No. C11-0116-1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2011

SAMUEL MILLSTONE,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Team 67

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Do rules of statutory construction or the Due Process Clause permit a person to be convicted of negligently discharging a pollutant in violation of the criminal penalty provisions of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), without a showing of criminal intent?

II. Does informing a potential witness of the constitutional right to remain silent constitute witness tampering within the meaning of 18 U.S.C. § 1512(b)(3)?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Samuel Millstone—the defendant in the United States District Court for the District of New Tejas and the Appellant before the United States Court of Appeals for the Fourteenth Circuit—respectfully submits this brief-on-the-merits in support of his request that this Court reverse the judgment of the court of appeals.

OPINIONS BELOW

The opinion of the United States District Court is unreported. The unreported opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 3–21.

STATEMENT OF JURISDICTION

The judgment of the Fourteenth Circuit Court of Appeals was entered on October 3, 2011. R. at 3. The petition for a writ of certiorari was granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Constitution, which provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. In addition, this case involves the interpretation of Section 319(c)(1)(A) of the Federal Water Pollution Control Act,[1] which provides

[1] This Act is commonly known as the Clean Water Act. This brief refers to it as "the Act" or the "Clean Water Act." In addition, the numbering of the Act's specific sections does not correspond with the United States Code's numbering. To avoid

that any person who "negligently violates section 1311 . . . 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." 33 U.S.C. § 1319(c)(1)(A) (2006). The Appendix includes this section, as well as other relevant sections codified at 33 U.S.C. §§ 1311, 1321, and 1362 (2006). *See* Appendix "A."

This case also involves the interpretation of Section 1512 of the federal witness-tampering statute, which provides, "Whoever knowingly . . . corruptly persuades another person, or attempts to do so, . . . with intent to . . . 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 . . . shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. § 1512(b)(3) (2006). *See* Appendix "B."

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Samuel Millstone (Millstone) has demonstrated success as a student, a police officer, and a business manager. R. at 4. He combined his experience in law enforcement with his background in business and asked his friend, Reese Reynolds (Reynolds), to join him in starting a security company called Sekuritek. R. at 4. Sekuritek quickly established itself as the premier security company in New Polis. R. at 4.

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confusion, this brief refers to the applicable section of the Clean Water Act in text and to the United States Code section in citations.

The Bigle Contract. In November of 2006, Drake Wesley, the Chief Executive Officer of Bigle Chemical Company, asked Millstone if Sekuritek could handle security for its newest site along the Windy River. R. at 5. Millstone signed the contract with Bigle on November 16, 2006, on the condition that Sekuritek could be "live" and "online" by December 1, 2006. R. at 5. The Windy River facility spanned 270 acres and required a standing staff of 1,200 people during any given shift. R. at 5. Given the facility's size, Sekuritek invested in new equipment and personnel. R. at 5–6.

Reynolds purchased equipment, while Millstone hired and trained personnel. R. at 4. After conducting a "cursory" review of potential vendors, Reynolds purchased a new fleet of large sport-utility vehicles from a "relatively unproven company." R. at 6. Millstone hired 35 new security personnel, but the new employees could not complete the usual three-week training course before the December 1st deadline. R. at 6. So Millstone developed a training program requiring one week of formal training and three weeks of "on the job observation and training." R. at 6 n.2. A security survey issued over a month later reported no security breaches. R. at 7.

The Employee Accident. On January 27, 2007, Josh Atlas, one of Sekuritek's newest security guards, was patrolling the facility in a Sekuritek-branded SUV when he saw someone who he believed was an intruder near a storage tank. R. at 7. Atlas' employee handbook included instructions on how to handle these types of situations: "Upon arriving within 100 yards of an apparent emergency requiring

aid or suspected security breach, all Sekuritek personnel are to leave their vehicle in a stopped and secured position to the side of any pathway and proceed on foot to investigate further."[2] R. at 8. Atlas chose not to follow company policy. R. at 7. Instead of proceeding on foot, the employee raced to the scene in the SUV to investigate further. R. at 7. But the pedal stuck, causing the SUV to crash into a storage tank and explode. R. at 7. The ensuing fire spread across the facility, sparked more explosions, and spilled chemicals into the Windy River. R. at 8. Emergency responders were unable to reach the plant for three days, in part, because of the fire that spread to surrounding areas. R. at 7. The Windy River fire and spill caused substantial damage to the city of Polis, New Tejas. R. at 7–8.

The Investigation. Federal officials investigated the explosion and cause of the subsequent spill. R. at 8. Because Bigle had relocated its headquarters to China during the preliminary stage of the investigation and were beyond the reach of federal authorities,[3] the media clamored for the government to bring criminal charges against Millstone and Reynolds. R. at 9. This pressure caused investigators to focus their attention on Millstone and Reynolds and ultimately prompted the conclusion that Millstone failed to adequately conduct a thorough training seminar and failed to adequately supervise his employees. R. at 9.

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[2] Testimony indicated that Sekuritek included this policy "to avoid impeding any other first responders such as the Polis Police Department, the Polis Fire Department, or the Polis EMS." R. at 8 n.7.

[3] All of Bigle's Officers are citizens of the Republic of China and could not be extradited back to the United States. Also, no employees, assets, or holdings of Bigle are left within the borders of the United States. R. at 8 n.6.

As public outcry intensified, Millstone met with Reynolds and discussed the proper course of action regarding the government investigation and possible criminal charges. R. at 9. After Reynolds suggested telling the government agents everything, Millstone replied:

> Tell them everything? Are you crazy? Look, they're talking about treating us like criminals here. I'm not going to jail, Reese. It's time to just shut up about everything. The feds can't do anything if we don't talk. If they start talking to you, just tell them you plead the Fifth and shut up. And don't even think about pinning all this on me. Remember, they're looking at your stupid gas-guzzlers too.

R. at 9. The government subsequently granted Reynolds immunity in exchange for his testimony against Millstone. R. at 10 n.9.

