7] and with the history and tradition of criminal law. This is the view adopted in the Third Circuit's Model Criminal Jury Instructions, which provide that when any federal crime charged includes negligence as a required element, district courts should instruct juries that the negligence must: "involve[] a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Instruction 5.09 (2011).

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[6] *See, e.g.*, *United States v. Sharma*, 394 F. App"x 591, 597 (11th Cir. 2010); *Wood*, 207 F.3d at 1228; *United States v. Fesler*, 781 F.2d 384, 393 (5th Cir. 1986); *United States v. Schmidt*, 626 F.2d 616, 617 (8th Cir. 1980); *Keith*, 605 F.2d at 463; *United States v. Pardee*, 368 F.2d 368, 374 (4th Cir. 1966).

[7] The overall goal of federal water pollution legislation "is to restore and maintain the chemical, physical, and biological integrity of the Nation"s waters." 33 U.S.C. § 1251(a) (2006). The goal of the enforcement provisions is "that the discharge of toxic pollutants in toxic amounts be prohibited." *Id.* § 1251(a)(3).

The history and tradition of criminal law dictate that ordinary negligence is an insufficient basis for criminal liability because it does not "protect those who [a]re not blameworthy in mind from conviction." *Morissette*, 342 U.S. at 251-52; *see also X-Citement Video*, 513 U.S. at 70-71; *Liparota*, 471 U.S. at 424-26; *U.S. Gypsum Co.*, 438 U.S. at 437; *infra* Part III.B. Criminal negligence, as defined by the Model Penal Code and the Third Circuit Model Criminal Jury Instructions, requires a greater level of culpability than ordinary negligence. Thus, criminal negligence better comports with the principles of criminal law because requiring criminal negligence does not produce the same absurd results that requiring ordinary negligence would, this Court should interpret § 1319 to require criminal negligence. *See Griffin*, 458 U.S. at 575.

2. Any Comparison to the Civil Penalty Provisions in § 1321 of the CWA Are Inapposite

The court of appeals below implicitly applied the canon *in pari materia*[8] to infer that negligence means the same thing in both the criminal and civil parts of the CWA. This analogy must be rejected because it compels absurd results, and because such comparisons have been explicitly rejected by this Court.

[8] *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) ("[T]he question [is] whether identical or similar words should be read *in pari materia* to mean the same thing.").

a. The Court of Appeals' *In Pari Materia* Analysis Results in the Absurd Conclusion that Imprisonment Requires a Lesser Showing of Culpability than Civil Penalties

The court of appeals, as well as the Ninth Circuit in *Hanousek*, suggested that Congress could have required a higher standard of culpability than ordinary negligence in § 1319 because it later did so "in the civil portion of the statute," § 1321(b)(7)(D). R. 11-12; *see also Hanousek*, 176 F.3d at 1121. This suggestion underscores the faulty reasoning utilized by the Ninth and Fourteenth Circuits. The civil portion of the statute, § 1321(b)(7), creates a strict liability civil penalty regime for certain discharges of oil or other hazardous substances, allowing a penalty of up to $25,000 per day of violation or $1,000 per standard unit of discharge. 33 U.S.C. § 1321(b)(7)(A). Subparagraph (D) provides that when a discharge "was the result of gross negligence or willful misconduct," the allowable civil penalties escalate to $100,000 per day of violation or $3,000 per standard unit of discharge. 33 U.S.C. § 1321(b)(7)(D). On the other hand, § 1319(c)(1), the offense charged against Mr. Millstone, allows for a "[c]riminal penalt[y]" – imprisonment for up to one year. The suggestion that a lower standard of culpability is sufficient to merit deprivation of one year of personal liberty than to merit deprivation of $100,000 in fines "shock[s] the general moral or common sense," *Crooks*, 282 U.S. at 59-60, and is an absurd result. This Court must avoid such an interpretation, because there is an alternative interpretation that does not produce absurd results – requiring criminal negligence. *See Griffin*, 458 U.S. at 575 ("[I]nterpretations of a statute which would

produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

b. This Court Has Warned Against Equating Civil and Criminal Culpability Standards

The Ninth and Fourteenth Circuits' cross-references between §§ 1319 and 1321 are also dubious in light of this Court's recent opinion in *Safeco Insurance Co. of America v. Burr*. 551 U.S. 47 (2007). In *Safeco*, insurance companies urged the Court to interpret the culpability requirement of the Fair Credit Reporting Act's civil liability provisions in light of the Act's criminal liability provisions. *Id.* at 60. The Court observed that, under the criminal culpability standard, "the government [must] prove something extra, in contrast to its civil law usage." *Id.*; *see also id.* at 68 n.18 (differentiating civil and criminal recklessness standards). The Court concluded that the civil and criminal standards were incompatible, and that "[t]he vocabulary of the criminal side of FCRA is consequently beside the point in construing the civil side." *Id.* at 60. The court of appeals below, as well as the Ninth Circuit in *Hanousek*, ran afoul of this principle by using the "vocabulary of the [civil] of [the CWA] in construing the [criminal] side." *See id.*; R. 11-12; *Hanousek*, 176 F.3d at 1121. At least one federal court has recognized this implication. *See United States v. Atl. States Cast Iron Pipe Co.*, No. 03–852 (MLC), 2007 WL 2282514, at *14 n.17 (D.N.J. Aug. 2, 2007) (holding that *Hanousek*'s reasoning "was explicitly rejected in . . . *Safeco*, [thus] there is good reason to scrutinize carefully that aspect of *Hanousek*, rather than accepting it as controlling" (citation omitted)). This Court should apply its holding in *Safeco* that civil and criminal culpability

standards are incomparable, and dismiss any appeal to § 1321(b)(7)(D) as a tool for interpreting § 1319(c)(1)(A) *in pari materia*.

III. IF THIS COURT DETERMINES THAT THE CLEAN WATER ACT IS AMBIGUOUS, IT SHOULD APPLY THE RULE OF LENITY, NOT THE PUBLIC WELFARE STATUTE DOCTRINE

This Court should determine that the plain language of the CWA requires the government to prove a level of culpability higher than ordinary negligence. If, however, this Court determines that the court of appeals' interpretation of § 1319 is plausible, the Court is confronted with two plausible interpretations: that either ordinary negligence or criminal negligence is required. This renders § 1319 ambiguous. *See Smith v. United States*, 508 U.S. 223, 239-40 (1993); *see also Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 419 n.2 (2005) (a statute "is ambiguous because its text, literally read, admits of two plausible interpretations"); *Houghton v. Payne*, 194 U.S. 88, 99 (1904). If the CWA is ambiguous, then it is subject to the rule of lenity and should be interpreted in favor of Mr. Millstone, *see Staples v. United States*, 511 U.S. 600, 619 n.17 (1994), to require criminal negligence. If the CWA is ambiguous, it is also susceptible to being considered a public welfare statute, as the court of appeals below found. Because such a broad reading of the public welfare doctrine violates the foundations of the doctrine, its application in this case violates Mr. Millstone's right to due process of law. Accordingly this Court should reject the court of appeals' holding.

