No. C11-0116-1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2011

SAMUEL MILLSTONE,
Petitioner,

v.

UNITED STATES of AMERICA,
Respondent.

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

BRIEF FOR PETITIONER

Team #49
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Did the Fourteenth Circuit err in upholding an ordinary negligence standard to support a criminal conviction under 33 U.S.C. § 1319(c)(1)(A) by analogizing to a civil provision of the statute in defiance of this Court's precedent, sacrificing the due process protection afforded by a gross negligence standard?

II. Did Millstone "corruptly persuade" a witness in violation of 18 U.S.C. § 1512(b)(3) when he suggested to his business partner that he invoke the Fifth Amendment privilege against self-incrimination, even though Millstone did not engage in any coercive behavior?

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TO THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully submits this brief in support of his request to reverse the judgment of the court below.

OPINION BELOW

The opinion of the Fourteenth Circuit Court of Appeals is unreported and is set forth in the Record. (R. 3-21.)

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourteenth Circuit upon granting a petition of a writ of certiorari. 28 U.S.C. § 1254 (2011). This Court granted the petition for a writ of certiorari for this case. (R. 2.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the interpretation of 33 U.S.C. § 1319 (2011), which penalizes negligent violations of the Clean Water Act, and 18 U.S.C. § 1512 (2011), which criminalizes corruptly persuading a witness to impede a federal investigation. The Fourteenth Circuit erred in comparing these statutes to 33 U.S.C. § 1321 (2011) and 18 U.S.C. § 1503 (2011), respectively. These statutes are set forth, in relevant part, in Appendix A.

This case also implicates both the First and Fifth Amendments to the United States Constitution. These amendments are set forth in Appendix B.

STANDARD OF REVIEW

This Court reviews matters of law de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Because the jury instruction in this case constitutes a disputed statement of law, and the motion for acquittal is premised on the interpretation of a law, this Court should review the opinion of Fourteenth Circuit Court of Appeals de novo.

STATEMENT OF THE CASE

Statement of the Facts

In 2004, Appellant Samuel Millstone ("Millstone") and Reese Reynolds ("Reynolds") founded Sekuritek, a company that deployed security personnel equipped with the latest technology. (R. 4.) Millstone acted as president and CEO of the company, utilizing his Masters in Business Administration from the University of New Tejas. (R. 4.) The security industry was a natural progression for him after a decade of law enforcement experience with the Polis Police Department in New Tejas. (R. 4.) Millstone's role at Sekuritek was to consult with clients, train security employees, and supervise operations. (R. 4.) Reynolds was in charge of sales, marketing, and equipment purchases. (R. 4.)

Sekuritek quickly became a well-established company with numerous security contracts. (R. 4.) Millstone's and Reynolds' technical savvy and know-how put Sekuritek in the premier tier of the industry. (R. 4-5.) On November 5, 2006, Bigle Chemical Company ("Bigle") approached Millstone to handle security for Bigle's New Tejas plant. (R. 5.) At 270 acres, the facility was Bigle's largest plant,

requiring a standing staff of 1,200 people and grossing $2.4 million a day in profits. (R. 5.) Millstone signed the Bigle security contract on November 16, 2006. (R. 5.) To fulfill the contract, Millstone developed a detailed plan to meet Bigle's needs, which included hiring thirty-five new security guards, making significant investments in security equipment, and purchasing vehicles for security transportation. (R. 5-6.) Millstone hired new personnel from mixed security backgrounds and developed a one-week formal training program augmented by three weeks of immersive on-the-job training. (R. 6.) Millstone gave every employee a handbook detailing Sekuritek's standard procedures. (R. 8.) Reynolds purchased a new fleet of custom sport-utility vehicles ("SUV") from an up-and-coming company. (R. 6.) Sekuritek began staffing the Bigle facility at the end of November 2006. (R. 6.)

On January 27, 2007, after over two months free of incidents, Josh Atlas ("Atlas"), a Sekuritek guard, saw a possible intruder near a chemical storage tank.[1] (R. 7.) Atlas drove a Sekuritek SUV to the tank to investigate. (R. 7.) Due to a manufacturing default, the SUV's gas pedal stuck, causing Atlas' vehicle to accelerate rapidly out of control. (R. 7.) Atlas leapt from the vehicle, which veered into a chemical storage tank and caused an explosion. (R. 7.) The resulting fire spread quickly to other storage tanks. (R. 7.) These additional burning tanks

[1] The Sekuritek handbook instructs employees to handle possible security breaches with the following procedure:

> 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.

(R. 8.)

caused chemicals to spill into a nearby river. (R. 7.) The widespread fire and the plant's security wall hampered emergency responders from reaching the site for three days while chemicals continued to spill into the river. (R. 7.)

The accident received national media attention because the resulting fires caused several deaths and damaged adjacent property. (R. 7, 9.) After the accident, during the ensuing federal investigation, Bigle abruptly left the country and relocated back to the Republic of China. (R. 8.) All of Bigle's officers are citizens of the Republic of China, and although Bigle profited $2.4 million a day from the plant, no Bigle assets remain in the United States. (R. 5, 8.) Direct costs from the fires totaled $450 million, and costs of the chemical cleanup are estimated at over $300 million. (R. 7, 8.) Economists speculate damage to the local economy at nearly $1.25 billion. (R. 8.) After Bigle left the country, federal investigators learned that the initial explosion resulted from an out of control Sekuritek SUV impacting a storage tank. (R. 8.) Consequently, the government focused its investigation on Sekuritek. (R. 8.) With increasing public outcry, the media clamored for criminal charges against Sekuritek's corporate officers. (R. 9.)

Millstone and Reynolds met to discuss the federal government's investigation of Sekuritek and the criminal charges that would likely result. (R. 9.) Reynolds told Millstone he was considering assisting the government in its investigation. (R. 9.) In response, Millstone impassionedly advised Reynolds that this was not a wise choice. (R. 9.) In light of the pending criminal charges against both men, Millstone

cautioned Reynolds that they should invoke their Fifth Amendment privilege against self-incrimination.[2] (R. 9.)

Procedural History

The United States brought charges against Millstone under 33 U.S.C. § 1319(c)(1)(A) for negligently discharging pollutants in violation of the Clean Water Act ("CWA"). (R. 10.) The indictment alleged that Millstone's negligent management of security personnel and failure to inspect the SUVs prior to purchase caused the chemical spill. (R. 10.) The United States also charged Millstone with witness tampering under 18 U.S.C. § 1512(b)(3) based on his conversation with Reynolds suggesting that the men invoke their Fifth Amendment privileges against self-incrimination. (R. 10.) The United States granted Reynolds immunity for his involvement in the accident in exchange for his testimony against Millstone. (R. 10.)