II. NATURE OF THE PROCEEDINGS

The District Court. The Government charged Millstone for the negligent discharge of pollutants in violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A). R. at 10. The Government claimed that Millstone (1) negligently hired, trained, and supervised security personnel, and (2) negligently failed to adequately inspect the SUVs prior to purchase and use. R. at 10. The Government also charged Millstone for witness tampering under 18 U.S.C. § 1512(b)(3). Over Millstone's objection, the district court gave the following instruction to the jury: "The government must prove beyond a reasonable doubt that the discharge of pollutants was the result of Millstone's negligence. 'Negligently' means the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." R. at 10. Afterwards, the jury found Millstone

guilty of both a negligent violation of the Clean Water Act and witness tampering. R. at 10.

Millstone filed two post-trial motions. R. at 10. He filed a motion for new trial on the Clean Water Act charge, arguing that the district court improperly instructed the jury on the operative provisions. R. at 10. He also filed a motion acquittal on the witness tampering charges, arguing that the federal witness tampering statute does not encompass the act of encouraging Reynolds to invoke his Fifth Amendment rights. R. at 10. The district court denied both motions. R. at 10.

The Court of Appeals. Millstone appealed both issues. The Fourteenth Circuit Court of Appeals affirmed the conviction by holding for the government on both claims. R. at 11–15. The court of appeals held that the Clean Water Act allowed criminal prosecution with a civil negligence standard even though the statutory provision allowed for a $25,000 fine and a year's imprisonment. R. at 11. The court of appeals also held that the federal witness tampering statute encompassed the act of encouraging another to invoke the Fifth Amendment right to remain silent. R. at 14.

SUMMARY OF THE ARGUMENT

This appeal challenges the government's attempt to stretch existing laws well beyond what Congress intended. Though the accident at the Bigle Chemical Company's Windy River facility was tragic, it cannot serve as a basis for convicting the owner of a security company for crimes under environmental laws or federal

witness tampering statutes. Congress did not extend criminal responsibility as far as the government and the lower courts chose to extend it.

I.

The district court gave the wrong jury instruction on the Clean Water Act claim. Instead of defining the criminal penalty provision with a criminal negligence standard, the district court told the jury that the government only had to show a departure from the standard of care a reasonable person would employ. The Clean Water Act makes it a crime to negligently discharge a pollutant into the navigable waters of the United States. Although "negligently" is not statutorily defined, courts have routinely recognized that where the undefined term "negligently" is used in a criminal statute it means criminal negligence, not civil negligence. And the reason is simple: the *mens rea* requirement protects against discriminatory prosecutions, divests prosecutors of unrestrained discretion, and ensures the constitutional guarantee of due process. Otherwise, the Act would criminalize a broad range of innocent conduct—a result this Court has consistently sought to avoid. To the extent any uncertainty remains, the criminal negligence standard should prevail because Section 319 is a criminal statute and the rule of lenity dictates that any doubt in a criminal law should be resolved in the accused's favor.

Moreover, due process requires that a criminal prosecution be based on a finding of specific criminal intent. Nonetheless, without any textual basis for support, the Government seeks to reduce its burden of proof by claiming the Clean Water Act is a public welfare statute. Under narrow circumstances, regulatory

offenses with little or no punishment are allowed to proceed without a showing of *mens rea* based on the premise that average citizens know certain highly regulated industries subject a person to strict liability. This doctrine is generally disfavored. The simple truth is that the Clean Water Act regulates much more than dangerous pollutants. In fact, it applies to harmless substances like rock and sand. The practical effect of the Government's interpretation criminalizes a broad range of innocent conduct. Further, the Clean Water Act imposes potentially severe penalties, which is uncharacteristic of statutes where courts have applied the public welfare doctrine. Congress never intended for the Clean Water Act to extend to an owner of a security company for negligent hiring or negligent training.

This Court should reverse the court of appeals' judgment on the Clean Water Act charge and remand for a new trial.

II.

The conviction under the federal witness tampering statute suffers from the same problems. Congress never intended for criminal responsibility to flow from the simple act of encouraging another to exercise the constitutional right to remain silent. Courts have routinely held, in harmony with congressional intent, that "corrupt" persuasion requires something more than merely asking someone to withhold information from a federal investigation. In the cases discussed in the legislative history prior to the enactment of Section 1512, the "something more" was an independently wrongful act, like bribery or asking a witness to lie to the government. It certainly did not encompass what is now the basis of the

government's claim here—a request that another person exercise a constitutional privilege.

The court of appeals' interpretation departs from the statute's language, history, and purpose. The court of appeals invites this Court to interpret "corruptly" to mean "motivated by an improper purpose." But this Court should decline such a dangerous invitation. Such a sweeping interpretation shifts the focus from acts to motivations and criminalizes any persuasion that interferes with a federal investigation. Worse, the interpretation suggests that "corruptly" is a means of showing intent but, in doing so, the term "corruptly" becomes meaningless as another statutory provision supplies the intent requirement. This is nothing more than a thinly veiled attempt to rewrite a law that does not reach what the government wants to prosecute.

This Court should reverse the court of appeals' judgment and enter a judgment of acquittal on the federal witness tampering charge.

ARGUMENT AND AUTHORITIES

Millstone challenges his conviction under two federal statutes—the Clean Water Act and the federal witness tampering statute. This appeal focuses on the district court's denial of a motion for new trial on the claims under the Clean Water Act and a denial of a motion for acquittal on the federal witness tampering charges. In both motions, Millstone raised statutory interpretation issues that presented purely legal questions about the scope of the federal statutory provisions.

The district court's ruling on a motion for new trial is reviewed for an abuse of discretion. *Sykes v. Anderson*, 625 F.3d 294, 322 (6th Cir. 2010). However, a district court abuses its discretion by applying the wrong law so, when the grounds asserted in the motion for new trial depend only on the resolution of a legal question, an appellate court reviews the ruling de novo. *Hook v. Ernst & Young*, 28 F.3d 366, 370 (3d Cir. 1994).