A. If this Court Determines that § 1319 is Ambiguous, the Court Should Apply the Rule of Lenity and Interpret the Statute to Require Criminal Negligence

If the CWA is found to be ambiguous, this Court should employ its "longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,'" *Liparota*, 471 U.S. at 427 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)), that is, an "ambiguous criminal statute is to be construed in favor of the accused." *Staples*, 511 U.S. at 619 n.17; *see also U.S. Gypsum Co.*, 438 U.S. at 437; *Bell v. United States*, 349 U.S. 81, 83 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."). Due process generally requires citizens have sufficient notice of the unlawfulness of an offense. *See e.g.*, *Roth v. United States*, 354 U.S. 476, 491 (1957). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427. In light of these important and long-held principles, the rule of lenity counsels strongly in this case that § 1319 should be interpreted in favor of Mr. Millstone. Accordingly, if the Court finds the court of appeals' interpretation of § 1319 plausible at all, this Court must still interpret § 1319 to require criminal negligence, as opposed to ordinary negligence.

B. The Clean Water Act Does Not Fit Into the Narrow Public Welfare Statute Exception

The history and development of the public welfare statute doctrine in this Court instructs that the Clean Water Act is not a public welfare statute. The court of appeals ruled to the contrary, finding that because the CWA is a public welfare statue, Mr. Millstone's Fifth Amendment right to due process of law was not violated when the district court held him criminally liable for ordinary negligence. *See* R. 12. To reach this conclusion, the court of appeals applied a broad reading of the public welfare doctrine and only examined whether the items regulated could cause public harms. See R. 12. This Court has rejected this broad view because more analysis is required. *See X-Citement Video*, 513 U.S. at 72; *Staples*, 511 U.S. at 615-16. The court of appeals' ruling is an error that this Court should reverse, in order to avoid an impermissible broadening of the public welfare doctrine beyond the bounds this Court has established.

The public welfare statute doctrine is an exception to the general rule that prosecutors must prove the defendant's intent as to each element of a crime. *See U.S. Gypsum Co.*, 438 U.S. at 436-37. This Court and lower courts have applied the public welfare exception to cases in which the government attempts to criminally punish ordinary negligence. *See e.g., United States v. Balint*, 258 U.S. 250, 252-53 (1922); *Hanousek*, 176 F.3d at 1121-22. The Court has only applied the public welfare exception, however, to statutes that meet two requirements: (1) the statute must create only petty offenses and prescribe light penalties, *Staples*, 511 U.S. at 617-18; *Morissette*, 342 U.S. at 256; and (2) the statute must deal with a narrow set

of devices or materials that could cause such great harm as to put those using them on notice that the device, material, or harm is regulated, *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564 (1971).

Labeling the CWA as a public welfare statute violates the basic tenants of the doctrine and this Court's precedent. While public welfare statutes generally punish petty offenses and the penalties assessed for violating them are minor, the penalties under the CWA amount to felony penalties, and are simply too harsh to merit public welfare statute status. Further, although the categories of material or devices regulated by public welfare statutes are generally narrow, the CWA regulates pollutants from dirt and sand to industrial chemicals, a range of products that is too broad to merit application of the public welfare exception.

1. This Court Has Rejected the Broad Reading of the Doctrine Employed by the Court of Appeals

It is not disputed that the CWA imposes regulation on chemicals and devices that "may serious[ly] threaten the community's health or safety," *Liparota*, 471 U.S. at 433, and it is not disputed that the act "implicate[s] public welfare." *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996). Those questions alone, however, are not conclusive.

Although some circuits, including the court of appeals in this case, have treated the question of whether a statute regulates substances that may seriously threaten the community as dispositive, *see* R. 12; *Hanousek*, 176 F.3d at 1121, such a view is too broad. The public welfare exception is meant to be an exception, not the rule. *U.S. Gypsum Co.*, 438 U.S. at 437. Allowing anything that seriously

threatens the community's safety to fit into the exception allows for the exception to envelop the rule. *Staples*, 511 U.S. at 616-18; *see also U.S. Gypsum Co.*, 438 U.S. at 436-37.

This Court rejected such a broad, simplistic view in *Staples*, in which this Court refused to extend the public welfare exception to a law governing machinegun sales. *Staples*, 511 U.S. at 615-16. No doubt exists that a machinegun is a danger to the safety of a community. *See Ahmad*, 101 F.3d at 391. In *Staples*, however, this Court did not end its analysis with the question of whether a device or material could be harmful to the community – instead it looked to whether the penalties were too harsh for the exception to apply. *Staples*, 511 U.S. at 617-18. The broad view that all statutes that regulate items that seriously threaten the community qualify as public welfare statutes is contrary to this Court's precedent. In applying such a view of the public welfare exception, the court of appeals committed reversible error. This Court's precedent requires an inquiry into other questions to determine if the statute comports with the public welfare doctrine. *See Staples*, 511 U.S. at 615-618.

2. The Penalties Prescribed by the CWA Are Too Severe To Allow the CWA To Fall Under the Public Welfare Exception

Historically, public welfare offenses were limited to those offenses considered "small," "minor," or "petty." *See Tenement House Dep't of N.Y.C. v. McDevitt*, 109 N.E. 88, 90 (N.Y. 1915); *Morissette*, 342 U.S. at 256. Further, in describing what offenses can constitute public welfare statutes, the Court noted that the "penalties [for such offenses] are relatively small, and conviction does no grave damage to an

offender's reputation." *Morissette*, 342 U.S. at 256. Based on this tradition, this Court has suggested that "absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a *felony offense* as dispensing with *mens rea*." *Staples*, 511 U.S. at 618 (emphasis added). The historical and contemporary analysis dictates that the CWA does not constitute a public welfare statute because its penalties are not petty or small, and violations of the CWA can be punished as felonies. The penalties attached both the CWA are too grave for the constitutional application of the public welfare exception.

a. From a Historical Perspective, the CWA Does Not Constitute a Public Welfare State Because Its Penalties Are Too Harsh, Its Penalties Constitute Felony Penalties, and Its Penalties Will Damage An Offender's Reputation

