No. 04-368

IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center. WLF devotes substantial resources to litigating cases and filing *amicus* briefs urging rules of law that promote free enterprise and limit government to make it more accountable in all contexts, including criminal law enforcement actions by the Department of Justice. WLF has participated as *amicus* in numerous cases which, like the present one, raise important issues regarding *mens rea* requirements in federal criminal statutes.[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community. The potential criminalization of corporate compliance with document retention policies and with the advice of in-house attorneys concerns the Chamber and many of its members. The broad interpretation of vague, ambiguous criminal statutes to encompass such conduct does not provide the business community with the guidance it needs to comply with the law on the obstruction of justice. *Amici* and their members believe that the Court will benefit from their insight in construing the obstruction of justice statute at issue in this case.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the government charged Arthur Andersen & Co. ("Andersen") with the willful obstruction of justice because Andersen employees, including an in-house lawyer, requested that other employees comply with the Company's legal document retention policy and because an in-house lawyer advised an employee to edit a draft of a memorandum. These events occurred at a time when a formal investigation by the Securities Exchange Commission ("SEC") was possible but far from certain. That charge and ultimate conviction devastated Andersen. Andersen's elimination from the already concentrated field of national accounting firms resulted in the loss of tens of thousands of jobs and caused untold anguish to thousands of individuals adversely affected by this prosecution. While enforcement of the criminal law often has overwhelming consequences for affected persons and industries, its predicate must be a legislative judgment that specified conduct is plainly unlawful. This predicate was not satisfied by the interpretation of the obstruction of justice statute advanced by the United States and embraced by the Fifth Circuit.

The witness tampering statute was amended in 1990 to add the criminal prohibition at issue here. Section 1512(b) of Title 18 criminalizes the knowing, corrupt persuasion of another person to destroy documents with an intent to impair the documents' availability for use in an official proceeding. Although the Fifth Circuit recognized that its interpretation of § 1512(b) cast only a "dim light . . . upon its meaning, its circularity aside, " App. 19a, that court nonetheless said that a conviction under this provision simply for persuading another to take a legal action with an improper purpose is permissible. Equating knowing, corrupt persuasion with persuasion for an improper purpose not only results in a statute that is impermissibly vague, but also renders the corruption requirement mere surplusage. Section 1512(b)(2)(B) already expressly requires that the persuasion be intended for the

improper purpose of impairing an official proceeding. Section 1512(b)'s element of knowing, corrupt persuasion should have been interpreted to require that the persuasion was done using an illicit method or that the persuasion involved inducing another to engage in unlawful conduct or that the defendant otherwise knew that the persuasion was unlawful.

The Fifth Circuit's decision is not simply wrong in its particulars. It reflects a fundamental misunderstanding of the governing rules of statutory interpretation for criminal laws. Because § 1512(b) is a criminal statute, under our Constitution, it must be interpreted to provide persons with reasonably clear guidance and notice about what conduct falls within the statute's sweep. See *United States* v. *Kozminski*, 487 U.S. 931 (1988). Here, the generic problem arising from enforcement of a vague criminal law is exacerbated by the fact that § 1512(b) has been interpreted to criminalize a non-coercive request to an employee to comply with a company's lawful document retention policy and an in-house lawyer's recommendations with respect to editing a memorandum. Thus, the federal government purports to criminalize conduct that is part of numerous businesses' everyday routine and that was undertaken without requiring the jury to find any consciousness of wrongdoing. The high profile of this case and the destructive consequences of the conviction together have cast a pall over the administration of routine document retention policies and the conveyance of appropriate legal advice.

Petitioner Andersen clearly explains why the Fifth Circuit's interpretation of § 1512(b) cannot be sustained based on the text, legislative history and purposes of § 1512(b). No purpose would be served by revisiting those points here. In this brief, accordingly, *Amici* focus on the rules of construction governing criminal statutes and their proper role in this case.

First, the rule of lenity resolves the interpretation of ambiguous criminal law statutes in favor of their strict construction. Had that rule been applied to § 1512(b), it would have prevented the fundamentally unfair consequence of the imposition of criminal penalties on Andersen without adequate notice that its conduct was criminal. As this case reflects, the failure to use the rule of lenity to resolve ambiguity concerning a criminal law not only leads to the misinterpretation of criminal statutes and inadequate notice in the rules governing conduct that results in moral condemnation and punishment, but also impedes the administration of justice. Although conflicting interpretations of federal criminal laws may eventually be resolved by this Court; that resolution often gives rise to issues of retroactivity and the applicability of the new rules in habeas proceedings that significantly burden the already overloaded courts.

Second, *Amici* show that the Fifth Circuit's interpretation of the multiple *mens rea* requirements of § 1512(b) is utterly inconsistent with the analytical framework prescribed by the Court. Where, as here, a federal statute criminalizes conduct that is "not inevitably nefarious," *Ratzlaf* v. *United States*, 510 U.S. 135, 144 (1994), this Court consistently construes statutory *mens rea* elements to require either knowledge of the law or knowledge of facts sufficient to render that conduct blameworthy. Instead, the Fifth Circuit adopted a construction that authorized criminal punishment for conduct that a reasonable person would not have understood to be criminal.

Finally, *Amici* show that this case vividly illustrates the damaging consequences of the failure properly to understand and apply the rule of lenity and other interpretive principles that provide society with notice that specified conduct is criminal. There is presently risk and uncertainty in the administration of routine document retention policies and in compliance with legal advice concerning the revision of

internal documents. This uncertainty and risk paralyze and harm the businesses and individuals affected.