In a jury trial, Millstone was convicted of both charges. (R. 10.) After the judge denied his motion for a new trial, Millstone appealed to the Fourteenth Circuit Court of Appeals. (R. 10.) On appeal, Millstone argued that the jury was improperly instructed that ordinary negligence, defined as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation," was sufficient culpability to support a conviction under the CWA.

[2] Millstone's exact language was:

> 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. 9.)

(R. 10.) Millstone also argued that he did not "corruptly persuade" Reynolds, as the witness tampering statute requires, when he encouraged Reynolds to exercise a constitutional right. (R. 10.)

On October 3, 2011, the Fourteenth Circuit upheld Millstone's convictions. (R. 3,15.) In a vigorous dissent, Judge Newman argued that extending the civil definition of ordinary negligence could not possibly sustain a criminal conviction under the CWA. (R. 18.) Judge Newman criticized the majority for ignoring due process concerns by inaccurately classifying the CWA as a public welfare statute. (R. 12.) Additionally, Judge Newman emphasized that the majority blatantly disregarded both this Court's precedent and common sense in holding that Millstone was guilty of witness tampering for simply encouraging Reynolds to invoke his Fifth Amendment privilege. (R. 21.) Millstone petitioned for a writ of certiorari, which this Court granted for the October Term of 2011. (R. 2.)

SUMMARY OF ARGUMENT

The Fourteenth Circuit Court of Appeals erred in upholding a jury instruction of ordinary negligence to support a charge under the CWA and in upholding Millstone's conviction for witness tampering absent any evidence of corrupt behavior.

I.

A criminal violation of § 1319(c)(1) of the CWA requires a jury instruction defining "negligently" as gross negligence for three reasons.

First, a gross negligence standard is necessary under applicable principles of statutory interpretation, which include the plain meaning of the term "negligently," the penalty structure of the CWA, the broader context of federal statutory environmental protection, and the rule of lenity. Congress expressly chose to use the term "negligently" in § 1319(c)(1) but failed to define the term. *Black's Law Dictionary* defines the exact term "negligently" by referring to the Model Penal Code definition of gross negligence. However, the Fourteenth Circuit justified its use of an ordinary negligence definition by incorrectly relying on a civil portion of the CWA to interpret the criminal provision at issue, despite this Court's recent precedent rejecting that practice. Principles of statutory interpretation thus mandate the use of a gross negligence standard.

Second, the Fourteenth Circuit erred when it extended the public welfare doctrine to the CWA and dispensed with a necessary mens rea element for § 1319(c)(1). There is no evidence that Congress designed the CWA to be a public welfare offense. Moreover, extending the public welfare doctrine to the CWA violates due process protections because the statute fails to alert the public that traditionally lawful conduct is now illegal, which violates this Court's precedent. An ordinary negligence standard also will not deter future negligent violations, will unnecessarily target those who cannot prevent violations, and will subject defendants to severe penalties for mere accidents. Accordingly, the CWA is unquestionably not a public welfare statute.

Finally, this case puts constitutional rights precariously at risk because when environmental harm is severe, there is a corresponding temptation to prosecute based on the improper motivations of vengeance, retaliation, and brash public demands for a scapegoat. This Court should not follow the Ninth and Tenth Circuits' analysis of § 1319(c)(1) of the CWA because those cases involved defendants with significantly higher degrees of culpability than Millstone has in this case. Therefore, a gross negligence standard of culpability is necessary to ensure that deterrence and retribution appropriately anchor charges for CWA violations.

II.

The Fourteenth Circuit erred in defining "corruptly persuades" as "persuading with the intent to impede testimony" to uphold Millstone's conviction under § 1512(b)(3). To the contrary, this Court has held that persuasion alone is insufficient to constitute witness tampering. Consistent with this Court's precedent, the Third, Ninth, Tenth, and District of Columbia Circuits have correctly found that corrupt persuasion requires independently coercive or dishonest behavior to justify the harsh criminal sanctions of the statute. Millstone's conversation with Reynolds encouraging him to invoke his Fifth Amendment right did not involve any form of corrupt behavior, as required by this Court's precedent, and is entirely insufficient to justify criminal liability.

Furthermore, principles of statutory interpretation demand a higher level of culpability than Millstone demonstrated in his conversation with Reynolds.

Reading the terms of the statute in context and giving meaning to each word, "corruptly persuades" needs both culpable behavior and the intent to impede an investigation to sustain a conviction under § 1512(b). A narrow definition of "corruptly persuades" is also necessary to provide fair warning of liability under § 1512(b), a statute that provides for up to twenty years of imprisonment. Consequently, Millstone's actions fall far below the threshold necessary to support a conviction for witness tampering.

ARGUMENT

I. THE FOURTEENTH CIRCUIT IGNORED PRINCIPLES OF STATUTORY INTERPRETATION AND VIOLATED DUE PROCESS WHEN IT FAILED TO DEFINE "NEGLIGENTLY" UNDER § 1319(c)(1) OF THE CLEAN WATER ACT AS GROSS NEGLIGENCE.

Congress enacted the CWA to protect the nation's waterways. 33 U.S.C. § 1251(a) (2011). Violations of the CWA can result in any combination of administrative, civil, and criminal sanctions. 33 U.S.C. § 1319. Under the subsection titled "Criminal penalties," there are both negligent violations and knowing violations. 33 U.S.C. § 1319(c). For negligent violations, the statute states in relevant part:

> Any person who. . . negligently violates [the CWA] . . . 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). Subsequent negligent violations are felonies punishable by increased fines and incarceration penalties. *Id.* The CWA provides for even more severe penalties for knowing violations. 33 U.S.C. § 1319(c)(2). Here, the Fourteenth Circuit improperly upheld a civil negligence jury instruction that

defined ordinary negligence as the "failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." (R. 10.) Instead, this Court must require the criminal definition of negligence under the CWA, defined as "a *gross* deviation from the standard of care that a reasonable person would observe in the actor's situation." Model Penal Code § 2.02(2)(d) (2010) (emphasis added) ("MPC"). An instruction of gross negligence follows this Court's precedent regarding statutory interpretation, protects an accused from constitutional due process violations by requiring mens rea (mental state) as part of the offense, and has the practical benefit of ensuring proper prosecutorial discretion in highly contentious cases.

A. According to Principles of Statutory Interpretation, "Negligently" in the Clean Water Act Must Mean Criminal Negligence as Defined by the Model Penal Code.