This Court reviews de novo a district court's denial of a motion for judgment of acquittal. *See United States v. Tate*, 633 F.3d 624, 628 (8th Cir. 2011). A conviction will be reversed if no reasonable jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Fernandez-Hernandez*, 652 F.3d 56, 67 (1st Cir. 2011).

Millstone's conviction was not authorized by either federal statute. Under the applicable standards of review, the lower courts erred. This Court should reverse the judgment and hold Millstone was entitled to a new trial on the Clean Water Act charges and an acquittal on the federal witness tampering charges.

I. MILLSTONE IS ENTITLED TO A NEW TRIAL ON THE CONVICTION FOR NEGLIGENTLY DISCHARGING A POLLUTANT IN VIOLATION OF THE CLEAN WATER ACT.

Millstone's conviction was rooted in an untenable theory of environmental law. The Clean Water Act subjects any person who "negligently" discharges a pollutant to fines up to $25,000 per day and imprisonment up to one year. 33 U.S.C. § 1319(c)(1)(A) (2006); *see also* 33 U.S.C. § 1311(a) (2006) (making "the discharge of any pollutant by an person . . . unlawful"). In this case, the district court instructed

the jury that a person may be held criminally responsible under this provision of the Clean Water Act based on ordinary negligence. R. at 10. The civil standard requires proof of only a failure to exercise the standard of care a reasonably prudent person would have exercised in the same situation. Congress never intended for the Clean Water Act to sweep so broadly and, even if it did, the application of this civil standard to a criminal prosecution would be constitutionally impermissible.

A. The District Court Improperly Instructed the Jury that the Government Had to Prove that Millstone Acted with Only Ordinary Negligence to Show a Clean Water Act Violation.

Because Congress did not define the term "negligently" in Section 319, the district court had to decide how to define that term for the jury. The district court was faced with two distinct standards. The government sought an ordinary negligence instruction, asking the court to define negligence as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." R. at 10. In contrast, Millstone sought a criminal negligence instruction, asking the court to define negligence as "a gross deviation from the standard of care that a reasonable person would observe in the situation." R. at 11. Ultimately, the district court chose to give the government's ordinary negligence instruction. R. at 10.

The district court gave the wrong instruction. The legally incorrect "ordinary negligence" instruction necessarily lowered the government's burden of proof by allowing the government to obtain a conviction without a showing of criminal intent. Accurate jury instructions protect the accused and the judicial process itself

by influencing "what evidence the jury may hear, what arguments may be made, how they may be made, what legal principles the jury must apply, and even . . . who will sit on the jury." *Bracy v. Gramley*, 81 F.3d 684, 701 (7th Cir. 1996) (Rovner, J., dissenting), *rev'd*, 520 U.S. 899 (1997); *accord Carter v. Kentucky*, 450 U.S. 288, 302 n.20 (1981) (recognizing "the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest wor[d] or intimation is received with deference, and may prove controlling"). A jury cannot reach a proper verdict when a judge gives the wrong instructions.

1. Section 319 requires a criminal negligence instruction.

The instructions to the jury were so broadly worded that it was not necessary for the prosecutor to prove criminal intent—the irreducible minimum for any felony prosecution. This fundamental tenet of criminal enforcement acknowledges that congressional intent is paramount and that due process demands fair notice of the line between permitted and prohibited conduct. A criminal negligence instruction were necessary to limit the scope of Section 319 to what Congress intended and what the Due Process Clause requires.

a. The use of the ambiguous term "negligently" does not compel an ordinary negligence standard in Section 319(c)(1)(A)'s criminal penalty provision.

The district court claimed to give "negligently" a plain and ordinary meaning. R. at 10. Relying on a dictionary for guidance, the court of appeals agreed, reasoning that a person violates the statute "if he fails to exercise the standard of care a reasonably prudent person would have exercised in the same situation" and,

by that failure, causes a discharge of a pollutant. R. at 11 (citing *Black's Law Dictionary* 434 (3d ed. 1996)). From this faulty premise, both courts concluded that ordinary, civil negligence was the appropriate standard. R. at 13. However, the plain language is not so plain.

The lower court ignored the well-settled rule that "[o]ne definition of a word does not express its whole meaning or necessarily determine the intention of its use." *Osborne v. San Diego Land & Town Co. of Me.*, 178 U.S. 22, 38 (1900). As Justice Breyer cautioned, "dictionaries, . . . unilluminated by purpose, can lead courts into blind alleys, producing rigid interpretations that can harm those whom the statute affects." *Duncan v. Walker*, 533 U.S. 167, 193 (2001) (Breyer, J., dissenting). Instead, a statute's words must be read in context "with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

When read in context, Section 319(c)(1)(A)—entitled "*Criminal* penalties"—requires *criminal* negligence. *See Carter v. United States*, 530 U.S. 255, 267 (2000) (holding statutory title may "shed light on some ambiguous word of phrase in the statute itself"). Although Congress did not define "negligently" as requiring *mens rea*, the statute's silence is not dispositive: "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Congress' failure to expressly indicate whether *mens rea* is required "does not signal a departure from

this background assumption of our criminal law." *Liparota v. United States*, 471 U.S. 419, 419 (1985). Indeed, the common-law rule requiring *mens rea* is "followed in regard to statutory crimes even where the statutory definition did not in terms include it." *United States v. Balint*, 258 U.S. 250, 251–52 (1922); *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."). Thus, the standard criminal usage counsels reading the undefined term "negligently" as requiring *mens rea*.[4] "[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples v. United States*, 511 U.S. 600, 606 (1994).