ARGUMENT

I. THE DECISION BELOW SUBVERTS THE RULE OF LENITY.

Section § 1512(b) is ambiguous. The Fifth Circuit's interpretation of § 1512(b)'s *mens rea* requirement broadened a conflict between the Third and D.C. Circuits on the one hand, and the Second and Eleventh Circuits on the other. See Pet. 18-26.[2] The existence of a circuit split is not dispositive proof of ambiguity, but the decisions on both sides of the split reveal a consensus that § 1512(b) is inherently ambiguous. See generally Gary G. Grindler & Jason A. Jones, *Please Step Away From the Shredder and the "Delete" Key: §§ 802 and 1002 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. 67, 74 (2004) ("The meaning of 'corruptly persuades' under § 1512(b) is, unfortunately, perhaps even less certain than the interpretation of the similar language in §§ 1503 and 1505; there is much disagreement between the circuits"). As *Amici* now show, the Fifth Circuit's conclusion – that the ambiguous "knowingly . . . corruptly persuades" language criminalizes the conduct of a defendant who acts with an "improper purpose" – does serious violence to the rule of lenity.

A. The Rule Of Lenity Is A Vital Tool for Construction of Ambiguous Criminal Statutes.

Originating in England during the late seventeenth and early eighteenth centuries to protect individuals from the expansive imposition of the death penalty, see Sarah

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[2] Without expressly resolving the proper interpretation of § 1512(b), the Eighth Circuit has recognized the statute's ambiguity, *United States* v. *Pennington*, 168 F.3d 1060, 1066 (8th Cir. 1999), and the Ninth Circuit has acknowledged the statute's competing interpretations, *United States* v. *Khatami*, 280 F.3d 907, 912-13 (9th Cir. 2002).

Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197, 199-200 (1994), the rule of lenity remains a substantive canon of statutory interpretation essential to guarding individual rights. The rule mandates that courts faced with statutory ambiguity or more than one plausible reading of a criminal statute take the narrowest view. See *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) ("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") (citing cases); cf. 1 William Blackstone, *Commentaries* *92 ("[a] man cannot suffer *more* punishment than the law assigns, but he may suffer *less*"). As explained below, the Fifth Circuit's interpretation of the ambiguous "knowingly . . . corruptly persuades" element of § 1512(b) ignored the rule of lenity and interpreted the provision expansively rather than narrowly.

The foundations of the American rule of lenity were laid in *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). Chief Justice Marshall, interpreting the Crimes Act of 1790, held that this statute, which granted federal jurisdiction over cases involving manslaughter committed on an American vessel on the "high seas," did not apply to cases involving manslaughter committed on a vessel docked on a river in China. The Court strictly construed the statute, stating:

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. [*Id.* at 95.]

See *id.* at 105 (in the absence of Congressional action "this Court cannot enlarge the statute").

Following *Wiltberger*'s teaching, strict construction of criminal statutes became the governing canon within United States courts. For example, in *United States* v. *Lacher*, 134 U.S. 624, 628 (1890), the Court held that "before a man can be punished, his case must be plainly and unmistakably within the statute." See also *Ladner* v. *United States*, 358 U.S. 169, 178 (1958) ("[T]he Court will not interpret 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"); *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.) (it is "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a higher punishment").

This Court has set forth two primary reasons for the rule of lenity: ensuring legislative supremacy and providing proper notice to the public of what conduct is criminal. In *Wiltberger*, Chief Justice Marshall emphasized that the rule was intended to guarantee legislative supremacy in the establishment of criminal law. See 18 U.S. (5 Wheat.) at 95-97, 105-06. This Court later explained that "'because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in Benchmarks* 196, 209 (1967)). Cf. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (the most important aspect of the prohibition of vague criminal statutes is "the requirement that a legislature establish minimal guidelines to govern law enforcement") (internal quotation marks and citation omitted).[3]

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[3] In this manner, the rule of lenity serves as a companion to the doctrine of constitutional doubt in effectuating the intent of the legislature and avoiding the creation of constitutional peril through broad interpretation of ambiguous language. *Cf. Clark* v. *Suarez Martinez*, 125 S. Ct. 716, 724 (2005) (discussing lenity in the same context as constitutional avoidance);

This Court has also elaborated on the rule's role in ensuring that the public is provided with adequate notice of the standards governing conduct and for imposing criminal punishments. Justice Holmes, writing for the Court in *McBoyle* v. *United States*, 283 U.S. 25 (1931), stated:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that fair warning should be given to the world in language that the common world will understand . . . . To make the warning fair, so far as possible the line should be clear. [*Id.* at 27.]

Accord Bass, 404 U.S. at 347-49. Thus, the rule of lenity is among the "[s]ound principles of statutory construction [which] lead [the Court] to reject the amorphous definitions" that create room for arbitrary and unfair decisions by allowing judges to develop standards of criminal punishment on a case-by-case basis. *Kozminski*, 487 U.S. at 951.

The rule of lenity also plays a critical role in constraining prosecutorial discretion. Vigorous application of the rule will deter prosecutors from stretching criminal statutes to fit conduct the prosecutor finds personally offensive. Sadly, it is too late to spare Andersen and all of its employees. But reversal of the conviction will protect future targets of excessive prosecutorial zeal.

This Court's jurisprudence continues to make the rule of lenity the determining principle of construction when the text, structure and legislative history of a criminal statute are ambiguous about its meaning and application. Most recently in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court again stated 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.'" *Id.* at 409

Almendarez-Torres v. *United States*, 523 U.S. 224, 270-71 (1998) (Scalia, J., dissenting).