This Court has held that a statutory term with multiple definitions is open to interpretation. *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992). Negligence is one of the most complex concepts in the law and has distinct criminal and civil definitions. *See Black's Law Dictionary* 1031-35 (6th ed. 1990) (*"Black's"*). Despite the ambiguity of the term, the Fourteenth Circuit held that negligence has one "ordinary" meaning from *Black's*, and that this definition supplants any other possible interpretation. (R. 11.) To the contrary, negligence has two common definitions: the ordinary negligence definition the Fourteenth Circuit upheld and the gross negligence definition used for criminal statutes. *See* MPC § 2.02(2)(d). The rules of statutory interpretation require that this Court

reverse the Fourteenth Circuit because the plain meaning, internal structure, and context of the CWA demand the criminal definition of "negligently" for violations of § 1319(c)(1). Additionally, a gross negligence standard is obligatory under the rule of lenity to provide fair warning of criminal liability.

1. The plain meaning of "negligently" in § 1319(c)(1) is a gross deviation from a reasonable standard of care.

Statutory interpretation begins with reviewing the plain meaning of a statute's text to determine the statute's meaning. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). Dictionary definitions provide insight into the plain meaning of a disputed word when Congress has failed to provide a definition. *Fowler v. United States*, 131 S. Ct. 2045, 2051 (2011). In analyzing a statute, this Court presumes Congress carefully chose which words to include. *Russello v. United States*, 464 U.S. 16, 23 (1983). Therefore, reviewing courts should examine the precise wording Congress employs.

The MPC explicitly provides the criminal definition of negligence for the term "negligently." MPC § 2.02(2)(d); *see also Black's*, at 1035. For criminal charges, the MPC requires mens rea to ensure that a defendant has sufficient culpability to justify conviction. MPC § 2.02(1). This Court frequently relies on the MPC to construe mens rea elements in federal criminal statutes. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978) (relying on the MPC to add a criminal intent element to the federal Sherman Antitrust Act); *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969) (interpreting "knowing" in the tax code by adopting the MPC definition of "knowledge"). State courts have also long held that negligence in

criminal statutes mandates gross negligence. *See State v. Taylor*, 87 P.2d 454, 459 (Iowa 1939); *People v. Sike*s, 159 N.E. 293, 297 (Ill. 1927); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 37 n.10 (Tex. 1994).

The Fourteenth Circuit's opinion relied exclusively on one definition of "negligence" and failed to examine the precise word disputed in the statute – "negligently." (R. 11.) Although the term "negligence" may be ambiguous, Congress used the unambiguous term "negligently." 33 U.S.C. § 1319(c)(1). *Black's* defines "negligently" with the MPC definition of a "gross deviation from the standard of care." *Black's* at 1035. The Fourteenth Circuit erred in interpreting a word not even included in the statute. Because this Court's precedent supports the use of the MPC to construe the mens rea requirement for federal criminal penalties, a gross negligence jury instruction is proper.

2. Because the Clean Water Act allows for a range of penalties, this Court must presume Congress intended the criminal provision of § 1319(c)(1) to require mens rea.

In examining the meaning of a statute, courts must examine the "broader context of the statute as a whole." *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1184 (2011). When an act has a range of sanctions, Congress intends a range of liabilities. *Gypsum*, 438 U.S. at 442-43 (1978). In *Gypsum*, this Court reasoned that, without a showing of congressional intent otherwise, a range of both civil and criminal sanctions indicated that Congress required mens rea in the criminal sanction of a federal statute. *Id.*

As in *Gypsum*, the CWA has a range of sanctions: administrative, civil, and criminal. 33 U.S.C. § 1319(c), (d), (g). This Court must interpret that these three levels of penalties imply a hierarchical structure where more culpable conduct gives rise to stiffer penalties. Civil sanctions in § 1319(d) require a lower level of culpability than the criminal sanctions in § 1319(c). Accordingly, to make sense of the CWA statutory scheme and to avoid an absurd result, negligence under § 1319(c), with a criminal penalty, must have an intent element to ensure the appropriate higher level of culpability. Only the definition of gross negligence has the requisite intent element, making it the proper standard to apply in this case.

3. In the broader context of the Clean Water Act, the criminal penalties of § 1319(c)(1) must require more culpability than ordinary negligence.

The meaning of statutory language always depends on context. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). Despite approving contextual examination, this Court has specifically rejected the use of a civil portion of a statute to interpret its criminal portions. *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 60 (2007). In *Safeco*, this Court analyzed the mens rea requirements of "willfully and knowingly" in a federal act and held that the criminal provisions did not provide *any* insight into construing the civil penalties of the statute. *Id.* This Court has also cautioned that "language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same time." *Russello*, 464 U.S. at 25.

Before this Court decided *Safeco*, the Ninth Circuit relied on 33 U.S.C. § 1321(b)(7)(D) (2011), a civil portion of the CWA, to interpret "negligently" in the criminal penalty portion of § 1319(c)(1). *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999), *cert denied*, 528 U.S. 1102 (2000). The Ninth Circuit mistakenly noted that if Congress intended the gross negligence definition to apply, Congress could have added "gross" in § 1319 because it used that term in § 1321. *Id.* In support of this, the Ninth Circuit relied on *Russello* for the proposition that one section of an act can show that Congress could have used the equivalent language in a different section of the same act. *Id.*

Although courts should not use civil provisions of a statute to inform criminal provisions, courts must look to both the "specific context" of the disputed term and the "broader context of the statute as a whole." *AT&T*, 131 S. Ct. at 1184. Courts may presume Congress is aware of other statutes it has enacted, and other federal acts may provide relevant context to discern the purpose of a statute. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

The Fourteenth Circuit erred by comparing a civil provision of a statute to a criminal provision, disregarding that Congress did not enact § 1312 and § 1319 around the same time, and failing to consider other environmental acts to place the CWA in context.

The Fourteenth Circuit mimicked the Ninth Circuit in *Hanousek* by comparing § 1321 to § 1319. (R. 11-12.) Neither the Fourteenth Circuit nor the Ninth Circuit cited any precedent that supports the use of the civil portion of a

statute to interpret the statute's criminal provisions. This Court's holding in *Safeco* undermines the validity of the analysis employed by both *Hanousek* and the Fourteenth Circuit. The only court that has considered the validity of cross-applying the civil and criminal provisions of the CWA since this Court's decision in *Safeco* is the New Jersey District Court, which disclaimed the analysis in *Hanousek*. *United States v. Atl. States Cast Iron Pipe Co.*, No. 03-852 (MLC), 2007 WL 2282514, *14 at n.17 (D.N.J. Aug. 2, 2007) (*Hanousek's* "type of reasoning was explicitly rejected in . . . *Safeco* . . . . We believe there is good reason to scrutinize carefully that aspect of *Hanousek*, rather than accepting it as controlling."). The Fourteenth Circuit erred in misapplying *Russello* and ignoring *Safeco* to justify comparing § 1319 with § 1321. (R. 11-12.)