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[4] The majority of courts have interpreted the undefined term, "negligence," in state criminal statutes as requiring *mens rea*. *See, e.g.*, *Santillanes v. State*, 849 P.2d 358, 365 (N.M. 1993) ("We interpret the *mens rea* element of negligence . . . to require a showing of criminal negligence instead of ordinary civil negligence . . . . We do not find the absence of definition of negligence in the statute indicative of legislative intent."); *State v. Grover*, 437 N.W.2d 60, 63 (Minn. 1989) ("[A]bsent a clear legislative declaration that a showing of ordinary negligence . . . is sufficient evidence of a crime, . . . criminal negligence statute[s] requir[e] a showing that the actor's conduct involved a 'gross deviation from the standard of care that a reasonable person would observe in the actor's situation.'"); *State v. Rowell*, 487 S.E.2d 185, 187 (S.C. 1997) ("[I]n a criminal case, the State cannot rely on civil concepts of negligence . . . to meet its burden . . . ."); *People v. Speegle*, 62 Cal. Rptr. 2d 384, 391 (Ct. App. 1997) ("[A] conviction . . . requires proof of criminal negligence."); *Commonwealth v. O'Hanlon*, 653 A.2d 616, 617–18 (Pa. 1995) (The "definition of negligence . . . encompasse[s] not the lack of care necessary to prove tort liability, but criminal negligence, otherwise a conviction relying on this provision would violate due process."); *Panther v. Hames*, 991 F.2d 576, 581 (9th Cir. 1993) (applying Alaska law) (finding no error where the jury charge sufficiently instructed the jury that the negligence required must be more than mere civil negligence); *State v. Wilcoxon*, 639 So. 2d 385, 388 (La. Ct. App. 1994) ("[T]he state is required to show more than a mere deviation from the standard of ordinary care" because "[o]rdinary negligence does not equate to criminal negligence.").

b. The civil penalty standards of Section 321(b)(7)(D) are fundamentally distinct and cannot be used as guidance for the Clean Water Act's criminal provisions.

Apart from its tenuous plain language analysis, the court of appeals supported its interpretation by looking to another provision of the Clean Water Act. In doing so, the court of appeals went beyond the parameters of the criminal penalty section and instead relied on the use of "gross negligence" in the civil penalty section. R. at 11–12 (citing 33 U.S.C. § 1321(b)(7)(D) (2006)). In its estimation, Congress' use of gross negligence there indicates that the term "negligently" in Section 319(c)(1)(A) must have been intended to mean ordinary negligence. R. at 11–12.

But courts "should not look to the *civil* side of a statute when interpreting the *criminal* side." R. at 16 (Newman, J., dissenting). This Court reached a similar conclusion in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007). There, the Court considered if civil liability for "willfully" failing to comply with the Fair Credit Reporting Act (FCRA) extended to a company's reckless conduct. *Id.* at 60. Safeco urged the Court to look to FCRA's criminal provisions to show that the civil provision cannot include "recklessness." *Id.* at 60. In rejecting the argument, this Court explained that "[t]he vocabulary of the criminal side of [a statute] is . . . beside the point in construing the civil side." *Id.* Thus, Congress' use of the term "gross negligence" in the civil side of the Clean Water Act is "beside the point" in construing Section 319.

The Clean Water Act's history further contradicts the court of appeals' interpretation. The term "gross negligence" was not added to Section 321 until

1990—three years *after* Section 319(c)(1) was enacted. *See* Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990). The court of appeals improperly relied on a later act of Congress to determine an earlier Congress' intent, even though "a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996); *see also United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

2. The rule of lenity requires that ambiguities in a criminal statute be construed in favor of the accused.

Even if the Court ultimately concludes that the language of section 319 does not unambiguously support Millstone's construction, the Court should at the very least acknowledge that the statutory language does not unambiguously support the government's construction either. In this circumstance, the criminal negligence standard is required by the rule of lenity. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) ("[T]o interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."). The canon of statutory construction requiring lenity prevents the court from interpreting a federal criminal statute "so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Whalen v. United States*, 445 U.S. 684, 695 n.10 (1980). The rule of lenity gives the benefit of the doubt to the accused and ensures that, when two reasonable interpretations exist, ambiguous criminal laws are interpreted in the accused's favor. *Liparota*, 471 U.S. at 424. The time-honored interpretive guideline "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." *Id.* at 427.

3. Eliminating *mens rea* as an essential element of a criminal prosecution under the Clean Water Act violates due process.

Even if Congress intended for a Clean Water Act violation to be triggered by ordinary negligence, a criminal prosecution under these circumstances would be barred by the Due Process Clause. The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. It requires criminal laws to give fair warning, "in language that the common world will understand, of what the law intends to do, and if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Thus, "the first essential of due process of law" is violated where a criminal statute prohibits conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Otherwise, it would allow for "arbitrary and discriminatory enforcement" by which "policemen, prosecutors, and juries . . . [can] pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983).

This case is illustrative. The record indicates that the city of Polis, New Tejas sustained tragic losses as a result of the Windy River spill. In fact, most economists estimate the financial cost totaled nearly $1.25 billion. R. at 8. Understandably, the media portrayed the Windy River spill as yet another example of a corporation

sacrificing the lives and fortunes of others out of greed, but unfortunately, Bigle could not be held liable for the spill. R. at 8 n.6. So the media quickly turned its focus to Sekuritek and clamored for criminal charges against Millstone and Reynolds. R. at 9. And, as public outcry intensified, the government reacted, bringing criminal charges against Millstone under the Clean Water Act for negligently discharging pollutants. R. at 9–10. In searching for a law to criminalize Millstone's conduct, the government has stretched the Clean Water Act beyond its breaking point. While Polis, New Tejas has certainly paid a steep price for the Windy River spill, retaliation does not justify interpreting the Clean Water Act's criminal penalty provisions as strict liability crimes.

a. Due process requires that the government prove a defendant's criminal intent to sustain a criminal conviction.