(alteration omitted) (quoting *McNally*, 483 U.S. at 359-60). See also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("where text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor") (citing *Bass*, 404 U.S. at 347-49); *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (when "ambiguity survives," the court "choose[s] the construction yielding the shorter sentence by resting on the venerable theory of lenity"); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (the rule of lenity applies where the text, structure and history of the statute leave reasonable doubt about the statute's intended scope).[4]

As we show *infra*, the rule of lenity applies in this case and should have guided all courts of appeals to a strict construction of § 1512(b). Indeed, once the Fifth Circuit acknowledged that defining "'knowingly . . . corruptly' in terms of improper purpose" is "circular[]" and casts only "dim light" upon its meaning and that other tools of statutory guidance did not resolve § 1512(b)'s ambiguity, App. 19a, that court should have applied the rule of lenity and concluded that the statute did not criminalize Andersen's actions in this case.

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[4] There is a debate among justices of this Court concerning whether the rule of lenity applies whenever statutory text is ambiguous or only in "situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal*, 498 U.S. at 108 (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980)). *See id.* at 131-32 (Scalia, J., dissenting) (debating the majority's characterization of the rule); *R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring in part and in the judgment) (the Court's "treatment of 'the venerable rule of lenity,' does not venerate the important values the old rule serves") (internal citation omitted). This debate is irrelevant here. The statute is ambiguous before and after application of all traditional tools of statutory construction so the rule of lenity applies under all justices' views.

B. Because § 1512(b) Is Ambiguous, The Rule Of Lenity Applies.

Section 1512's text is hopelessly ambiguous. The legislative history and other aids to construction are as vague as the text. This is precisely the situation in which a court should apply the rule of lenity, as the Third and D.C. Circuits have done. The Fifth Circuit's failure to apply the rule of lenity and reverse the conviction was erroneous.

In *United States* v. *Farrell*, 126 F.3d 484 (3d Cir. 1997), the Third Circuit properly applied the rule of lenity in its construction of § 1512(b). That court reversed a defendant's conviction under § 1512(b) for "knowingly . . . corruptly persuading" a witness to withhold information from the Department of Agriculture. The court found "the phrase 'corruptly persuades' to be ambiguous," *id.* at 487, concluding that the meaning of "corruptly" was not discernible "from the face of the statute," the legislative history, or other statutes prohibiting obstruction of justice generally, *id.* at 487-90.

The government proposed that § 1512's "knowingly . . . corruptly" element should be read to require only an "improper purpose," a definition used in some of cases interpreting the *mens rea* element of § 1503. The court, however, flatly rejected the argument that "knowingly . . . corruptly" means "'motivated by an improper purpose'" under § 1512(b). *Id.* at 489-90. The Third Circuit reasoned that § 1512(b)'s "knowing" element and specific intent requirement rendered the government's proposed construction of "corruptly" superfluous. *Id.* at 490 ("because the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' . . . renders the term surplusage, a result that we have been admonished to avoid"). The court concluded that even if other more expansive readings of § 1512 were reasonable, the

rule of lenity demanded a strict construction of the statute. *Id.* at 489 (citing cases).[5]

Similarly, in *United States* v. *Poindexter*, 951 F.2d 369 (1991), the D.C. Circuit held that the word "corruptly," as used in the former § 1505, "on its face . . . is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" *Id.* at 378 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The court explained that "corruptly" has both a transitive and intransitive meaning, the former involving the persuasion of another by means of corruption or bribery while the latter involves persuading wickedly or immorally, that is, with a bad motive. *Id.* The court adopted the transitive meaning to avoid unconstitutional vagueness and concluded that even that reading "would still be unconstitutionally vague" without the additional requirement that the defendant's conduct violate a "legal duty." *Id.* at 379 (emphasis omitted). Further, the court found that the text failed to satisfy the notice rationale for the rule of lenity set forth in *Bass*, 404 U.S. at 348. See 951 F.2d at 386 ("neither the legislative history nor the prior judicial interpretation of § 1505 supplies the constitutionally required notice that the statute on its face lacks").[6]

In contrast, the Fifth Circuit broadly interpreted § 1512(b)'s ambiguous text and legislative history, embracing the harsher of two readings of a criminal statute although neither

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[5] In *United States* v. *Davis*, 183 F.3d 231 (3d Cir.), *amended by* 197 F.3d 662 (3d Cir. 1999), the Third Circuit revisited the meaning of "'corrupt persuasion'" in § 1512, and again expressly recognized that a jury instruction defining "corruptly" as "'having improper motive or purpose'" was erroneous. 183 F.3d at 250 & n.6.

[6] After *Poindexter*, Congress amended § 1515 to redefine "corruptly" as used in § 1505. *See* Pet. 18 n.19. The amendment provided "the term 'corruptly' means acting with an improper purpose." 18 U.S.C. § 1515(b). Congress conspicuously applied that new definition *only* to § 1505, notwithstanding that §§ 1503 and 1512 also use "corruptly."