Although both the Ninth and Fourteenth Circuits referenced *Russello*, in that case, this Court acknowledged that relying on other sections of the same act is not necessarily informative, even if Congress passed the acts at a similar time. Congress added the "negligently" provision of § 1319(c)(1) to the CWA by enacting the Water Quality Act of 1987. Pub. L. No. 100-4, 101 Stat. 7, 42 (1987). Three years later in a different legislative session, Congress amended the CWA § 1321(b)(7)(D), the "gross negligence" provision of § 1321, by enacting the Oil Pollution Act of 1990. Pub. L. No. 101-380, 104 Stat. 484, 537 (1990). Because Congress enacted § 1319 three years before it enacted § 1321, the Ninth and Fourteenth Circuit misapplied *Russello* in comparing the two sections. Here, the

Fourteenth Circuit erred in assuming the intent of § 1319, enacted in 1987, could be informed by an act that was not even passed until 1990.

According to this Court's precedent in *FDA*, courts should examine the general context surrounding a statute, and in this case, similar environmental acts are informative. Under the Fourteenth Circuit's interpretation, the CWA is unique among environmental statutes in that criminal penalties attach to ordinary negligence.[3] For example, in the Clean Air Act, Congress explicitly defined "negligently" to include a heightened requirement of danger. 42 U.S.C. § 7413(c)(4) (2011). In contrast, the CWA does not have any additional language to justify the Fourteenth Circuit's expansive interpretation of negligence to be ordinary negligence. This Court cannot allow the Fourteenth Circuit's misunderstanding of § 1319(c)(1) to set a new standard in environmental law when there is no clear congressional intent allowing it. Therefore, a gross negligence jury instruction is appropriate in this case.

4. To ensure fair notice of criminal liability, the rule of lenity requires this Court to construe § 1319(c)(1) in favor of a criminal defendant.

The rule of lenity is a longstanding doctrine of statutory interpretation in which courts construe ambiguities in criminal statutes in the defendant's favor.

[3] Most environmental statutes have criminal enforcement provisions for knowing violations; however, no environmental statute criminalizes ordinary negligence. *See, e.g.*, Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 1361(b) (2011); Toxic Substances Control Act, 15 U.S.C. § 2615(b) (2011); Endangered Species Act 16 U.S.C. § 1540(b) (2011); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1268(e) (2011); Ocean Dumping Act 33 U.S.C. § 1415(b) (2011); Safe Drinking Water Act 42 U.S.C. § 300i-1(a)-(d) (2011); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)-(e) (2011); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9603(b) (2011); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11045(b)(4) (2011).

Liparota v. United States, 471 U.S. 419, 427 (1985). This principle reflects the policy that the legislature must define criminal conduct, and it also ensures that criminal statutes provide defendants fair warning of the bounds of unlawful conduct. *Id.* The rule of lenity applies when congressional intent is ambiguous. *Muscarello v. United States*, 524 U.S. 125, 138 (1998). To clarify congressional intent, this Court may look to legislative history. *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1266 (2011). However, this Court has emphasized that the most authoritative statement of congressional intent is the statute itself, not legislative history. *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1980 (2011). If the legislative history fails to resolve statutory ambiguity, the rule of lenity compels a court to construe the statute narrowly, in favor of the criminal defendant. *Dixson v. United States*, 465 U.S. 482, 491 (1984).

Congress did not define "negligently" in the CWA. Given that the Fourteenth Circuit has construed negligence one way and there is also clear support for gross negligence, § 1319 is ambiguous. As the Fifth Circuit has noted, "[t]he language of the CWA is less than pellucid." *United States v. Ahmad*, 101 F.3d 386, 389 (5th Cir. 1996). Furthermore, the legislative history of the CWA fails to resolve this ambiguity regarding congressional intent. Some statements in the legislative history support the use of gross negligence; however, some statements suggest otherwise. *Compare Extending and Amending the Clean Water Act: Hearings on S. 431 and S. 432 Before the Subcomm. on Envtl. Pollution of the S. Comm on Env't and Pub. Works*, 98th Cong. 109 (1983) (statement of George Clemon Freeman, Jr.)

(testifying that the criminal provisions of the CWA punish knowing and "grossly negligent polluters"), *with* 118 Cong. Rec. 10, 644 (1972) (statement of Rep. Harsha), *reprinted in* 1 FWPCA, Legis. History of the Federal Water Pollution Control Act Amendments of 1972, at 530 (1973) (stating that simple negligence is sufficient to convict). Following this Court's precedent in *Dixson*, the rule of lenity applies here. Consequently, this Court must hold that the jury instruction for ordinary negligence was improper, and the correct jury instruction required a finding of gross negligence. Only a gross negligence standard will ensure that a criminal defendant has the necessary culpability to justify a criminal conviction.

Because the plain meaning of "negligently" is gross negligence according to *Black's* and the MPC, the CWA provides for a range of sanctions, and a civil portion cannot inform the criminal portion of the CWA, a gross negligence jury instruction is necessary. The Fourteenth Circuit erred in relying on § 1321 to interpret § 1319 because Congress did not enact the statutes around the same time, and under the Fourteenth Circuit's mistaken reading, the CWA becomes an outlier among environmental statutes. The rule of lenity also prevents this Court from resolving the ambiguity in the CWA against a criminal defendant. Accordingly, this Court must reverse the Fourteenth Circuit and require a jury instruction of gross negligence.

B. Because the Clean Water Act Criminalizes Traditionally Lawful Conduct and Fails to Adequately Protect Due Process, It Is Not a Public Welfare Statute.

This Court must reverse the Fourteenth Circuit because the criminal negligence provision of the CWA, § 1319(c)(1), is not a public welfare statute. During the industrial revolution, the public welfare doctrine evolved as a practical necessity as demand increased for strict health and welfare regulations. *Morissette v. United States*, 342 U.S. 246, 254 (1952). Unlike offenses in traditional Anglo-American criminal jurisprudence, public welfare offenses do not require a mens rea element to find an accused guilty. *Id.* at 254-55. In order to protect public health, Congress enacted public welfare statutes that lacked mens rea elements to "require the punishment of the negligent person" even though the accused may be ignorant of the "noxious character" of the harmful substance at issue. *United States v. Balint*, 258 U.S. 250, 252-53 (1922). Nonetheless, a statute that protects the welfare of the public does not necessarily warrant classification as a public welfare statute.

This Court generally disfavors offenses without a mens rea element, and a mens rea requirement is the rule, not the exception. *Staples v. United States*, 511 U.S. 600, 605-06 (1994). The fundamental flaw in public welfare offenses is that without a mens rea element, a person oblivious of any wrongdoing can be convicted despite a lack of any notice of the consequences of his conduct. *Lambert v. California*, 355 U.S. 225, 228 (1957). This Court has emphasized that "[i]ngrained in our concept of due process is the requirement of notice." *Id.* When a statute

prescribes a penalty for a "mere failure to act," the Fifth Amendment requires notice in order to to safeguard a defendant's right to due process. *Lambert*, 335 U.S. at 228; *see also* U.S. Const. amend. V. Additionally, a requirement of mens rea protects the administration of justice by ensuring that deterrence and reformation drive public prosecutions, as opposed to vengeance and retaliation. *Morissette*, 342 U.S. at 250-51.