The degree of the offense charged and the potential penalties have historically been considered in deciding whether a wrongful mens rea is required for conviction. In a decision that this Court found influential in *Morissette*, Judge Cardozo wrote that knowledge of a criminal act or scienter were not required when a crime prescribed only a minor penalty because: "[I]n the prosecution of *minor* offenses there is a wider range of practice and of power. Prosecutions for *petty* penalties have always constituted in our law a class by themselves."[9] *McDevitt*, 109

[9] Judge Cardozo traced the history of the exception, and found that even under English common law, the "nature and extent of the penalty attached to the offense may reasonably be considered." *McDevitt*, 109 N.E. at 90 (quoting *Regina v. Tolson*, (1889) 23 Q.B.D. 168, 177). This rule has carried over to contemporary (*continued*)

N.E. at 90 (emphasis added); *see also Morissette*, 342 U.S. at 257. These offenses are not "crime[s] in the strict sense, but a civil right of action for the benefit of the public." *McDevitt*, 109 N.E. at 90. Additionally, this Court, in determining when a defendant is entitled to a jury trial, defined "petty" offenses as those that are punishable by less than six months in jail. *See Baldwin v. New York*, 399 U.S. 66, 72-73 (1970).

Both the penalties under the CWA demonstrate that the penalties are too harsh to apply the public welfare statute exception. Under § 1319(c)(1), Mr. Millstone faced "a fine not less than $2,500 nor more than $25,000 per day of violation, or . . . imprisonment for not more than 1 year, or both," for any *negligent* violations of § 1311. 33 U.S.C. § 1319(c)(1). A subsequent *negligent* violation can be punished by up to up two years in prison and / or a fine of "not more than $50,000 per day of violation." *Id.* The same section of the statute governs penalties for "knowingly" violating the statute. *Id.* § 1319(c)(2). For knowing violations, an offender can be sentenced for up to three years for a first offense and up to six years for subsequent offenses. *Id.* These penalties for violations of § 1311(a) of the Act are beyond "petty;" rather, they harsh criminal penalties exceeding the standard described by Judge Cardozo and this Court. *See Morissette*, 342 U.S. at 256; *McDevitt*, 109 N.E. at 90. Based on the common law view of the public welfare

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jurisprudence, as this Court has acknowledged that penalties for violating public welfare statutes should be "relatively small." *Morissette*, 342 U.S. at 256.

doctrine, these penalties prove too much to allow the CWA to constitute a public welfare statute.

In addition, the potential penalties under the CWA demonstrate these offenses are punishable as felonies.[10] Crimes are classified by the maximum term of imprisonment authorized to punish their violation. 18 U.S.C. § 3559(a) (2006). A felony is classified as any crime punishable by more than one year of imprisonment. *Id.* Because the CWA clearly provides for imprisonment of more than one year, the CWA can punish violations as felonies. *See* 33 U.S.C § 1319(c); 18 U.S.C. § 3559(a). This further underscores that the CWA cannot be a public welfare statute, because "punishing a violation as a felony is simply incompatible with the theory of public welfare offense." *Staples*, 511 U.S. at 618.

Finally, throughout the history of the public welfare doctrine, courts, including this Court, have expressed concern with applying the public welfare exception to penalties that will do damage to a person's reputation. *See Morissette*, 342 U.S. at 256. In *Morissette*, this Court noted that conviction for public welfare offenses "does not do grave damage to an offender's reputation." 342 U.S. at 256. This Court acknowledged in *Baldwin*, however, that "the prospect of imprisonment

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[10] Although Mr. Millstone is not subject to imprisonment for more than one year, under this charge, a defendant who knowingly violates or is a subsequent negligent violator is subject to more than one year. 33 U.S.C. § 1319(c). Applying the public welfare doctrine to only first negligent offenses would allow a person to be held liable for ordinary negligence on a first offense, but require the government prove criminal negligence on the person"s second offense. This is an absurd result, "so gross as to shock the general moral or common sense." *Crooks*, 282 U.S. at 59-60. This would inexplicably change the meaning of the word "negligent" depending on the facts of each case.

for however short a time . . . may well result in quite serious repercussions affecting [a person's] career and [a person's] reputation." 399 U.S. at 73. It follows that because an offense carries the prospect of imprisonment, conviction will damage the reputation of the offender. Additionally labeling a person a felon has substantial impact on their reputation and is "as bad a word as you can give to man or thing." *Morissette*, 511 U.S. at 260 (quoting 2 F. Pollock & F. Maitland, History of English Law 465 (2d ed. 1899)).

b. Increasing CWA Penalties Demonstrates that Congress Did Not Intend the CWA To Be a Public Welfare Statute

Whether contravention of an act constitutes a federal crime is a question of Congressional intent, viewed through the lens of statutory construction and "inferences of the intent of Congress." *United States v. Balint*, 258 U.S. 250, 253 (1922). Preliminarily, Congress knows and understands the courts' precedents when enacting legislation. *See e.g., Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1795 (2010); *Edelman v. Lynchburg College,* 535 U.S. 106, 116–17, & n. 13 (2002). The CWA criminal penalty section was originally in enacted in 1972.[11] *See* Federal

[11] Congress enacted the first iteration of the modern CWA as the Water Pollution Control Act of 1948. Pub. L. No. 80-845, 62 Stat. 1155. Though the 1948 Act, as amended, provided civil remedies for federal and state agencies to avail themselves of, it did not provide for criminal penalties. *See id.*; Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498. Congress first provided for criminal sanctions for "[a]ny person who willfully or negligently" violated the law in the Federal Water Pollution Control Act Amendments of 1972. Pub. L. No. 92-500, § 309(c)(1), 86 Stat. 816, 860. The Clean Water Act of 1977 did not substantially alter this wording. *See* Pub. L. No. 95-217, 91 Stat. 1566. Finally, the Water Quality Act of 1987 provided most of the current language of § 1319. Pub. L. No. 100-4, § 312, 101 Stat. 7, 42-43; *see* (*continued*)

Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 1319(c)(1), 86 Stat. 816, 860. Congress separated knowing violations from negligent violations, doubled the fines and tripled the terms of imprisonment prescribed for knowing violations in 1987. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 7, 42-43. Congress again amended the penalty portions of the CWA in 1990. *See* Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484. This track record indicates Congressional awareness of the significant criminal penalties it has historically prescribed, and recently raised, under the CWA. Because Congress is aware of this Court's precedent when drafting statutes, *Merck & Co.*, 130 S. Ct. at 1795; *Edelman,* 535 U.S. at 116–17, & n. 13, Congress could not have intended the CWA to constitute a public welfare statute in light of this Court's 1952 *Morissette* decision.