Congress's language nor its legislative history were "clear" or "definite." *McNally*, 483 U.S. at 359-60. With respect to § 1512(b)'s text, the court "defin[ed] 'corruptly' in terms of improper purpose," even though it forthrightly acknowledged "*the dim light [that definition] casts upon its meaning, its circularity aside*." App. 19a (emphasis supplied). And, the Fifth Circuit did not conclude that the legislative history clearly dictated its interpretation of "knowingly . . . corruptly persuades," but instead opined that "defining 'corruptly' as 'motivated by an improper purpose' *comports easily* with the legislative history." *Id*. at 23a (emphasis supplied). This analysis reveals the court's erroneous understanding of the rule of lenity. That rule requires a *restrictive interpretation* of a statute whose text and legislative history leave its meaning unclear. The fact that the legislative history is consistent with an interpretation of text that itself casts only a "dim light" on the statute's meaning cannot justify the court's failure to apply the rule of lenity.

Like the Fifth Circuit, the other circuits interpreting § 1512(b) expansively have acknowledged that the section's "knowingly . . . corruptly" language is not clear-cut. In *United States* v. *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), and *United States* v. *Shotts*, 145 F.3d 1289, 1300-01 (11th Cir. 1998), the Second and Eleventh Circuits rejected arguments that § 1512(b) was vague. In so doing, they relied on § 1512's legislative history. See, *e.g.*, *Shotts*, 145 F.3d at 1300-01 (relying on *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting)). The legislative history, however, is wholly indeterminate. Senator Biden's remarks relating to "knowing[] . . . corrupt persuasion" account for a few paragraphs in a lengthy section-by-section analysis of the Anti-Drug Abuse Act of 1988, and reveal only that the "knowingly . . . corruptly persuades" language was intended to overrule a Second Circuit case and ensure that bribing witnesses or persuading witnesses to commit perjury could be prosecuted under federal law. See 134 Cong. Rec. 32701 (1988).

Indeed, the definitional language introduced by the House Report, and enacted as § 1515(a)(6), merely states the "term 'corruptly persuades' does not include conduct that is not 'misleading conduct' because a state of mind required for 'misleading conduct' is lacking." H.R. Rep. No. 100-169, at 12-13 (1987); *id.* at 13 n.27; see also 18 U.S.C. § 1515(a)(6) (implementing House language and defining "knowingly . . . corruptly persuades" as used in §§ 1512 and 1513). Nowhere does the legislative history of § 1512 equate "knowingly . . . corruptly" with an "improper purpose," or cite any cases applying the *mens rea* element in those terms.[7]

In the decision below, the Fifth Circuit's "statutory inflation" of § 1512(b) "raise[s] concerns about both legislative primacy and due process." Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 Wm. & Mary L. Rev. 2209, 2262 (2003). Congress enacted a *mens rea* requirement of "knowing" and "corrupt" persuasion, as well as the improper purpose of interfering with a proceeding. By failing to give the requirement of "corrupt" persuasion any content – let alone content more demanding than knowing persuasion – the Fifth Circuit authorized a prosecution not contemplated by the legislature and adopted a statutory interpretation that contravenes the rule of lenity.

C. The Application Of The Rule Of Lenity In This Case Fully Serves Its Important Purposes And The Administration Of Justice.

The application of the rule of lenity here would serve the administration of justice.

First, the law must give notice of what conduct may be punished by criminal sanction. As this Court has explained,

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[7] Not a single case cited in Senator Biden's discussion of "corrupt persuasion" mentions the phrase "improper purpose." *See* 134 Cong. Rec. at 32701 (citing cases); *cf.* Pet. 23 n.23 (discussing the cases' nexus to wrongful acts).

"'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *Bass*, 404 U.S. at 348 (quoting *McBoyle*, 283 U.S. at 27). If a criminal law is ambiguous, it does not give fair warning unless it is strictly construed to resolve the ambiguity in the defendant's favor. Only then does the statute provide sufficient notice of the conduct being criminalized.

Clear notice is particularly important when a statute criminalizes conduct that is an integral part of numerous businesses' daily routine. Here, Andersen was convicted of a crime based on an instruction to adhere to the Company's document retention policy and in-house counsel's advice to edit a memorandum at a time when no formal SEC investigation was pending. Had the rule of lenity been applied to § 1512(b), and particularly to its *mens rea* requirements, the statute's ambiguities would have been resolved in favor of a heightened *mens rea* requirement.

Second, as Justice Scalia has noted, the rule of lenity, properly understood and applied, should prevent the fundamental unfairness resulting from circuit splits about the interpretation of federal criminal statutes. See *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). If the courts of appeals faithfully applied the rule when ordinary tools of statutory construction resulted in a conclusion that the statute was ambiguous, there would be far fewer differing interpretations of criminal statutes.

Moreover, without the rule of lenity as a tie-breaker in construing ambiguous statutes, the enforcement of such laws sews trouble, confusion and an increased caseload for courts in the future. As Justice Scalia has observed:

> In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction [the rule of lenity] consistent application:

> by fostering uniformity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime. [*Bryan*, 524 U.S. at 205 (citing *Bousley* v. *United States*, 523 U.S. 614 (1998))].

In *Bousley* the Court had to sort out the consequences of *Bailey* v. *United States*, 516 U.S. 137 (1995), which resolved a circuit split about the meaning of the prohibition on the "use or carry[ing]" of a firearm in the commission of a crime. Once the Court resolved that issue, substantial additional litigation ensued concerning retroactivity. This Court ultimately heard *Bousley* to resolve a circuit split involving hundreds of habeas petitions over whether defendants who pled guilty could raise *Bailey* challenges on habeas corpus review. The Court held such challenges were available on habeas if defendants could show "'actual innocence.'" 523 U.S. at 623-24. This also happened in *McNally* where the Court's decision altered an element of the criminal offense, and thus applied retroactively. More than 200 former government officials had their convictions overturned. Many lives had already been ruined.