This Court first extended the public welfare doctrine to an environmental statute in 1971, when a transporter of dangerous acid was found guilty for not having a proper permit. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) ("[W]here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."). Circuit courts of appeal are split on whether the CWA is an environmental public welfare statute. *Compare Hanousek*, 176 F.3d at 1121 (holding that the CWA is a public welfare statute), *and United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997) (holding that a knowing violation under the CWA is a public welfare offense), *with Ahmad*, 101 F.3d at 391 (holding that because public welfare statutes are such a narrow exception to the requirement of mens rea, the public welfare doctrine does not apply to the CWA).

Except for the Ninth Circuit in *Hanousek*, other circuit courts that have weighed in on this question have only equated *knowing* violations of the CWA under § 1319(c)(2) as public welfare offenses. *United States v. Kelley Technical Coatings,*

Inc., 157 F.3d 432, 439 n.4 (6th Cir. 1998); *Sinskey*, 119 F.3d at 716; *United States v. Hopkins*, 53 F.3d 533, 537-38 (2d Cir. 1995). These decisions are not persuasive in this case because knowing violations are not equivalent to negligent violations. This Court has held that different applications of the same statute may require different mens rea standards. *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 2007); *see also Staples*, 511 U.S. at 605. Under the CWA, there is a higher degree of culpability for knowing violations, which result from direct action, than for negligent violations, which result from indirect acts of omission. 33 U.S.C. § 1319(c).

In a rare dissent from this Court's denial of certiorari for *Hanousek*, Justice Thomas and Justice O'Connor vehemently opposed classifying the CWA as a public welfare statute. *Hanousek v. United States*, 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting). Justice Thomas noted that the CWA regulates some dangerous substances; however, as a public welfare statute, the CWA would impermissibly criminalize "using standard equipment to engage in a broad range of ordinary industrial and commercial activities." *Id.* The dissent emphasized that the CWA cannot be a public welfare statute because it fails to "alert an individual that he stands in responsible relation to a public danger." *Id.* (quotation omitted).

Previously, five Ninth Circuit judges voiced these same concerns in a dissenting opinion for a rejection of an en banc rehearing for *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting). The Ninth Circuit dissenters stressed that the purpose behind the CWA was not

advanced in the slightest by imposing on public servants, such as sewer workers, a "massive legal risk, unjustified by law or precedent, if they unknowingly violate" the CWA. *Weitzenhoff*, 35 F.3d at 1299. Because the CWA regulates "ordinary, innocent, productive conduct," an expansive interpretation of the statute will deter people from performing socially valuable work due to the risk of imprisonment for merely doing their job. *Id.* The *Weitzenhoff* dissent noted that without a "clear command" from Congress, courts have no justification to disregard a mens rea requirement, which would make a criminal law "morally arbitrary." *Id.* at 1293, 1299.

Without articulating any specific test, this Court assesses public welfare statutes on a case-by-case basis and considers several factors to determine whether a statute constitutes a public welfare offense. As a threshold issue, this Court must first find "some indication of congressional intent, express or implied" in order to eliminate mens rea from a criminal statute. *Staples*, 511 U.S. at 606. The CWA lacks any statement of congressional intent that would dispel the presumption of a mens rea requirement. For example, a Texas statute similar to the CWA criminalizes the discharge of pollutants into state waters and unmistakably provides that relevant offenses "may be prosecuted without alleging or proving any culpable mental state." Tex. Water Code Ann. § 7.147 (West 2011). Because there is unequivocally no language similar to this in the CWA, this Court should decline to extend the public welfare doctrine for a lack of express congressional intent.

Even if this Court entertains the claim that the CWA could be a public welfare statute, this Court must resolve ambiguity in the statute to uncover hidden congressional intent. In designating public welfare statutes, Congress has balanced the "relative hardships" between the abrogation of due process caused by dispensing with mens rea and the burden to the public resulting from a lack of heightened protection. *United States v. Dotterweich*, 320 U.S. 277, 285 (1943). To discern hidden congressional intent, this Court has considered any combination of six factors to determine whether sufficient justification exists to classify a statute as a public welfare offense.

First, a public welfare statute must promote the "maintenance of public policy." *Balint*, 258 U.S. at 252. For example, in *Balint*, this Court found a statute prohibiting the importation of narcotic drugs was a public welfare statute because Congress enacted it to further the goal of reducing the adverse social impact of addictive drugs. *Id.*

A second factor this Court has considered in designating public welfare statutes is whether the accused is in a position to prevent the targeted harm. *Morissette*, 342 U.S. at 256. An accused under a public welfare statute must be in a responsible position, as the actor either possessing or dealing with the substance regulated, to prevent the potential public danger. *Staples*, 511 U.S. at 607.

The third feature of a public welfare statute is that an accused "would hardly be surprised" to know that his conduct was unlawful due to the inherently dangerous nature of the substance or conduct regulated. *United States v. Freed*,

401 U.S. 601, 609 (1971). In *Freed*, this Court noted that the dangerous nature of hand grenades should put an owner on notice that grenades are strictly regulated. *Id.* at 609. Requiring a lack of surprise ensures that there is implied notice alerting the public of potential penalties. *Lambert*, 355 U.S. at 228. This Court has stressed that "[n]otice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Id.* For example, the Florida Supreme Court struck down a portion of the state's 1977 Air and Water Pollution Control Act, which was similar to § 1319(c)(1), because the provision criminalized ordinary negligence instead of criminal or gross negligence. *State v. Hamilton*, 388 So.2d 561, 563-64 (Fla. 1980). The court held that even if a statute is "specifically enacted in the public interest there must be clearly ascertainable standards of guilt by which a citizen may gauge his conduct." *Id.*

A fourth attribute of all public welfare statutes is that they do not criminalize traditionally lawful conduct. *Staples*, 511 U.S. at 610. In *Staples*, this Court construed a mens rea requirement into a statute that penalized failure to register machine guns, regardless of the owner's knowledge as to the gun's automatic nature. *Id.* at 615. Unlike importing narcotic drugs or possessing hand grenades, "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610. Thus, this Court held that the statute in *Staples* did not constitute a public welfare statute. *Id.* at 618.

Fifth, public welfare statute penalties must be minor, and a conviction should do no "grave damage to an offender's reputation." *Morissette*, 342 U.S. at 256.

Sanctions under a public welfare statute must also not include incarceration in a state penitentiary. *Staples*, 511 U.S. at 616. In fact, the Fifth Circuit has held that the CWA is not a public welfare statute due to its severe penalties. *Ahmad*, 101 F.3d at 391.