Morrissette made clear that public welfare statutes impose "minor" penalties. 342 U.S. at 256. Even before *Morissette*, the common law tradition was clear – the public welfare exception is intended for petty offenses, *see McDevitt*, 109 N.E. at 90, and this Court defines "petty offenses" as those with a term of less than six months imprisonment. *Baldwin*, 399 U.S. at 73. Yet, in face of this precedent, Congress has chosen to provide for terms of imprisonment that are not minor, and by definition, felony penalties. *See supra* Part III.B.2. This demonstrates that Congress did not intend the CWA to be a public welfare statute.

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also Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (making a non-substantive amendment, bringing § 1319 into its current form).

3. The Wide Range of Devices and Substances Regulated Under the CWA Is Not Limited to "Dangerous or Deleterious" Products

As discussed, the fact that the CWA may implicate public health and welfare is not dispositive. With that in mind, this Court has limited its application of the public welfare doctrine to statutes that regulate a narrow class of items. This Court has recognized that some items, although dangerous, may be "so commonplace and generally available that [the Court] would not consider them to alert individuals to the likelihood of strict regulation." *Staples*, 511 U.S. at 611. The CWA regulates many items – such as soil, sewage and garbage – that are little if not "commonplace." *Id.*; *see* 33 U.S.C. § 1362 (2006). Further, the CWA regulates such a broad scope of materials that it must fall outside this Court's traditional boundaries for public welfare statues. The overreaching view that all statutes regulating items threatening to the community qualify as public welfare statutes is contrary to this Court's precedent, and the court of appeals below erred in adopting it.

a. The Range of Substances Regulated by the CWA Is Too Broad for the Public Welfare Exception

Although it alone is not determinative, the public welfare doctrine may apply to the regulation of "dangerous or deleterious devices or products or obnoxious waste materials." *United States v. Int'l Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971). Further, "as a threshold matter [in determining] whether a particular statute defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in 'responsible relation to a public danger.'" *Staples*, 511 U.S. at 613 n.6.

There are times, however, that "'even dangerous items can . . . be so commonplace and generally available' that [this Court] would not consider regulation of them to fall within the public welfare doctrine." *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari) (quoting *Staples*, 511 U.S. at 611) (alteration omitted).

The CWA imposes regulation on a wide range of products, wastes, and devices, which inevitably includes some items that are so commonplace, even if sometimes considered dangerous, that they do not qualify for the public welfare exception. *See id.* Along with industrial chemicals, § 1362 includes in its definition of pollutants "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362. Cases have been brought under § 1319 of the CWA to punish, for example, the discharge of "fill materials," which are simply a mix of sand, rock, and dirt. *See, e.g.*, *S. Pines Associates by Goldmeier v. United States*, 912 F.2d 713, 714 (4th Cir. 1990); *Parkview Corp. v. Dep't of Army Corps of Engineers*, 469 F. Supp. 217, 219 (E.D. Wis. 1979). This Court has noted that commonplace materials may regulated, such as "[p]encils, dental floss, [and] paper clips . . . [b]ut they may be the type of products which might raise substantial due process questions if Congress did not require . . . 'mens reas.'" *Int'l Minerals & Chemicals Corp.*, 402 U.S. at 564-65. Similarly, as Justice Thomas noted, applying the exception to the CWA would

"expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations." *Hanousek*, 528 U.S. at 1103 (Thomas, J., dissenting from denial of certiorari). Dirt and rock are more analogous to paper clips and dental floss than to heavy industrial chemicals. Some items listed in § 1362's definition can be dangerous, but they are also too commonplace to trigger the public welfare exception.

b. This Court's Application of the Public Welfare Doctrine Has Been Limited to Situations in Which the Materials Regulated Were of a Very Limited and Narrow Scope

This Court's application of the public welfare doctrine has been limited to statutes that narrowly regulate a dangerous product or device. *See Int'l Minerals and Chem. Corp.*, 402 U.S. at 564.[12] In *International Minerals*, the public welfare exception was applied to a regulation that dealt specifically with "sulfuric acid and hydroflosilicic acid," both corrosive liquids. 402 U.S. at 559. This narrow category of products constituted "dangerous or deleterious devices." *Id.* at 564. Similarly, in *United States v. Balint*, the exception was applied to the Narcotic Act, which had the "incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs." 258 U.S. at 253. The Court categorized the products regulated by the act as "poisonous," "dangerous," and "noxious," and further, the Act

[12] The Court in *International Minerals* highlighted the times it has applied the public welfare statute exception: "In Balint the Court was dealing with drugs, in Freed with hand grenades, in [International Minerals] with sulfuric and other dangerous acids." 402 U.S. at 564.

only regulated derivatives of opium and coca leaves. *Id.* at 251-54. Both of these Acts regulated narrowly defined categories of highly dangerous materials.

On the other hand, as discussed, the CWA regulates a wide range of products. A wide range of people come into contact with such products, so untold numbers of people may potentially be held liable for discharge. A simple mixture of sand, dirt, and rock can constitute a "pollutant." 33 U.S.C. § 1362. This Court, time and time again, has applied the public welfare exception when the items regulated are narrowly defined. Although pollutants can be harmful, the CWA regulates too wide a range of products to qualify as a public welfare statute under this Court's prior holdings.

Convicting Mr. Millstone under the guise that the CWA constitutes a public welfare statute violates his right to due process of law. For centuries, the public welfare statute exception to the general *mens rea* requirement has only been applied to offenses with minor penalties. The CWA's penalties are too harsh to qualify it as a public welfare statute. Finally, the CWA regulates pollutants from sand and dirt to highly destructive radiological and chemical waste. This range of substances is too wide for the CWA to be considered a public welfare statute – not all of the regulated pollutants may be considered so dangerous as to assume that those handling them are on notice that they are highly regulated.

IV. THE COURT OF APPEALS' DEFINITION OF THE WORD "CORRUPTLY" IN THE FEDERAL WITNESS TAMPERING STATUTE IS AT ODDS WITH THIS COURT'S PRECEDENT, AND THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE STATUTE

The court of appeals' definition of the word "corruptly," as used in § 1512(b), runs counter to this Court's holding in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the plain language of the statute, and the legislative history of the statute. These sources of authority instruct that the word "corruptly" describes *how* a defendant corruptly persuades a witness, and the intent requirements of § 1512(b)(1)-(3) describe *why* a defendant corruptly persuades a witness. To conflate the two renders one or the other superfluous, and is therefore not consistent with the plain language of the statute. Because "corruptly" must have a meaning independent of a defendant's motivation, mere persuasion that does not meet this Court's definition of "corruptly" cannot provide a sufficient basis for criminal liability. Persuading another to invoke his or her Fifth Amendment right against self-incrimination, and nothing more, is innocuous conduct that does not amount to witness tampering under § 1512(b).