As a general rule, the government must prove beyond a reasonable doubt that the accused possessed criminal intent. *Staples*, 511 U.S. at 618 (holding criminal statute demands proof of general criminal intent "absent a clear statement from Congress that *mens rea* is not required"). The criminal intent requirement avoids three dangers inherent in expansive statutory provisions, like the ordinary negligence standard. *United States v. Bachelder*, 442 U.S. 114, 123 (1979). First, they trap the innocent by failing to give a reasonable opportunity to know what is prohibited. Second, they encourage arbitrary and discriminatory enforcement by delegating basic policy matters on a subjective, ad hoc basis to the police, judges

and juries. Third, they inhibit the exercise of freedoms because individuals will try to avoid what may possibly be considered unlawful conduct.

The criminal intent standard for criminal prosecutions is deeply ingrained in our criminal justice system. Anglo-American courts have been reluctant to criminalize simple negligence. *See* 4 William Blackstone, *Commentaries* *7, *21 ("[A]s a vicious will, without a vicious act is no civil crime, . . . an unwarrantable act without a vicious will is no crime at all."); Oliver Wendell Holmes, Jr., *The Common Law* 4 (1881) ("I do not know any very satisfactory evidence that a man was generally held liable either in Rome or England for the accidental consequences even of his own act."); *Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will."). In fact, this Court has described the presumption of a *mens rea* requirement in criminal statutes as a "background principle" against which Congress legislates. *X-Citement Video*, 513 U.S. at 71.

b. The Clean Water Act is not public welfare legislation that would fit within the narrow exception allowing criminal conviction without proof of criminal intent.

This Court has created a limited exception to the traditional *mens rea* requirement. The public welfare doctrine allows the government to dispense with the *mens rea* requirement in certain regulatory settings. By invoking the doctrine, the court of appeals held that Millstone need not be aware of any criminal wrongdoing as he worked at a facility subject to heavy regulation. R. at 12 (citing

United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993)). In the court's view, the proximity to the facility "places him in responsible relation to public danger [and] should [have] alerted him to the probability of strict regulation." *Staples*, 511 U.S. at 607. As a result of criminalizing potentially innocent conduct, public welfare statutes have a "generally disfavored status" and have been recognized only in "limited circumstances." *U.S. Gypsum*, 438 U.S. at 437. This is not one of those circumstances.

i. The Clean Water Act's complex regulatory framework necessarily conflicts with the rationale for applying the public welfare doctrine—the presumption that the actor must know of the probability of strict regulation because of his proximity to a significant public danger.

The Clean Water Act is not public welfare legislation because an ordinary person would have no idea of what actions would trigger environmental liability. *See United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971). With thousands of pages in the Code of Federal Regulations, the conduct proscribed by the Clean Water Act is not apparent to the average citizen, which is a fundamental premise of public welfare legislation. *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996). That is particularly true with individuals like Millstone. He was responsible for handling security at the Windy River plant. R. at 5. He never handled chemicals. Nor did his company, Sekuritek. In fact, Millstone and his employees do not use industrial equipment or engage in manufacturing, construction, or other industrial activities. As such, he would have no reason to be

alerted to the dangerous nature of the chemicals and, in turn, the likelihood of regulation for actions taken by his employees.

Moreover, the court of appeals imposed criminal liability for "using standard equipment to engage in a broad range of ordinary industrial and commercial activities." *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (mem.) (Thomas, J., dissenting). If liability extends to Millstone—who visited the site "periodically"—then liability may also extend to Windy River's standing staff of 1,200 employees. R. at 5, 6. And given that the facility spans 270 acres, many of those employees engage in a broad range of activity unrelated to the facility itself, which would necessarily be innocent conduct. R. at 6.

The lower court relied on this Court's decision in *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, to support the notion that the Clean Water Act is a public welfare statute because it regulates "dangerous or deleterious" pollutants. R. at 12 (citing *Int'l Minerals*, 402 U.S. at 565). In that case, the Court held that a person shipping sulfuric acid could be convicted of "knowingly" violating a statute governing shipments of corrosive liquids, without regard to whether he had knowledge of the regulations. *Int'l Minerals*, 402 U.S. at 558. The Court expressly confined its narrow holding to "dangerous or deleterious devices or products or obnoxious waste materials." *Id.* at 565. The Court went on to distinguish between items obviously subject to regulation, like sulfuric acid, and items that were not clearly subject to regulation, like pencils, dental floss and paper clips, and found that the latter category "might raise substantial due process

questions if Congress did not require . . . '*mens rea*' as to each ingredient of the offense." *Id.* at 564.

Those due process questions are present here as the environmental regulation has been applied to the hiring and training of security personnel. Nonetheless, the Government argues that *International Minerals* controls the outcome of this case because pollutants, like sulfuric acid, are highly dangerous substances that should alert those who handle them to the probability of regulation. But the gap between *International Minerals* and this case is far too wide. To be sure, the Clean Water Act regulates dangerous substances in regulated industries. But—unlike the statute in *International Minerals*—the Clean Water Act's scope does not end there; it reaches a wide range of ordinary items that people handle on a daily basis. The term "pollutant," for example, includes harmless items, such as "rock" and "sand." *See* 33 U.S.C. § 1362(6) (2006). Like dental floss and paper clips, rock and sand would not alert an individual to the probability of regulation. Yet if this Court were to adopt the lower court's reasoning, tossing a stone into a well can amount to a criminal conviction. However extreme that may sound, the Clean Water Act "has tremendous sweep . . . . Much more ordinary, innocent, productive activity is regulated by this law than people not versed in environmental law might imagine." *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting on denial of hearing en banc); *cf. United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (sentencing a father and his son to twenty-one months in prison for leaving "clean fill dirt" on property deemed a wetland), *aff'd*, 36 F.3d 1052 (11th Cir. 1994).