Finally, the sixth factor provides that public welfare statutes should not be mere statutes of convenience for law enforcement. *Lambert*, 355 U.S. at 229. The law at issue in *Lambert* violated due process because it required felons, without notice, to register with the city government and assessed penalties for failing to register. *Id.* at 226. This Court noted that the ordinance was enacted for the convenience of law enforcement, which was not a compelling enough reason to uphold the law in light of due process violations. *Id.* at 229-30. Moreover, this Court does not uphold statutes that require reliance on the government's good faith promise to use prosecutorial discretion responsibly. *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

In this case, § 1319(c)(1) of the CWA cannot be a public welfare statute because Congress did not expressly designate it as a public welfare statute. The circuit courts that have found the CWA to be a public welfare statute are unpersuasive because those courts failed to assess implications of the CWA *negligence* provision under §1319(c)(1) as a public welfare offense. Additionally, this Court cannot imply congressional intent here because none of the attributes of public welfare offenses recognized by this Court's precedent apply to § 1319(c)(1).

As to the first factor requiring a benefit to public policy, Congress stated that the purpose of the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Eighth Circuit also explained that Congress designed the CWA to deter future offenses as an important policy aspect of the statute. *Sinskey*, 119 F.3d at 716. This aim is clearly within the realm of benefitting public policy, but criminalizing ordinary negligent conduct will not deter future violations. Deterrence via the threat of penal sanctions is most effective when individuals have the conscious ability to choose their behavior, and deterrence is least effective when free choice is absent. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 161 (J.H. Burns and H.L.A. Hart eds., 1970) (1823). Here, criminalizing the equivalent of accidental conduct has no deterrent value. In fact, Senator Inhofe expressed deep concern that criminalizing ordinary employees involved in "non-deliberate environmental accidents," as in *Hanousek,* extended the CWA beyond the intent of Congress. *Implementation of the Clean Water Act: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water of the S. Comm. on Env't. and Pub. Works*, 108th Cong. 4 (2003) (colloquy between Sens. Domenici, Inhofe, and Breaux) ("Colloquy"). The only deterrent value an ordinary negligent violation would have in this case is to either dissuade security companies from taking jobs at chemical plants or to force them to charge astronomically higher premiums for normal operations. In the future, despite inspection of security vehicles and diligent employee training, a security guard may still be liable under the morally arbitrary CWA for a blameless

accident. As Judge Newman noted in the Fourteenth Circuit dissent, an ordinary negligence standard under the CWA would penalize "a visitor to Bigle Chemical's plant who negligently forgot to tie his shoes, fell and tripped a switch that discharged chemicals." (R. 17-18.) Indeed, Senator Domenici noted that the expanded breadth of the CWA creates an unintended "legal minefield" that incentivizes employees to hamper, rather than assist, environmental investigations in order to avoid potentially incriminating themselves for an accident. Colloquy, at 4. The CWA negligence provision cannot be a public welfare statute because only a gross negligence standard will deter future violations and remove incentives for employees to hamper environmental investigations.

The second factor is absent in this case because Millstone was not in a position to prevent the harm that the CWA was designed to eliminate. Millstone was not in the same position as the defendant in *International Minerals* as a transporter of chemicals. As a contractor of Bigle, Millstone did not "possess" or "deal with" the chemicals in the plant like employees of Bigle did. Millstone was not involved in the business operations of Bigle, and if the plant had a CWA discharge permit, neither Millstone nor Sekuritek would have been responsible for it. Millstone only had influence over the narrow role Sekuritek played in maintaining security at Bigle. In this context, penalizing Millstone would criminalize his reasonable business decisions. Millstone's decision to delegate the duty to purchase and inspect Sekuritek vehicles to his business partner is not criminal. Millstone's decision to hire several employees new to the security

industry represents his commitment to helping the local economy by creating new jobs and is certainly not criminal. Millstone's decision to train these employees in a week-long seminar followed by at least three weeks of immersive on-the-job training is not criminal. Millstone's decision to trust Reynolds in selecting a newer vehicle manufacturer, who failed in its duty to alert Millstone of a latent defect, is not criminal. It would have taken a soothsayer's foresight for Millstone to anticipate measures that would have prevented the successive acts by independent actors that caused this accident. Thus, the CWA negligent provision cannot be a public welfare statute because it will penalize actors, such as Millstone, who are not in a position to prevent unlawful environmental harm. A gross negligence jury instruction is more appropriate to hold Millstone to an accurate standard of care relative to his position at Bigle.

Even though there is no "surprise" that the government regulates certain chemicals, as the third factor requires, the CWA regulates many substances other than chemicals. The CWA regulates "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."[4] 33 U.S.C. § 1362(6) (2011). If ordinary negligence becomes the standard under the CWA, then

[4] Unlike other environmental statutes, the CWA has an extremely broad definition of pollutant. For example, the Resource Conservation and Recovery Act *specifically* defines hazardous waste, the Comprehensive Environmental Response, Compensation, and Liability Act defines hazardous substances, and the Toxic Substance Control Act defines toxic substances. 42 U.S.C. § 6903(5) (2011); 42 U.S.C. § 9601(14) (2011); 15 U.S.C. § 2602(2) (2011). These are the kinds of statutes that deal exclusively with such extremely dangerous pollutants in which notice of regulation is implied.

accidental discharge of rock, sand, or warm water into a navigable stream by a property owner doing home renovations will be criminal. This result is certainly surprising because the CWA fails to give individuals any notice that traditionally lawful conduct is now illegal. The only mechanism preventing criminal prosecution of these innocent violations would be the discretion of agents of the Environmental Protection Agency ("EPA") or the Department of Justice. Prosecutorial discretion alone is not enough to save a statute from misuse according to this Court's precedent in *Stevens*, as analyzed under the sixth consideration for public welfare statutes. Notably, as far as the record reveals, Millstone's security practices did not violate any Department of Homeland Security ("DHS") regulations for chemical facilities. *See* Chemical Facility Anti-Terrorism Standards, 6 C.F.R. § 27 (2011). Analogous to the registration statute in *Lambert* that failed to give defendants notice, Millstone was never on notice that his business decisions could be worthy of criminal prosecution. The negligence provision in § 1319(c)(1) cannot be a public welfare offense because it criminalizes mere failure to act without any form of implied notice, leaving accused persons under the CWA surprised to know that their conduct is criminal.