In *Arthur Andersen*, this Court rejected the foundations of the court of appeals' reading of § 1512. The court of appeals nonetheless continued to apply an impermissibly lax standard. Additionally, the *Arthur Andersen* Court held that defendants must be conscious of the wrongful nature of their act to be criminally liable under § 1512(b). This Court, in *Arthur Andersen*, and Congress in its legislative history, have instructed that the word "corruptly" describes the manner of persuasion at issue, based on its wrongful nature and its effect on the

witness being tampered with. The Court and Congress place motivation by an "improper purpose" in its rightful place in the statute: the three improper purposes described in § 1512(b)(1)-(3). In light of this Court's precedent and Congressional intent, the court of appeals' interpretation of § 1512(b) is erroneous because it punishes defendants for their motivation alone.

A. This Court's Decision in *Arthur Andersen* Controls, and Requires that the Court of Appeals' Interpretation of § 1512(b) be Rejected

This Court's decision in *Arthur Andersen*, 544 U.S. 696 (2005), rejected the view that § 1512(b), part of the federal witness tampering statute, should be read through the lens of § 1503, the federal obstruction of justice statute. *Id.* at 706, n. 9. In so doing, this Court discarded the foundation for the argument that the word "corruptly" in the witness tampering statute should be read *in pari materia* with the same word in the obstruction statute to require "motivation by an improper purpose." The court of appeals ignored this holding. Instead, the court rested its holding on the same logic this Court discarded in *Arthur Andersen*, concluding that motivation by an "improper purpose" alone is a sufficient basis for criminal liability. R. 15. Additionally, although this Court held that § 1512(b) required a showing that the defendant was "conscious of wrongdoing," the court of appeals made no finding to meet this requirement. Other lowers courts, including the authorities cited by the court of appeals, have approved new evidentiary requirements in light of *Arthur Andersen* that the court of appeals ignored.

1. The Court of Appeals' Decision Did Not Comport With this Court's Holding in *Arthur Andersen*

The court of appeals erred in deciding that *Arthur Andersen* did not control. The court of appeals applied the Second and Eleventh Circuits' interpretation of the statute. R. 15. When presented with the same opportunity in *Arthur Andersen*, however, this Court expressly declined to do so. Before this Court considered *Arthur Andersen*, the Second and Eleventh Circuits had interpreted the word "corruptly" in § 1512(b) through the lens of 18 U.S.C. § 1503. *See, e.g.*, *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). Both circuit courts concluded that "corruptly" should be given the same meaning in § 1512(b) as in § 1503, that is, simply "motivated by an improper purpose." *Shotts*, 145 F.3d at 1301; *Thompson*, 76 F.3d at 452. The court of appeals below applied the same logic and adopted the same standard. R. 14-15.

This Court's unanimous opinion in *Arthur Andersen* recognized that distinctions between §§ 1503 and 1512 rendered the Second and Eleventh Circuits' analogy "inexact," and accordingly the Court overruled the Government's contention that § 1503's definition of "corruptly" should apply to § 1512(b). *See* Arthur Andersen, 544 U.S. at 704-05; Brief for the United States, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 U.S. S. Ct. Briefs LEXIS 310 at *40 (defining the Government's position). Citing different mens rea requirements, between the two sections, the Court rejected any comparison between §§ 1503 and 1512(b)'s use of "corruptly." *Id.* at 706, n. 9.

The differences between §§ 1503 and 1512 that the Court identified demonstrate why the structure of § 1512 requires a definition of corruption independent from motivation by improper purpose. Some courts reviewing § 1503 have found that "corruptly" is the statute's singular intent element. *See United States v. Farrell*, 126 F.3d 484, 490 (3d Cir. 1997) (citing *United States v. Barfield*, 999 F.2d 1520, 1524 (11th Cir. 1993); *United States v. Bashaw*, 982 F.2d 168, 170 (6th Cir. 1992); *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1979)). As such, interpreting "corruptly" within § 1503 to mean "motivated by an improper purpose" is "entirely appropriate given the structure of that statute," which would lack a mens rea requirement without such an interpretation. Farrell, 126 F.3d at 490. This differs from § 1512, which includes multiple intent elements, including that defendants act "knowingly," and with a specific intent listed in § 1512(b)(1)-(3). A direct analogy between the two usages of "corruptly" within §§ 1503 and 1512 is inappropriate because in the former, "corruptly" clearly references the defendant's state of mind, whereas in the latter, "corruptly" is simply describing the wrongful methods used by the defendant in his persuasive efforts.

Contrary to this Courts' precedent, the court of appeals erred by continuing the improper application of the Second and Eleventh Circuits' justifications in its finding that a defendant's acting with an "improper purpose" could be sufficient for conviction.

2. The Court of Appeals' Test Ignores the Additional Requirement Set Forth By This Court in *Arthur Andersen*

This Court held in *Arthur Andersen* that by requiring a defendant "knowingly . . . corruptly persuade[] another person," Congress required the Government prove a "conscious[ness] of wrongdoing" to merit a conviction under § 1512(b). 544 U.S. at 706. The plain meaning of the statute requires that this "consciousness of wrongdoing" be separate from the question of motivation. *See infra* Part IV.B. The court of appeals contended that the inquiries into "consciousness of wrongdoing" and motivation could be consolidated because other courts have continued to apply the "improper purpose" definition to "corruptly" even after this Court's unanimous holding in *Arthur Andersen*. R. 15. According to the court of appeals, "the improper purpose provides the consciousness of wrongdoing described in *Arthur Andersen*." R. 15. Even one post-*Arthur Andersen* case cited by the court of appeals, however, required more than just an improper purpose under § 1512(b).

In one of the cases cited by the court of appeals, *United States v. Kaplan*, 490 F.3d 110, 125-127 (2nd Cir. 2006), the Second Circuit approved a new requirement in light of this Court's decision in *Arthur Andersen*. *Id.* at 125-27. Upholding a jury instruction regarding § 1512(b), the court noted that the instruction was sufficient under *Arthur Andersen* because, in addition to finding an "improper purpose," it required the jury to find "unlawful intent." *Id.* at 126. Though still questionable, this standard at least addressed the need to prove consciousness of wrongdoing. The analysis of the court of appeals below did not address any sort of consciousness of

wrongdoing aside from holding that it can be inferred if the defendant was "motivated by an improper purpose." R. 15.[13] Although Kaplan is cited for the proposition that Arthur Andersen did not require a change to the analysis, the Kaplan Court did in fact describe a new factor, separating the question of motivation from the question of consciousness. 490 F.3d at 126. The court of appeals made no similar requirement in its holding and the decision of the court of appeals should be reversed because its test did not require a consciousness of wrongdoing.