Bousley and *McNally* effectively illustrate the profound rippling effect and additional work generated when courts interpret ambiguous criminal statutes without the presumption mandated by the rule of lenity. Once the meaning of the statute is determined, courts, defendants and prosecutors pay the price for the period of uncertainly caused by the failure to apply the rule of lenity. Because a defendant convicted by a jury that has been erroneously instructed on an element of a criminal offense can often plausibly plead actual innocence, the resolution of a circuit split may give rise to substantial issues related to the issuance of a writ of habeas corpus. The same result would attach to a reversal here, because the definition of a crime under § 1512(b) would be fundamentally

altered by a heightened *mens rea* requirement (this case would not, however, give rise to the thousands of habeas petitions resulting from *Bailey* because many fewer prosecutions occur under § 1512(b)).

In sum, the proper application of the rule of lenity to ambiguous criminal statutes could prevent the harmful consequences resulting from conflicting interpretations of a criminal statute, not only for the defendants swept in by overbroad and inconsistent interpretations but also for the judiciary whose caseload is multiplied. Section 1512(b) should be strictly construed to exclude Andersen's conduct.

II. SECTION 1512(b) SHOULD NOT BE INTERPRETED TO CRIMINALIZE CONDUCT THAT A REASONABLE PERSON WOULD NOT UNDERSTAND TO BE CRIMINAL.

The maxim "ignorance of the law will not excuse," *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68 (1910), and the criminal law's "ancient requirement of a culpable state of mind," *Morissette* v. *United States*, 342 U.S. 246, 250 (1952), are often in tension. That tension is heightened when a defendant is prosecuted under a statute criminalizing acts not generally understood to be immoral or criminal – *viz.*, crimes that are *mala prohibitum*.[8] In a series of cases, this Court has resolved that tension by recognizing that ignorance of the law in fact may be a valid excuse *if the law itself makes knowledge of the law an element of the offense*, and by interpreting the *mens rea* elements of crimes that are *mala prohibitum* to require that the defendant know that his or her conduct was unlawful.

This interpretive approach to *mala prohibitum* offenses reflects a background presumption that culpability should be

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[8] *Malum prohibitum* refers to "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Black's Law Dictionary* 978 (8th ed. 2004).

required for criminal punishment in that setting. It resembles the rule of lenity – indeed, it probably is no more than a particular application of the rule of lenity – because it results in a more demanding *mens rea* requirement for criminal laws addressing conduct not generally understood to be criminal. See Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 Emory L.J. 753, 864 n.463 (2002) ("[c]onstruing mens rea terms in the defendant's favor is a form of leniency, and it serves conceptual clarity to call it such").[9] As we show *infra*, this is the framework that should have been utilized by the Fifth Circuit in interpreting § 1512(b).

Instead, the Fifth Circuit constructively applied the maxim "ignorance of the law is no excuse." The lower court failed to recognize that, although this maxim continues to hold sway in interpreting statutes criminalizing conduct that is *malum in se* and in interpreting so-called public welfare statutes, the *mens rea* requirements of statutes such as § 1512(b), which criminalize at least some conduct that is not inherently culpable are generally interpreted to require a defendant to know that he or she is acting unlawfully.

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[9] This Court has recognized that interpreting statutes involving conduct that is *malum prohibitum* to require a heightened *mens rea* is interrelated with the rule of lenity. *See Ratzlaf*, 510 U.S. at 146-49 (requiring showing of *mens rea* in tandem with application of rule of lenity); *Liparota* v. *United States*, 471 U.S. 419, 426-28 (1985) ("requiring mens rea is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"); *cf. Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994) (finding it unnecessary to apply rule of lenity because common law requirement of *mens rea* governed statutory interpretation); *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion) (proper to apply the rule of lenity to a civil statute whose criminal applications carry no willfulness requirement)

A. Ignorance Of The Law Does Excuse Crimes That Are *Mala Prohibitum* Where Knowledge Of The Law Is An Element Of The Crime.

Seeking to uphold the Fifth Circuit's interpretation of § 1512(b)'s *mens rea* requirements, the government relies heavily on the axiom that "'ignorance of the law is no defense.'" See Cert. Opp'n at 11, 22-24. That maxim has no application here. Section 1512(b) criminalizes conduct that a reasonable person would not understand to be criminal; thus, under this Court's precedent, § 1512(b)'s *mens rea* requirements should be interpreted to make a defendant's knowledge that he or she is engaged in unlawful conduct an element of the crime.

In *Barlow* v. *United States*, 32 U.S. (7 Pet.) 404, 411 (1833), Justice Story stated, "[i]t is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." But, there have always been exceptions to this general rule. See Vera Bolgár, *The Present Function of the Maxim Ignorantia Juris Neminem Excusat – A Comparative Study*, 52 Iowa L. Rev. 626, 630 (1967). Indeed, "the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element." Model Penal Code § 2.02, cmt. 131 (Tent. Draft No. 4, 1955), *quoted in United States* v. *Freed*, 401 U.S. 601, 615 n.6 (1971) (Brennan, J., concurring).

Thus, ignorance of the law does not excuse crimes that are *mala in se*, because the individual's evil or vicious mind is inherent in the commission of the crime itself.[10] For these

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[10] According to Blackstone, *mala in se* are "crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se* [crimes in themselves], such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature." 1 William Blackstone, *Commentaries* *54. *See also* Henry

common law crimes, the notion of ignorance would be flatly contrary to the moral certainty of the wrong. Cf. *Cheek* v. *United States*, 498 U.S. 192, 199 (1991) ("Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law").