The reach of the Clean Water Act is so broad that even skilled lawyers have difficulty in distinguishing between permissible and prohibited conduct. Average citizens certainly cannot be expected to know the difference. Regulatory crimes are wrongful not because of their intrinsic nature but rather because the law says they are. *See Black's Law Dictionary* 979 (8th ed. 2004) (defining malum prohibitum as "an act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral"). For that reason, individuals charged with regulatory crimes are less likely to realize their actions crossed the line from permissible to prohibited. *See The Federalist No. 62*, at 381 (James Madison) (Clinton Rossiter ed., 1961) ("It would be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; . . . no man, who knows what the law is to-day, can guess what it will be to-morrow."). This is especially true for those, like Millstone, charged with violations of the highly technical and complex provisions of the Clean Water Act.

The court of appeals presumed knowledge of a security company owner whose position does not "place him in responsible relation to a public danger." *Staples*, 511 U.S. at 618. In doing so, the court placed the threshold for criminal liability so low that average citizens would have no idea when their actions could subject them to liability under the Clean Water Act. Thus, this is not a circumstance where due process allows the government to presume criminal intent from a person's proximity to highly regulated conduct.

ii. The Courts have only applied the public welfare doctrine to regulatory schemes where the punishment is light.

The Clean Water Act is not public welfare legislation because of the harsh sanctions included in the criminal penalty section. A person convicted of knowingly discharging a pollutant can face three years in prison (six years for a subsequent violation). *See* 33 U.S.C. § 1319(c)(3)(A). Even worse, a person convicted of a knowing endangerment violation can face 15 years in prison. *See* 33 U.S.C. § 1319(c)(3)(A). If convicted for a subsequent violation, that person can be sentenced up to 30 years in prison. *Id.*

These severe sanctions stand in stark contrast to what this Court explained in *Staples v. United States*—"the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties or short jail sentences . . . . [A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." 511 U.S. at 617–18. Unlike what is involved with a criminal prosecution under the Clean Water Act, the penalties for a public welfare offense are "relatively small, and conviction does no grave damage to an offender's reputation." *Morissette*, 342 U.S. at 256.

The Clean Water Act is not a public welfare statute. Its reach is indiscriminate, covering dangerous and harmless substances alike. And its penalties are harsh, providing prison sentences up to 30 years. There is no indication that eliminating *mens rea* furthers the Clean Water Act's purpose,

considering it makes little sense to punish conduct that is by definition unintentional. The court of appeals' decision is predicated on "a dangerous rationalization—substituting public policy for due process." David Gerger, *Environmental Crime*, 24-OCT Champion 34, 36 (2000).

B. The Improper Jury Instruction Was Reversible Error.

This Court subjects unconstitutional jury instructions to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 18 (1999). In cases where a trial court has given the jury instructions that altered the government's burden of proof, a reviewing court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Boyde v. California*, 494 U.S. 370, 380 (1990). The government bears the burden of showing "there is no reasonable possibility" that the error prejudiced the defendant or affected the case's outcome. *Chapman v. California*, 386 U.S. 18, 24 (1966). Otherwise, the case must be remanded for a new trial. *Id.*

Under the circumstances, the possibility of prejudice in this case is not only reasonable, but it is almost certain. By giving a legally inaccurate definition of negligence, the district court committed an error that affected all aspects of the Clean Water Act claim. It was not harmless beyond a reasonable doubt.

II. MILLSTONE IS ENTITLED TO ACQUITTAL ON THE WITNESS-TAMPERING CHARGES.

The witness tampering conviction was also rooted in an untenable theory. The federal witness tampering statute makes it a crime for a person to "knowingly . . .

corruptly persuade another person, or attempts to do so, . . . with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. § 1512(b)(3) (2006). Millstone was convicted for witness tampering simply because he encouraged his business partner to invoke his constitutional privilege not to provide incriminating information to authorities. This expansive reading of the federal witness tampering statute ignores not only canons of statutory construction but also the underlying premise that a person who asserts a Fifth Amendment privilege does not commit a crime. "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, there is something very wrong with that system." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

A. One Cannot Corruptly Persuade Another to Withhold Information from the Government Merely by Encouraging That Person to Exercise a Constitutional Right to Do So.

This appeal focuses on what the words "corruptly persuades" mean. Once again, the district court was faced with two distinct interpretations. The government argued that the provision focused on motivations and applied broadly where an accused was "motivated by an improper purpose." R. at 14. In contrast, Millstone argued that the provision focused on actions and applied only where an accused encouraged another to commit an independently wrongful act such as bribery or providing false testimony. R. at 19.

By accepting the government's argument and holding that motivations were the focus of Section 1512, the court of appeals joined a growing circuit split on the issue. The Second and Eleventh Circuit Courts have interpreted "corruptly" to mean "motivated by an improper purpose"; therefore, the statute would prohibit any persuasion of a witness that impedes a federal investigation, even if it involves a non-coercive request for the witness to exercise a privilege or right. *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996); *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998). *But see United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975) ("[M]erely suggesting to [the witness] that he had the right to invoke the Fifth Amendment . . . would be insufficient to provide the necessary corrupt intent."). In contrast, the Third and Ninth Circuit Courts have required something more inherently wrong about the persuasion; thus, absent some other wrongful conduct like coercion, intimidation, or bribery, the statute does not reach asking a witness to withhold information under a privilege or right. *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997); *United States v. Doss*, 630 F.3d 1181 (9th Cir. 2011). This Court should clarify the circuit split and adopt the approach used by the Third and Ninth Circuit courts as that interpretation is most consistent with the federal witness tampering statute's language and history.

1. Section 1512's plain language does not criminalize the act of encouraging a witness to invoke his Fifth Amendment rights.

Section 1512(b)(3) criminalizes only actions by

> [w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so or engages in misleading conduct

> toward another, with intent to— . . . 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.

18 U.S.C. § 1312(b)(3). The court of appeals' interpretation of this language reads the word "corruptly" out of the statute.

a. The inclusion of the term "corruptly" with "persuades" requires evidence of more than encouraging another to exercise his constitutional rights.