B. The Fourteenth Circuit's Interpretation of "Corruptly" as "Motivated by an Improper Purpose" Is at Odds with the Natural Reading and Structure of § 1512(b)

Contrary to the court of appeals' holding that "corruptly" should be defined as "motivated by an improper purpose," R. 14, the statute's plain language instructs that "corruptly" must be read to give it a meaning independent from the statute's motivation requirements, § 1512(b)(1)-(3). The court of appeals read the word "corruptly," as well as § 1512(b)(1)-(3), to describe *why* a person persuades witness, ignoring the question of *how* the witness is persuaded. This interpretation impermissibly renders either the word "corruptly" or § 1512(b)(1)-(3) superfluous.

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[13] The court of appeals also cited to *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006) for the proposition that "courts since *Arthur Andersen* have continued to hold that "corruptly" means "motivated by an improper purpose," and that the improper purpose provides the consciousness of wrongdoing described in *Arthur Andersen*." R. 15. *Gotti* is inapposite because it simply ignores the holding of *Arthur Andersen*, and cites to *Thompson*, 76 F.3d at 442. *See Gotti*, 458 F.3d at 342-43. As discussed, the foundations of *Thompson* were discredited by this Court"s holding in *Arthur Andersen*. The Second Circuit"s decision in *Kaplan* is more relevant because it discusses the requirements for conviction post-*Arthur Andersen*. *See* 490 F.3d at 125-127.

The plain language of the statute uses "corruptly" to characterize the type of persuasion at issue, but the court of appeals' opinion ignores this requirement.

1. The Plain Language of § 1512(b) Instructs that "Corruptly" Describes the Character of Persuasion, Rather than Restating the Motivation Requirement

When statutory language is plain and unambiguous, this Court will enforce the statute according to its terms. *Dodd*, 545 U.S. at 359; *Barnhart*, 534 U.S. at 450; *Ernst & Ernst*, 425 U.S. at 200; *see also* Arthur Andersen, 544 U.S. at 705 ("the natural meaning of [knowingly and corruptly] provides a clear answer"). The plain meaning of statutory language depends on the context of the language in question. *Ernst & Ernst*, 425 U.S. at 201; *see also Gonzales*, 550 U.S. at 152.

"In interpreting statutory texts courts use the ordinary meaning of terms." *Gonzales*, 550 U.S. at 152; *see also Russello*, 464 U.S. at 21. Although the term "corruptly" is generally seen as synonymous with "wrongful, immoral, depraved, or evil," *see Arthur Andersen*, 544 U.S. at 705 (citations omitted), the "longstanding and well-accepted" legal definition of "corruptly" is acting "with the intent to give some advantage inconsistent with official duty and the rights of others." *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., dissenting in part, concurring in part) (quoting *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir. 1979), *cert. denied*, 449 U.S. 825 (1980)). Webster's defines "corrupt" as "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 (2002). These indications of the ordinary meaning of corrupt all

demonstrate that "corruptly" in § 1512(b) is an adverb modifying "persuades," not an adjective describing a defendant's motivation. Under a natural reading of § 1512(b), which the court of appeals ignored, persuasion reaches "corrupt" status if it entails independent acts of wrongdoing such as bribery and suborning perjury.

This natural reading of "corruptly" within § 1512(b) is supported by the canon *noscitur a sociis*. The canon instructs that "the coupling of words together shows that they are to be understood in the same sense," that is, "where the meaning of any particular word is doubtful or obscure, the intention of the [legislature] may frequently be ascertained and carried unto effect by looking at the adjoining words." *Neal v. Clark*, 95 U.S. 704, 708-09 (1877); *see also United States v. Williams*, 553 U.S. 285, 294 (2008). The phrase "corruptly persuades" is within a list of prohibited actions in § 1512(b): "whoever knowingly uses *intimidation*, *threatens*, or *corruptly persuades* another person, or *attempts* to do so, or *engages in misleading conduct* toward another person" may violate the statute if the defendant acts with an intent listed in § 1512(b)(1)-(3). 18 U.S.C. § 1512(b) (emphasis added). Each item listed in §1512(b)'s opening statement is a specific wrongful act directed at an individual, which is wrongful for reasons separate from a defendant's motivation. *Noscitur a sociis* instructs that "corruptly persuades" must be "understood in the same sense," *Neal*, 95 U.S. at 708-09, as "intimidat[es], threatens [or] engages in misleading conduct," that is, wrongful conduct independent from the intent requirements of § 1512(b)(1)-(3). In light of this canon, then, persuasion is only "corrupt" if it entails independent acts of wrongdoing.

2. The Court of Appeals' Interpretation of "Corruptly" Impermissibly Renders "Corruptly," or § 1512(b)(1)-(3), Superfluous

The court of appeals' interpretation of the witness tampering statute cannot stand, because it would render part of the statute superfluous. It is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)). As discussed, the court of appeals interpreted the word "corruptly" to mean "motivated by an improper purpose." R. 14-15 (quoting *Thompson*, 76 F.3d at 452). The statute independently requires, however, as applicable to this case, that a defendant act "with intent to . . . hinder, delay, or prevent the communication . . . of information relating to the commission or possible commission of a Federal offense." § 1512(b). Accordingly, the court of appeals' interpretation would allow a court to satisfy both the elements of corrupt persuasion and intent to hinder with the same facts. This renders one or the other of the elements superfluous, and impermissibly interprets the statute to contain surplusage.

As the dissent below points out, the court of appeals essentially rewrites the statute to require a defendant act: "[(1)] knowingly[; (2)] with the *improper purpose* of hindering, delaying, or preventing communication to a law enforcement officer[; (3) to] persuade[] another person[; (4)] with the *intent* to hinder, delay, or prevent

communication to a law enforcement officer." R. 21 (emphasis added) (alterations omitted). "It is [this Court's] duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). As the dissent points out, the court of appeals' interpretation does not give an effect to the word "corruptly" independent of the effect of the "intent" requirement. R. 21. Thus, the court of appeals' interpretation renders either the word "corruptly," or perhaps all of § 1512(b)(1)-(3), surplusage, because their intent requirements are already addressed by requiring the persuasion be "corrupt[]."