In addition, this Court has held that ignorance of the law does not excuse a subset of crimes that are *mala prohibitum* – the so-called public welfare offenses characterized by their relatively small penalties and regulatory focus. See, *e.g.*, *Barlow*, 32 U.S. at 411; *Shevlin-Carpenter Co.*, 218 U.S. at 68-69; *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971); *Freed*, 401 U.S. at 608-09. The Court explained that ignorance is typically not a defense "in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*." *United States* v. *Balint*, 258 U.S. 250, 252 (1922).

In *United States* v. *U.S. Gypsum, Co.*, 438 U.S. 422 (1978) (plurality opinion), however, the Court strongly indicated that the category of public welfare offenses in which strict liability would be inferred was extremely narrow. Citing these cases, the Court acknowledged that "strict-liability offenses are not unknown to the criminal law," but emphasized that "the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status." *Id.* at 437-38 (internal citations omitted). Significantly, the Court observed that the line between routine, acceptable business conduct and criminal conduct is

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M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 413 (1958) ("[A]lmost everyone is aware that murder and forcible rape and the obvious forms of theft are wrong. But in any event, knowledge of wrongfulness can fairly be assumed. For any member of the community who does these things without knowing that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct").

difficult to discern under the Sherman Act, rejected strict liability for criminal violations of the Act (despite the absence of any *mens rea* element), and interpreted the Act to impose the traditional criminal *mens rea* of a knowing violation of the law. *Id.* at 435-36. See also *Hanousek* v. *United States*, 528 U.S. 1102, 1104 (2000) (Thomas, J., dissenting from denial of certiorari) ("[t]he seriousness of the[] penalties [under the Clean Water Act] counsel against concluding that the CWA can accurately be classified as a public welfare statute").

In marked contrast and of vital importance here, ignorance of the law *does* excuse offenses that are *mala prohibitum*, that is, where a statute criminalizes conduct that is "not inevitably nefarious." *Ratzlaf*, 510 U.S. at 144. See generally John Shepard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021 (1999) (discussing this Court's cases reflecting what the author terms "the rule of mandatory culpability"). In a line of cases commencing with *Morissette* and culminating in *Bryan*, this Court has consistently construed *mens rea* elements in such statutes to require knowledge that the conduct at issue is unlawful. This is done in two ways. If knowledge of certain historical facts is sufficient to render conduct blameworthy, the *mens rea* elements of the statute are construed to require knowledge of such facts. See *infra* at 20-21 (discussing *Morissette* and *Staples*). But where, as here, knowledge of historical facts does *not* put a reasonable person on notice that his or her behavior is criminal, the *mens rea* elements of the statute are interpreted to require knowledge of the law. See *infra* at 22-23 (discussing *Liparota*, *Cheek*, *Ratzlof*, and *Bryan*).

In *Morissette*, a defendant who salvaged spent bomb casings from a vacant plot of land was indicted and convicted of "'knowingly . . . covert[ing]' [government] property." 342 U.S. at 248 (quoting 18 U.S.C. § 641). Believing that the casings were abandoned, the defendant argued that he had no criminal intent, but the trial court refused to allow him to

present his claimed innocent intent to the jury. See *id.* at 248-49. On review, this Court rejected the government's argument that Congress intended to criminalize even unwitting conversions, holding that the "knowing" element of the crime required the prosecution to prove that the defendant "had knowledge of the facts, though not necessarily the law, that made the taking a conversion." *Id.* at 271. Describing the public welfare cases as rare exceptions to the general rule that crime requires an "evil-meaning mind" and an "evil-doing hand," *id.* at 251-54, 257-63, Justice Jackson's majority opinion stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. [*Id*. at 250.]

Accordingly, the Court interpreted the explicit statutory *mens rea* element of knowing conversion to require knowledge of the facts making the conversion of property unlawful. *Id.* at 275.

The Court utilized the same analytical framework in construing the *mens rea* element in the National Firearms Act, which prohibits receipt or possession of an automatic weapon. Despite the absence of any scienter requirement, the Court reasoned that because the Act did not govern public welfare and because severe penalties were attached to its violation, the government was required to prove that the defendant knew of the features of the weapon that brought it within the scope of the Act. *Staples* v. *United States*, 511 U.S. 600, 606-07, 619 (1994). See also *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (holding "knowingly" requirement applied to each phrase of the Protection of Children Against Sexual Exploitation Act, and stating, "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor

of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct").

In *Liparota* v. *United States*, 471 U.S. 419, 433-34 (1985), the Court extended this framework by interpreting the *mens rea* element "knowingly" to require knowledge that one's conduct violated the law. In *Liparota*, the federal law penalized anyone who "knowingly" acquired food stamp coupons in a manner not authorized by regulations; Liparota argued that he did not know he had done anything wrong by accepting food stamps in exchange for a discounted amount of cash, *i.e.*, that he was not "morally blameworthy." *Id.* at 423. This Court construed the *mens rea* element to require proof that the defendant "knew that his conduct was unauthorized or illegal," *id.* at 434, thereby accepting ignorance of the law as an excuse. See also *Cheek*, 498 U.S. at 202-04 (interpreting *mens rea* element of "willfully" attempting to evade a tax to require proof of an intentional violation of a known legal duty).