Under the fourth factor, the negligence provision of the CWA is not a public welfare statute because it regulates traditionally lawful conduct. A standard of ordinary negligence under the highly complex regulatory framework of the CWA would criminalize commonplace industrial and commercial activities. The ordinary negligence standard upheld by the Fourteenth Circuit sweeps lawful conduct under

the purview of the CWA in defiance of this Court's holding in *Staples*. This Court decided *Staples* after the Ninth Circuit's decision in *Hanousek* and unequivocally held that any statute that criminalizes traditionally lawful conduct cannot be a public welfare statute. The Fourteenth Circuit's use of ordinary negligence exacerbates the already broad definition of pollutant in the CWA and makes traditionally lawful behavior, such as Millstone's commercial business decisions, illegal. Therefore, a jury instruction of gross negligence is necessary in order to prevent erosion of due process protections.

Penalties under the CWA are not minor, as the fifth factor associated with public welfare statutes mandates. Violation of § 1319(c)(1)(A) is punishable with fines up to $25,000 per day and imprisonment for one year. 33 U.S.C. § 1319(c)(1)(B). Subsequent violations are punishable with higher fines and imprisonment for over one year.[5] *Id.* Knowing violations under § 1319(c)(2) can result in three years of imprisonment for first offenses and up to six years of imprisonment for second violations. 33 U.S.C. § 1319(c)(2)(B). Justices Thomas and O'Connor, the five judges from the Ninth Circuit *Weitzenhoff* dissent, and the Fifth Circuit in *Ahmad* have all cited the strict penalties of the CWA as justifications for why the CWA is not a public welfare statute. *Hanousek*, 528 U.S. at 862 (Thomas, J., dissenting); *Weitzenhoff*, 35 F.3d at 1296-97 (Kleinfeld, J., dissenting); *Ahmad*,

[5] Besides potentially being subject to both civil and criminal penalties for the same infraction, a defendant could be subject to even higher fines than those under the CWA pursuant to the Alternative Fines Act. 18 U.S.C. § 3571 (2011). Additionally, under United States Sentencing Guidelines ("USSG"), a defendant's punishment may be subject to upward adjustment; for example, the *Hanousek* defendant's sentence was adjusted upwards under USSG § 3B1.1(c) for his supervisory role. Brief for the United States as Appellee at 39, 41, United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) (No. 97-30185).

101 F.3d at 391. Consequently, this Court should hold that the CWA is not a public welfare statute because of the statute's severe penalties.

Finally, the CWA cannot be a public welfare statute because *Lambert* precludes that classification for the mere convenience of law enforcement. Frequently, prosecutors use negligent charges of the CWA as a tool in plea bargains, as shown by a statistical study of environmental pollution cases from 1987-2000, which revealed that out of a total of 104 negligent violation cases, ninety percent were resolved by guilty pleas and only seven went to trial. Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong*, 32 Envtl. L. Rep. 11153, 11157 (2002). Many plea-bargained cases involved employees accused of knowing violations of the CWA in which the employer pled out to only negligent violations, despite the possibility of a higher charge. *Id.* at 11158-59. The infrequency of negligent violation charges, except as pleas or in combination with knowing violations, demonstrates that law enforcement commonly uses the negligent CWA provision to merely facilitate convictions. However, the convenience of § 1319(c)(1) does not remedy the due process concerns of the statute, and *Stevens* prevents the use of prosecutorial discretion alone to justify the constitutionality of a statute. In light of *Lambert* and *Stevens*, the CWA cannot be a public welfare statute because this would pose clear risks to due process under the guise of prosecutorial discretion. The appropriate constitutional remedy

is for this Court to hold that the CWA requires gross negligence for criminal convictions.

In conclusion, there is no indication that Congress intended the CWA to be a public welfare statute. This Court is entirely justified in reversing the Fourteenth Circuit's decision on the threshold basis that there is no clear expression of congressional intent. Nevertheless, even if this Court looks for implied intent by balancing the hardships between due process requirements and the public benefit served by the statute, the CWA is still not a public welfare statute. The balance in this case clearly favors a jury instruction with a mens rea requirement of gross negligence because the CWA fails each of the six factors associated with extending the public welfare doctrine to a statute. Thus, this Court must reverse the Fourteenth Circuit and hold that the CWA is not a public welfare statute.

C. The Facts of This Case Do Not Warrant an Ordinary Negligence Standard, Which Would Constitute a Severe Deviation from Previous Prosecutorial Practice Under the Clean Water Act.

Few circuits have entertained a challenge to the negligent provision of the CWA on due process grounds because there have been few cases of negligent violations. *See* Solow & Sarachan, *supra*, at 11156. Only the Ninth and Tenth Circuits have explicitly discussed the use of an "ordinary negligence" standard under the CWA, rather than a gross or criminally negligent standard. *United States v. Ortiz*, 427 F.3d 1278, 1279 (10th Cir. 2005); *Hanousek*, 176 F.3d at 1121. This Court should decline to follow *Hanousek* and *Ortiz* because the facts of this

case involve a significantly lower level of culpability compared to the egregious behavior of the defendants in those cases.

In *Ortiz*, a defendant was found guilty of violating § 1319(c)(1)(A) for repeatedly dumping industrial wastewater from a chemical distillation facility down a toilet connected to the Colorado River. 427 F.3d at 1280-81, 1286. The defendant had prior notice that the CWA required a discharge permit for his wastewater disposal, and he lied to investigators about his wastewater practices. *Id.* at 1280-81. Notably, the defendant did not dispute the use of an ordinary negligence standard under the CWA. *Id.* at 1282.

The Ninth Circuit in *Hanousek* upheld the use of an ordinary negligence standard under the CWA for a defendant's supervision of a construction project where a backhoe operator struck a pipeline causing oil to spill into the Skagway River. 176 F.3d at 1118-19. The defendant failed to follow the previous supervisor's practice of protecting the pipeline and failed to follow the standard industry practice of covering a pipeline with fill when heavy machinery operates nearby. *Id.* at 1124-25. The defendant also did not adequately instruct his employees to clean up the spill, and he was implicated with a co-defendant who lied to authorities and altered the pipeline to minimize the apparent size of the pipe's crack. Brief for the United States as Appellee at 10-11, United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) (No. 97-30185). In addition, the defendant had previously faced charges for Canadian environmental crimes. *Id.* at 46 n.22.

The conduct of the defendants in *Ortiz* and *Hanousek* could easily have been classified as grossly negligent. The EPA requires two factors, significant environmental harm and culpability, in selecting cases to prosecute.[6] Both of these factors are undoubtedly present in both *Hanousek* and *Ortiz*. Defendant Ortiz was on notice of the illegality of his repeated actions. Defendant Hanousek's gross negligence is evident in his complete failure to follow industry norms of construction care and spill clean up, his involvement in a cover-up, and his previous connection with environmental crime.