The Court is ordinarily reluctant "to treat statutory terms as surplusage." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Ore.*, 515 U.S. 687, 698 (1995); *see also Ratzlaf v. United States*, 510 U.S. 135, 140 (1994). Accordingly, the Court should be reluctant to accept the court of appeals' interpretation. By giving an independent meaning to "corruptly," consistent with the plain language of the statute and its legislative history, the Court can avoid creating surplusage in the statute and thereby remain consistent with its precedent on statutory interpretation.

C. The Statutory Purpose and Legislative History of § 1512(b) Instruct that "Corruptly" Must Have Meaning Independent from the Motivation Element of the Statute

The court of appeals read § 1512 to provide for the conviction of defendants whose conduct is wrongful for reasons unrelated to the conduct's effect on a potential witness or victim. This interpretation is contrary to the statutory purpose

and legislative history of § 1512, which instruct that the statute's clear purpose is to protect victims and witnesses from intimidation, harassment, or corruption. This Court examines the legislative purpose and statutory history both to inform and confirm its understanding of the context of a statute,[14] and to determine Congress's intent when a statute is ambiguous.[15] The available legislative history of the federal witness tampering statute shows that Congress meant the word "corruptly" to impose a requirement independent of the intent requirements of § 1512(b)(1)-(3), and thus the court of appeals erred in consolidating the two requirements into one.

The Victim and Witness Protection Act of 1982 ("VWPA"), Pub. L. No. 97-291, 96 Stat. 1248, added §1512 to the United States Code. Senate hearings regarding the potential enactment of the VWPA centered on the problem of "victim and witness intimidation." S. Rep. No. 97-532, at 15 (1982). At the time of its initial enactment, § 1512(b) did not contain the language "corruptly persuades." Congress, however, considered and rejected incorporating a broad obstruction of justice provision that would have mirrored the court of appeals' interpretation of §1512(b), because it would have set such a low threshold for criminal liability that Congress

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[14] *See e.g., United States v. Wells*, 519 U.S. 482, 492 (1997); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 158 (1972) ("[W]hile the clear meaning of statutory language is not to be ignored, "words are inexact tools at best," . . . and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history." (internal citations omitted)).

[15] *See, e.g.*, *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity.").

determined it was beyond the scope of the statute. *See* S. 2420, 97th Cong., § 1512(a)(3), 128 Cong. Rec. S3856 (daily ed. Apr. 22, 1982).

The VWPA's original draft included a clause that would have applied to "whoever . . . does any other act . . . with intent to influence improperly, or to obstruct or impair the administration of justice." *Id.* That is, the original VWPA would have punished mere persuasion – "any other act" – that is motivated by an improper purpose. The court of appeals below imposed this exact scheme on § 1512 through its interpretation of "corruptly persuades" – persuasion that is motivated by an "improper purpose." R. 14. The court of appeals' obstruction-like interpretation would criminalize conduct based on a defendant's *motive*, instead of the conduct's harmful effect on witnesses and victims. Congress specifically rejected the interpretation that mere persuasion is a sufficient basis for criminal liability in the final VWPA because it would have been "beyond the legitimate scope of this witness protection measure." 128 Cong. Rec. 26,810 (1982).

Congress added the phrase "corruptly persuades" to § 1512(b) in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. The co-author of the legislation, then-Senator and Chairman of Senate Committee on the Judiciary Joseph Biden, "drafted a section-by-section analysis" of the new act's provisions in order to "help[] . . . those who wish to know the intent of the drafters of the legislation." 134 Cong. Rec. S17,360 (daily ed. Nov. 10, 1988). In his analysis, Senator Biden memorialized Congress' intent in adding corruptly persuades: "to address an omission in the [VWPA] identified by the Second Circuit in *United*

States v. King." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988) (citing 762 F.2d 232 (2d. Cir. 1985)). Congress did not make the addition, then, to change the main statutory purpose it had articulated in 1982. *See* S. Rep. No. 97-532, at 15 (1982) ("[T]o strengthen existing legal protections for victims and witnesses of Federal crimes.").

In *King*, the defendant attempted to bribe a witness in exchange for his silence, and also tried to persuade the witness to lie to prosecutors about his involvement in a counterfeiting operation. *King*, 762 F.2d at 236-37. The Second Circuit held that such "nonmisleading, nonthreatening, nonintimidating attempt[s] to have a person give false information to the government" or to obtain his silence were not covered by the original version of § 1512. *Id.* at 238. Thus, in order to close the § 1512 "gap" recognized by the Second Circuit,[16] Congress amended § 1512 to criminalize "corrupt persuasion." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988).

Senator Biden provided examples of "corrupt persuasion," such as "preparing false testimony for [a] witness, or offering a witness money in return for false testimony." *Id.* In addition, every judicial decision referenced by Senator Biden in his analysis of § 1512 involved independently wrongful efforts to influence

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[16] *See King*, 762 F.2d at 238; *see also United States v. Hernandez*, 730 F.2d 895 (2d Cir. 1984) (holding that noncoercive tampering was considered outside the scope of § 1512 as originally enacted); *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984) (holding that a defendant"s noncoercive hiding of a witness did not violate § 1512 as originally enacted).

witnesses that went above and beyond mere persuasion.[17] Thus the legislative history of § 1512(b) provides further proof that the mere encouragement of a potential witness to invoke his or her Fifth Amendment right against self-incrimination is not a sufficient basis for criminal liability because it is not independently wrongful. Congress never intended to punish the innocuous act of persuading someone who has a constitutional right to withhold information to withhold that information. Congress has repeatedly rejected such an interpretation. Section 1512 and its "corruptly persuades" language are simply meant to ensure that victims and witnesses are protected, and to punish non-coercive attempts to hinder law enforcement investigations that could be independently viewed as "wrongdoing," such as bribery, or inducements to lie under oath.

D. If this Court Determines that the Witness Tampering Statute Is Ambiguous, It Should Apply the Rule Lenity and Interpret the Statute to Require an Independent Meaning of "Corruptly"

This Court should determine that the plain language of the witness tampering statute instructs that to "corruptly persuade[]" a person is not simply a restatement of the statute's intent requirement. *See supra* Part IV.B. If, however,

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[17] *See United States v. Risken*, 788 F.2d 1361, 1364-65 (8th Cir. 1986) (involving a defendant"s attempt to hire a "hitman" to kill a potential grand jury witness and witness bribery); *King*, 762 F.2d at 236-37 (involving bribery of witness and inducement to testify falsely); *United States v. Vesich*, 724 F.2d 451, 453 (5th Cir. 1984) (involving a defendant"s attempt to persuade a potential grand jury witness to testify falsely); *United States v. Gates*, 616 F.2d 1103, 1107 (9th Cir. 1980) (involving a defendant"s preparation of false testimony to a grand jury witness); *Lester,* 749 F.2d at 1290-91 (involving defendant"s non-coercive attempt to induce a witness to become unavailable to testify); *Hernandez*, 730 F.2d at 897 (involving defendant"s physical threats to a witness in order to obtain documentary evidence).