More recently, in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), the Court construed the *mens rea* element of willfulness in the Money Laundering Control Act's provision outlawing the "structuring" of cash transactions with banks into amounts smaller than $10,000 in order to prevent a bank from reporting the transaction. A defendant attempted to pay a gambling debt by purchasing cashier's checks for less than $10,000 from several, different banks. Concluding that structuring is not "so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of defendant's knowledge," *id.* at 146 – *viz.*, that structuring is *malum prohibitum* – the Court held that a willful violation of the anti-structuring law occurred only if "the Government . . . prove[d] that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 137, 149 (by using the term "willful," Congress "decree[d]" that ignorance of the law is a defense to a criminal charge).

Finally, in *Bryan* v. *United States*, 524 U.S. 184, 196-98 (1998), the Court held that in order "willfully" to violate the federal licensing requirement for firearms dealers, the government must show that defendant knew his or her conduct was unlawful. Again, the Court construed the statute to provide that a person commits a crime only if he or she acts with consciousness of wrongdoing.

Together *Liparota*, *Cheek*, *Ratzlaf*, and *Bryan* stand for the proposition that where, as here, a federal statute criminalizes acts that are not inherently nefarious, the *mens rea* element of the statutes will be interpreted to require the government to prove that the defendant knew that his conduct was unlawful. By this process of interpretation, ignorance of the law has become an excuse in such a setting. Cf. Wiley, *supra*, at 1045 (discussing the Court's shift toward a culpability requirement and stating "the *Liparota* and *Ratzlaf* decisions are more remarkable than the other cases [*Staples* and *X-Citement Video*] because they break with the historic rule that 'ignorance of the law is no defense' and then go further by requiring neither official reliance nor that the defendant bear the burden of proof"). In this line of cases, the rule that ignorance of the law does not excuse is secondary to the equally critical principle that the "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples*, 511 U.S. at 605 (internal quotation marks omitted). Cf. *Smith* v. *Wade*, 461 U.S. 30, 69 (1983) (Rehnquist, J., dissenting) ("'There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. . . . It is therefore the principal of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist'") (omission in original) (quoting 1 J. Bishop, *Criminal Law* §§ 285-287 (5th ed. 1872)).

B. Section 1512(b)'s *Mens Rea* Elements Should Be Interpreted To Require The Prosecution To Prove That A Defendant Knows Its Conduct Is Unlawful.

Neither one employee's request to another to observe the Company's legal document retention policy nor in-house counsel's advice to an employee to edit a memorandum could remotely be characterized as either *malum in se* or a public welfare offense. The conduct that § 1512(b) is alleged to criminalize here is not inherently dangerous, nor does it demonstrate an evil or guilty mind. Indeed, far from being inherently culpable, document destruction – or advice regarding destruction – is often socially beneficial. See Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721, 721, 724-25 (2003) (discussing benefits of document retention policies); Steven R. Schoenfeld & Rosena P. Rasalingam, *Document Retention Policies Have Long-Term Benefits*, N.Y.L.J., Nov. 18, 2002, at S5 (stating document retention policies "save money" and "facilitate the company's business operations and preserve the company's valuable information assets").

In addition, the penalties for violation of § 1512(b), which authorizes a ten-year term of imprisonment, are too severe and substantial to characterize it as a law regulating public welfare. See *Staples*, 511 U.S. at 616-18 (public welfare offenses typically involve small penalties); Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933) (the "cardinal principle[]" of public welfare offenses is that the penalty may not be severe).

Accordingly, § 1512(b) criminalizes conduct that is *malum prohibitum* – unlawful solely by virtue of the statute. As a result, under this Court's precedent set forth above, § 1512(b)'s ambiguous *mens rea* elements – that the defendant "knowingly . . . *corruptly persuade*" another person "*with intent* to . . . alter, destroy, mutilate, or conceal an

object *with intent* to impair the object's integrity or availability for use in an official proceeding," 18 U.S.C. § 1512(b)(2)(B) (emphasis added) – should be interpreted to require the defendant to know that his or her conduct was unlawful. Neither the trial court's instructions to the jury nor the Fifth Circuit's interpretation of the statute imposed this requirement. See Pet. App. 24a-25a, 29a, 41a (Fifth Circuit); *id*. at 47a-49a (jury instructions). The Fifth Circuit wrongly concluded that defendant's ignorance of wrongdoing would be no excuse for its acts even though, under this Court's precedents, § 1512(b)'s multiple *mens rea* elements required the prosecution to show that that Andersen knew its conduct was unlawful.

It was only by failing to heed the relevant precedents that the court below was able to construe § 1512(b) to criminalize conduct that was not inherently evil and that a reasonable person would not have understood was unlawful.

III. THE DECISION BELOW HAS SUBSTANTIAL DAMAGING IMPLICATIONS FOR THE ECONOMY AND INDIVIDUALS.

A. The Decision Below Criminalizes Supervision Of Legal Conduct And Creates Uncertainty And Inefficiency.

This was a high profile prosecution that destroyed a venerable business and many professional careers. The legal message that this prosecution sent has not been lost on businesses and individuals. If a company or executive has any basis to believe that a formal government investigation may be commenced at some point in the future, compliance with a lawful document retention policy or the advice of counsel with respect to edits to draft documents poses a serious risk of criminal prosecution. For large institutions this risk weighs heavily on their day-to-day decisions and activities. It is difficult enough to compete in a global market

place without having ordinary conduct take on a criminal risk simply because there is an inquiry in the air.