Congress' use of the word "corruptly" necessarily obligates the government to show something more than merely persuading another not to cooperate with authorities. Millstone does not dispute that he tried to convince Reynolds to withhold information and certainly he did so to avoid criminal prosecution. But he did not act "corruptly" within the meaning of the federal witness tampering statute because "[s]imply interfering with the flow of information to the government is not enough to constitute witness tampering [under Section 1512(b)]." *United States v. Davis*, 183 F.3d 231, 248 (3d Cir. 1999). Millstone merely asked Reynolds to exercise his right against self-implication—a privilege secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821).

The Third Circuit Court of Appeals addressed this precise issue in the case of *United States v. Farrell*, 126 F.3d 484. There, Farrell was charged for attempting to dissuade a coconspirator from providing information to federal investigators about a

conspiracy to sell adulterated meat. *Id.* at 485. Though he did not use coercion or engage in unlawful methods like bribery, Farrell was convicted for attempting to "corruptly persuade" a coconspirator to withhold information from federal officials. *Id.* at 486. The circuit court reversed, reasoning that the "inclusion of corruptly . . . necessarily impl[ies] that an individual can 'persuade' another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute." *Id.* at 489. The court held that "corruptly persuades" does not include "a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information . . . to investigators." *Id.* at 488.

More recently, the Third Circuit Court of Appeals explained:

> To be corrupt, the persuasion at issue must be accompanied by inappropriate coercive enticement or tainted by other illegality. It is not enough that the defendant merely advises a coconspirator to exercise his or her constitutional rights to remain silent, even if the defendant acts with the "improper purpose" of hindering a pending criminal investigation. The defendant must go beyond simple advocacy of a lawful course of action and either exert some form of wrongful coercive pressure, such as offering a bribe or employing misrepresentations, or request that the person engage in illegal conduct.

United States v. Vega, 184 F. App'x 236, 242 (3d Cir. 2006).

This Court addressed a closely related issue in *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696, 698 (2005). That case concerned the accounting firm convicted under Section 1512 for destroying documents associated with the Enron investigation. *Id.* Though the lower courts addressed the statutory construction issue with the word "corruptly" involved here, this Court avoided the issue by

finding that the jury instruction had improperly permitted a conviction without criminal intent. *Id.* at 706; *see also United States v. Arthur Andersen L.L.P.*, 374 F.3d 281, 296 (5th Cir. 2004) (adopting "improper motivation" standard used by Second and Eleventh Circuit courts), *rev'd on other grounds*, 544 U.S. at 698.

Nonetheless, the Court's analysis of the word "knowingly" does have some impact on the analysis of the word "corruptly." Writing for a unanimous court, Chief Justice Rehnquist explained that "persuad[ing]" a person "with intent to . . . cause" that person to "withhold" testimony from a federal official is not inherently malign. *Arthur Andersen*, 544 U.S. at 703–04. The Court even illustrated an example: "a mother who suggests to her son that he invoke his *right against compelled self-incrimination*." *Id.* at 704 (emphasis added). This Court—though in obiter dictum—implicitly acknowledged that corrupt persuasion requires something more than a non-coercive attempt to persuade another to exercise the Fifth Amendment.

Here, Millstone told Reese, "If they start talking to you, just tell them you plead the Fifth and shut up." R. at 9. Like the defendant in *Farrell*, Millstone never tried to bribe Reynolds. And, like the defendant in *Farrell*, Millstone never told Reynolds to lie. Instead, he merely encouraged Reynolds to exercise his "right against compelled self-incrimination." Millstone's request, without more, cannot qualify as "corrupt" persuasion under any reasonable reading of the statutory language.

b. Interpreting "corruptly" to mean merely "for an improper purpose" renders the term superfluous.

The problem is compounded by the fact that the court of appeals' interpretation writes the word "corruptly" out of the statute. In doing so, the interpretation violates the canon of statutory construction that "effect must be given, if possible, to every word, clause and sentence of a statute." *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction"). This is particularly true where, as here, the word describes an element of a criminal offense. *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994).

Under the court of appeals' view, the only role the term "corruptly" plays is to show intent, claiming that the criminal responsibility turns on an accused's improper motivation. R. at 14. However, this interpretation renders Congress' use of the word "corruptly" in Section 1512(b)(2) wholly redundant as the federal witness tampering statute has a separate, express intent requirement. The government already must show an accused acted "knowingly." 18 U.S.C. § 1512(b).

Section 1512(b)'s intent requirement is precisely what differentiates the provision from Section 1503, the provision the court of appeals used to support its conclusion. R. at 14. Section 1503 "lack[s] the modifier 'knowingly,' making any analogy inexact." *Arthur Andersen*, 544 U.S. at 706 n.9. So interpreting "corruptly" to mean "for an improper purpose" renders the term meaningless because the

"improper purposes" justifying Section 1512's application are "already expressly described in the statute." *Farrell*, 126 F.3d at 490.

For example, assume that Congress had omitted "corruptly" and simply prohibited the "persua[sion of] another person . . . with intent to . . . hinder, delay, or prevent" information from reaching a law enforcement officer. That language would criminalize the persuasion of another to withhold information, as it is motivated by the improper purpose of "hinder[ing], delay[ing], or prevent[ing]" a federal investigation. In the government's estimation, the same result would occur here. The word "corruptly" is wholly unnecessary. Congress included the word "corruptly" to limit the scope of the witness tampering statute.

2. Section 1512's legislative history confirms the plain language.

The legislative history also confirms that Congress never intended to criminalize voluntary requests to invoke a constitutional right. Instead, Congress' primary concern was to ensure that criminal law extends to non-coercive forms of witness "corruption," like preparing false testimony for a witness, or offering a witness money in return for false testimony.

a. Congress considered and rejected an amendment in 1982 that would have criminalized the act of suggesting a witness assert his Fifth Amendment rights.

Congress never intended a result that it expressly declined to enact. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier

discarded in favor of other language." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392–93 (1980). Yet, that is precisely what the government seeks to do in this case.