this Court determines that the court of appeals' interpretation of the statute is plausible, the Court is confronted with more than one plausible interpretations. This renders the statute ambiguous. *See Smith*, 508 U.S. at 239-40; *see also Graham Cnty. Soil & Water Conservation Dist.*, 545 U.S. at 419 n.2 (a statute "is ambiguous because its text, literally read, admits of two plausible interpretations"); *Houghton*, 194 U.S. at 99. If the witness tampering statute is ambiguous, then it is subject to the rule of lenity and should be interpreted in favor of Mr. Millstone, *see Staples*, 511 U.S. at 619 n.17, to require an independent meaning of the word "corruptly," distinct from "motivat[ion] by an improper purpose," R. 14-15 (quoting *Thompson*, 76 F.3d at 452), which is already required by § 1512(b)(1)-(3).

If the witness tampering statute is found to be ambiguous, this Court should employ its "longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,'" *Liparota*, 471 U.S. at 427 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)), that is, an "ambiguous criminal statute is to be construed in favor of the accused." *Staples*, 511 U.S. at 619 n.17; *see also U.S. Gypsum Co.*, 438 U.S. at 437; *Bell*, 349 U.S. at 83. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427. In light of these important and long-held principles, the rule of lenity counsels strongly in this case that the witness tampering statute should be interpreted in favor of Mr. Millstone. Accordingly, if the Court finds the

court of appeals' interpretation of the statute plausible at all, this Court must still reinterpret the statute to require more than a duplicative restatement of the statute's intent requirement.

E. Ratifying the Court of Appeals' Standard Will Foster Government Overreaching by Allowing the Punishment of Innocuous Persuasion – A Development that Concerned this Court in *Arthur Andersen*

This Court expressed concern in *Arthur Andersen* that the Government could punish defendants for mere persuasion; "innocuous" acts lacking any wrongful quality. *Arthur Andersen*, 544 U.S. at 703. With that in mind, this Court noted that there is nothing "inherently malign" in simply persuading another "with intent to cause that person to withhold testimony or documents from a Government proceeding or Government official." *Id.* at 703-04 (alterations and internal quotation marks omitted). The *Arthur Anderson* Court directly referenced § 1512(b) as subject to its conclusion that persuasion alone, even if motivated by an intent to withhold information from government officials, cannot be considered a malign or corrupt act. *See id.* at 704, n.8.

This Court opined that there would be nothing "malign" about a "mother who suggests to her son that he invoke his right against compelled self-incrimination," *Id.* at 704 (citing U.S. Const., amend. V), nor would "a wife who persuades her husband not to disclose marital confidences" be guilty of any malign act, *id.* (citing *Trammel v. United States*, 445 U.S. 40 (1980)). Further, it is not "necessarily corrupt for an attorney to persuade a client with the intent to cause that client to withhold documents from the Government." *Id.* (alterations and internal quotation

marks omitted). The examples provided by the *Arthur Andersen* Court demonstrate that simply persuading another to invoke a legal right or privilege that he rightfully possesses – with nothing more – is not the type of "wrongful, immoral, depraved, or evil" act that would qualify as "corrupt" under § 1512(b), regardless of the persuader's motivation. *See id.* at 705.

Similar to the *Arthur Andersen* Court's examples, there is nothing corrupt or malign about the mere encouragement of another to invoke his or her Fifth Amendment right against self-incrimination. Each of the examples listed by the *Arthur Andersen* Court deal with a legal right. Similarly this case deals with invoking a legal right not to testify. The court of appeals concluded that a jury could find that Mr. Millstone's statement to Mr. Reynolds was motivated by an improper purpose. R. 15. Just as a mother to her son, or a husband to his wife, the statement in this case was innocuous.

The *Arthur Andersen* Court's examples would have been different had the mother, attorney, or wife had suggested that the other person leave town or testify falsely. Such an action would demonstrate a consciousness of wrongdoing separate from an improper motive on the part of the party suggesting the unlawful action. *See Arthur Andersen*, 544 U.S. at 705-06. There is no allegation that Mr. Millstone did anything more than tell Mr. Reynolds he should invoke his Fifth Amendment right to remain silent. Even assuming, arguendo, that Mr. Millstone intended to keep information from government officials, and that his motive was improper, this Court's reading of § 1512(b) would still not define Mr. Millstone's actions as corrupt.

Just as in the examples of mother, wife, and lawyer, Mr. Millstone only suggested Mr. Reynolds avail himself of his constitutional rights. That mere encouragement is not corrupt.

CONCLUSION

The questions in this case present issues of government overreaching based on incorrect readings of the applicable statutes, and inaccurate applications of the relevant doctrines. The Government's reading of the statutes exceeds their plain language and deprives citizens of their right to due process of law. For the foregoing reasons, the judgment of the Fourteenth Circuit court of appeals should be reversed.

Respectfully submitted.

TEAM 44

DECEMBER 5, 2011

APPENDIX

U.S. Const. amend. V

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

Clean Water Act, 33 U.S.C. § 1311(a)

> (a) Illegality of pollutant discharges except in compliance with law
>
> Except as in compliance with [CWA provisions], the discharge of any pollutant by any person shall be unlawful.

Clean Water Act, 33 U.S.C. § 1319(c)(1)-(2)

> (c) Criminal penalties
>
> (1) Negligent violations
>
> Any person who--
>
> > (A) negligently violates section 1311 . . . of this title [or certain other CWA provisions]; or
> >
> > (B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage . . . ;
>
> shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who--

> (A) knowingly violates section 1311 . . . of this title [or certain other CWA provisions]; or
>
> (B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage . . . ;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

Clean Water Act, 33 U.S.C. § 1321(b)

(3) The discharge of oil or hazardous substances [] into or upon the navigable waters of the United States . . . is prohibited . . . .

. . . .

(7) Civil penalty action

(A) Discharge, generally

Any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3), shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil or unit of reportable quantity of hazardous substances discharged.

. . . .

(D) Gross negligence

In any case in which a violation of paragraph (3) was the result of gross negligence or willful misconduct of a person described in subparagraph (A), the person shall be subject to a civil penalty of not less than $100,000, and not more than $3,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged.

Federal Obstruction of Justice Statute, 18 U.S.C. § 1503(a)

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

Federal Witness Tampering Statute, 18 U.S.C. § 1512(b)(3)

(b) Whoever 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--

> . . . .
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[,] supervised release[], parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.