Criminal penalties are reserved for the most egregious conduct; moreover, unlike civil law penalties, criminal sanctions typically apply only to that conduct which society views as unambiguously wrongful. The Fifth Circuit's reading of § 1512(b) in this case, however, criminalizes conduct that was believed to be lawful and that consisted of reminding a subordinate to engage in wholly lawful conduct and providing legal advice to a client concerning the content of a memorandum. See Steven Lubet, *Document Destruction After Arthur Andersen: Is It Still Housekeeping or Is It A Crime?*, 4 J. App. Prac. & Process 323 (2002); Stephen Gillers, *The Flaw In The Andersen Verdict*, N.Y. Times, June 18, 2002, at A23 (explaining that in-house counsel's memorandum was "bona fide legal advice to a client who was writing a standard file memo, the kind of advice lawyers routinely give").

At the time of Andersen's alleged obstruction of justice, it was lawful and economically beneficial for Andersen to maintain a document retention policy and for Andersen employees to destroy documents in compliance with that policy. See Chase, *supra*, at 721, 724-25 (discussing benefits of document retention policies); Schoenfeld & Rasalingam, *supra*, at S5 (same). It was also lawful for a supervisor who discovered that employees were not complying with the document retention policy to destroy the documents him or herself. Under the Fifth Circuit's rule, however, it was illegal for that supervisor to suggest that employees observe the document retention policy if one object of the suggestion was to impede some future fact-finding by the government. This pushes an already severe form of vicarious corporate liability to an extreme. It is difficult to conceive of another area of the criminal law in which two individuals have precisely the same *mens rea*, and the one who acts commits no crime, but

the one who merely suggests the act is deemed to have engaged in illegal conduct.[11]

The effects of this anomalous situation are severe for businesses and individuals. Companies and employees will be consumed by inefficient caution. If an official investigation even approaches the horizon, it will become impossible as a practical matter for a company to advise its employees to comply with its efficient and legal document retention policy for fear of running afoul of the law. In a company with thousands of employees which generates millions of paper documents and hundreds of millions of electronic documents, such an approach is at least onerous. For a small business, where space limitations, storage costs, and legal advice are relatively more burdensome, such a rule can be devastating. If Congress wants to impose those burdens and to criminalize failure to act in accordance with a federal rule of document retention, then it should do so expressly and unambiguously. Absent that, prosecutors should not be invested with a roving commission to stretch criminal law to fit conduct not clearly prohibited. Only a faithful and consistent use of the rule of lenity and related interpretive principles regarding crimes that are not *mala in se* can prevent the kind of needless harm that the prosecution in this case created.

B. The Conviction Of Andersen And Others Under Amorphous Standards Inflicts Significant Damage On The Economy.

Instead of prosecuting individual actors, the United States chose to prosecute Andersen, allowing the jury to spread blame for the actions of a few across a corporate structure. By holding that Andersen violated § 1512(b), even though its

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[11] An analogous critique could be offered with respect to criminalizing the in-house attorney's legal advice to edit a company memorandum, but *Amici* incorporate the analysis of the National Association of Criminal Defense Lawyers to avoid repetition.

document retention policy and its compliance with legal advice were lawful, the prosecution was able to conflate legal and illegal acts, ultimately allowing the jury to punish a faceless corporation.

Multiple commentators opined that in the aftermath of Enron's collapse, government prosecutors were under intense pressure to obtain a symbolic conviction or find a scapegoat, and thus turned to Andersen because of the perceived ease in prosecuting obstruction of justice. See, *e.g.*, Jeffrey Toobin, *End Run at Enron: Why the Country's Most Notorious Executives May Never Face Criminal Charges*, New Yorker, Oct. 27, 2003, at 48 (a federal investigator stated that in Enron's aftermath, "'[w]e made Andersen our first case because it was easy and it was obvious'"). With a single stroke, and absent any showing of conduct that a reasonable person would know to be criminal, the government destroyed an important actor in a vital sector of the United States economy. As one commentator observed:

> [T]he attitude was Arthur Andersen got what it deserved.
>
> The question is: What is Arthur Andersen and *who* got what they deserved? You know, some secretary in Des Moines that doesn't have a job now or some junior auditor in Atlanta? I mean, that's who got punished. There is no such thing as Arthur Andersen and there is no such thing as Enron. You can't punish a legal entity.[12]

To be sure, enforcement of the obstruction of justice laws against corporations may serve the overall social good and benefit the economy by ensuring that shareholders are protected and markets remain competitive. In this case, however, an extravagant legal theory, tried and imposed

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[12] ABI Roundtable Discussion, *Remember When – Recollections of a Time When Aggressive Accounting, Special Purpose Vehicles, Asset Light Companies and Executive Stock Options Were Positive Attributes*, 11 Am. Bankr. Inst. L. Rev. 1, 10-11 (2003) (footnotes omitted) (emphasis supplied).

without sufficient *mens rea* protections, irreparably damaged individual lives and American business. Andersen disappeared because an incorrect and overbroad legal standard was applied.

Individuals and businesses need to know what they must do to comply with the law on the obstruction of justice; for that reason, the courts of appeals must apply the rule of lenity and related interpretive principles in the application of § 1512(b) and other ambiguous criminal laws. Unless these principles are rigorously observed, increasingly aggressive prosecutions of white-collar crime will inflict incalculable economic and intangible harm on businesses, their employees and their shareholders. Only Congress should make fundamental policy choice and nothing in § 1512(b) reflects that Congress did so there.

CONCLUSION

For all of these reasons, and those stated by petitioner, the decision of the court of appeals should be reversed.

Respectfully submitted,

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