Congress considered and rejected a clause prohibiting any conduct that impedes a federal investigation. Specifically, the proposed clause would have made it a crime for a person to "corruptly, by threats or force, or by any threatening letter of communication, intentionally, influences, obstructs or impedes, or attempts to influence, obstruct or impede the . . . enforcement and prosecution of Federal law." 128 Cong. Rec. 26,360 (1982). A Senate Report[5] explained that the language was intended to cover "the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined." S. Rep. No. 97-532, at 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2524. The report criticized the proposed language:

> [T]he analysis should be functional in nature to cover conduct the function of which is to tamper with a witness, victim, or informant in order to frustrate the ends of justice. For example, *a person who induces another to remain silent . . . would be guilty . . . irrespective of whether he employed deception, intimidation, threat, or force as to the person*.

Id. at 18–19 (emphasis added). Congress ultimately rejected the clause because it was "beyond the legitimate scope of [the] witness protection measure." 128 Cong. Rec. 26,810 (1982). More importantly, the legislative history makes clear that Congress declined to criminalize conduct that "frustrated the ends of justice"

[5] Although not binding, committee reports represent the most persuasive indication of congressional intent, short of the statutory language itself. *Mills v. United States*, 713 F.2d 1249, 1252 (7th Cir. 1983).

without regard to "whether the person employed deception, intimidation, threat, or force."

b. When Congress added the phrase "corruptly persuades" in 1988, the sponsor specifically stated that the amendment was intended to criminalize conduct such as bribery and encouraging a witness to lie.

Before Section 1512's enactment, witness tampering was prohibited under Section 1503, which made it a crime to influence or intimidate any witness or juror associated with a judicial proceeding. In an effort to pass a law focused only on witness tampering, Congress removed all references to witnesses from Section 1503 and enacted Section 1512, which prohibited the use of "physical force, threats, [or] intimidation" to influence testimony. The original version of Section 1512 was thought to be too narrow because it did not prohibit non-coercive attempts to persuade a witness to testify falsely. *See* H.R. Rep. No. 100-169, at 12 (1987), *reprinted in* 1988 U.S.C.C.A.N. 5937, 5937 (citing *United States. v. Risken*, 788 F.2d 1361, 1367 (8th Cir. 1986)). So in 1988, Congress responded by amending Section 1512 to prohibit "corrupt persuasion." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(c), 102 Stat. 4181, 4397 (1988).

As Senator Robert Byrd, the sponsor, explained, the amendment's purpose was to prohibit conduct like "preparing false testimony for a witness, or offering a witness money in return for false testimony." 134 Cong. Rec. S7446, 7447 (daily ed. June 8, 1988). In fact, all the examples mentioned in the legislative history involved independently wrongful efforts to influence witnesses. *See id.* at S7369

(citing *United States v. King*, 762 F.2d 232, 237 (2d Cir. 1985) (bribery); *United States v. Vesich*, 724 F.2d 451, 453–58 (5th Cir. 1984) (false testimony); *United States v. Gates*, 616 F.2d 1103, 1107 (9th Cir. 1980) (same); *Risken,* 788 F.2d at 1367 (attempt to have one witness killed and to mislead another); *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984) (hiding a witness with duty to testify); *United States v. Hernandez,* 730 F.2d 895, 898 (2d Cir. 1984) (threatening to kill witness)). Thus, the legislative history confirms that the term "corruptly" was meant to address independently wrongful acts, not merely motivations.

3. The rule of lenity demands resolution of ambiguities in criminal statutes in the accused's favor.

Millstone's interpretation is also required by the rule of lenity, which requires that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 360 (1987). The rule is "founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

Courts interpreting Section 1512(b) have acknowledged that it is not the clearest legislation. *See, e.g.*, *United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991). ("[T]he word 'corruptly' is vague."). In *United States v. Poindexter*, for example, then Judge Ginsburg explained how the term "corruptly" could be used transitively ("by means of corruption or bribery," i.e., by means of corrupting another) or intransitively (acting oneself "in a corrupt or depraved manner"). These

heroic attempts to divine congressional intent from the ambiguous statutory language are unnecessary. The rule of lenity requires that "the tie goes to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008).

B. The Error in Creating Liability from Innocent Conduct Is Automatically Reversible.

The government criminalized innocent conduct. The resulting conviction was beyond what Congress intended to proscribe and, for this reason, is not something that could be subjected to a harmless error analysis. In *Arizona v. Fulminante*, this Court distinguished between constitutional trial errors, which can be harmless, and constitutional structural defects, which cannot. 499 U.S. 279, 290–91 (1991). The Court explained that trial error "occur[s] during the presentation of the case to the jury" and is amenable to harmless error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307–08. At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." *Id.* The existence of a structural defect "affect[s] the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself." *Id.* at 310. A structural defect "transcends the criminal process" because '[w]ithout these basic protections, a criminal trial cannot reliably serve its function . . . and no criminal punishment may be regarded as fundamentally fair.'" *Id.* at 310, 311 (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)).

The district court's error prejudiced Millstone's substantial rights and nothing could be more fundamentally unfair. Conducting a harm analysis under these circumstances is wholly inappropriate. No subsequent trial could cure the error of creating a crime out of innocent conduct.

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit, remand the claim under the Clean Water Act for a new trial, and enter a judgment of acquittal on the federal witness tampering charges.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

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APPENDIX "A"

PROVISIONS OF THE CLEAN WATER ACT

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and section 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

§ 1319. Enforcement

(c) Criminal penalties

(1) Negligent violations

Any person who--

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; 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 or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

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, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; 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 or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

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.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

§ 1321. Oil and hazardous substance liability

(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.

§ 1362. Definitions

(6) The term "pollutant" means 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. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if

such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

APPENDIX "B"

PROVISIONS OF THE FEDERAL WITNESS TAMPERING STATUTE

§ 1503. Influencing or injuring officer or juror generally

(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.

§ 1512. Tampering with a witness, victim, or an informant

(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--

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(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 probation1 supervised release,,2 parole, or release pending judicial proceedings;

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