Unlike the defendants in *Ortiz* and *Hanousek*, Millstone's conduct lacks any indication of culpability. There is no evidence in the record that he failed to follow industry norms for chemical plant security. The CWA charge against Millstone exemplifies abuse of prosecutorial discretion because the government ignored the EPA requirement of culpability to justify prosecution. Here, the government flagrantly set aside due process protections in an effort to appease harsh public criticism demanding a scapegoat for this atrocious accident. The government favored vengeance and retaliation over culpability in its prosecution of Millstone, which was the exact motivation that this Court in *Morissette* feared would come to fruition when criminal statutes lack mens rea.

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[6] In 1994, the EPA Director of Criminal Enforcement, Earl E. Devaney, circulated a guidance memorandum regarding prosecutorial discretion of the EPA. Env't Prot. Agcy, 325R94001A, General Enforcement Policy Compendium: Volume II (1994). He emphasized that two criteria, significant environmental harm and culpable conduct, should govern case selection. *Id.* at 12-13. Indications of culpable conduct include repeated violations, deliberate misconduct, falsification of records, tampering with pollutant recording devices, and failure to obtain a regulatory permit. *Id.* at 13-14.

As a result of the overwhelming media attention, the investigators examining the accident focused on Sekuritek's training practices, the purchase of the defective SUV, and the installation of the security wall. Contrary to these allegations, Millstone properly provided Sekuritek staff with one week of intensive training and at least three weeks of on-the-job training. Sekuritek's employee handbook specifically instructed employees to leave their vehicle behind upon arriving at a suspected security breach. Because the record does not indicate that Atlas tried to radio a supervisor for instructions upon suspecting a security breach, there was no way for Millstone to have corrected Atlas's impulsive behavior in a supervisory capacity. Moreover, Millstone had no duty to inspect the vehicles, and even if there was a duty, it belonged to Reynolds. Millstone did not have any information of a recall or defect that would have given him notice of a requirement to take steps to prevent the use of a defective vehicle. Finally, the record is silent as to the reasons behind the construction of the security wall that impaired the emergency response. However, in line with regulations promulgated in the Chemical Facility Anti-Terrorism Standards, DHS has encouraged the use of security walls or barriers and vehicle patrols to protect chemical facilities. Dep't of Homeland Sec., Risk Based Performance Standards Guidance: Chemical Facility Anti-Terrorism Standards (2009), *available at* http://www.dhs.gov/xlibrary/assets/chemsec_cfats_riskbased_performance_standards.pdf.

Millstone is the last person left to absorb any public blame for the accident because all other parties are immune. Bigle has relocated to China, and no corporate officers can be extradited. Prosecutors granted Reynolds immunity, even though it was his duty to purchase and handle Sekuritek SUVs. This case represents a severe deviation from standard EPA prosecutorial practice, which focuses on both environmental harm and culpability. Here, the degree of Millstone's blameworthiness is far inferior compared to the direct actions of culpable negligence by the defendants in *Ortiz* and *Hanousek*. The government's new practice in this case puts constitutional rights at risk. When environmental harm is severe and liability is potentially astronomical, an angry local jury can easily hypothesize, in hindsight, a never-ending list of further precautions that a "reasonably prudent person" could have taken.

Thus, fair enforcement of § 1319(c)(1) requires a gross negligence standard of culpability to ensure that the government does not abuse its prosecutorial discretion by succumbing to public cries for a scapegoat. Only a gross negligence standard can prevent vengeance and retaliation from motivating charges under the CWA for negligent violations when the severity of environmental harm is high and the degree of culpability is virtually absent.

II. MILLSTONE DID NOT CORRUPTLY PERSUADE REYNOLDS TO WITHHOLD TESTIMONY WITHIN THE DEFINITION OF 18 U.S.C. § 1512(b)(3) BY ENCOURAGING HIM TO INVOKE HIS FIFTH AMENDMENT PRIVILEGE.

Congress enacted the federal witness tampering statute as part of the Victim and Witness Protection Act of 1982. Pub. L. No. 97-291, 96 Stat. 1248. The statute

was designed to protect witnesses from harassment and intimidation intended to prevent their testimony. S. Rep. No. 97-532, at 15 (1982). In 1988, Congress amended the statute to include the phrase "corruptly persuades." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(c), 102 Stat. 4181, 4398 (codified as amended at 18 U.S.C. § 1512). The federal witness tampering statute provides, in relevant part:

> 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). As the House Judiciary Committee noted, this revision allows conduct that is not coercive or misleading to be prosecuted under § 1512. H.R. Rep. No. 100-169, at 12 (1987). The lead drafter of the 1988 amendment, Senator Biden, offered examples of unlawful conduct under the statute, such as "preparing false testimony for [a] witness" and "offering a witness money in return for false testimony." 124 Cong. Rec. S17300 (daily ed. Oct. 21, 1988) (statement of Sen. Biden); *United States v. Farrell*, 126 F.3d 484, 492 (3d Cir. 1997).

Millstone was convicted of federal witness tampering under § 1512(b) for merely encouraging Reynolds to invoke his Fifth Amendment privilege against self-incrimination. The Fifth Amendment guarantees that no defendant in a criminal case "shall be compelled . . . to be a witness against himself." U.S. Const. amend. V. Any obstruction or "denial of constitutionally protected rights demands judicial

protection" because these rights are the keystones of American jurisprudence. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

The Fourteenth Circuit's decision upholding Millstone's conviction for witness tampering is inconsistent with the high level of protection this Court has afforded to "precious Fifth Amendment rights." *Miranda v. Arizona*, 384 U.S. 436, 472 (1966). The threat of harsh criminal sanctions coupled with an overbroad definition of "corruptly persuades" will discourage the exchange of information regarding this fundamental constitutional right. To prevent abrogation of constitutional rights, this Court should overturn the decision of the Fourteenth Circuit and hold that under § 1512(b), "corrupt persuasion" requires, at a minimum, behavior more culpable than simply encouraging a witness to invoke a constitutional privilege. This requirement of higher culpability comports with this Court's precedent, principles of statutory interpretation, and policy governing notice of criminal liability.

A. Millstone Cannot Be Guilty of Witness Tampering Under § 1512(b)(3) Because He Did Not Employ Any Coercive or Dishonest Behavior in Informing Reynolds of His Constitutional Right.

This Court has emphasized that "corruptly" in § 1512(b) must mean something more than merely acting with intent to persuade another to withhold information from the government. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706-07 (2005). In *Arthur Andersen*, this Court noted that simply intending to persuade someone to withhold testimony "is not inherently malign." *Id.* at 703-04. This Court provided two examples of permissible persuasion: a wife who persuades

her husband to invoke a martial privilege and a mother who suggests that her son invoke his privilege against self-incrimination. *Arthur Anderson*, 554 U.S. at 704. The jury instruction at issue in *Arthur Andersen* failed to limit the definition of "corruptly" because it incorrectly allowed any conduct that impeded the government's fact-finding ability to qualify as unlawful. *Id.* at 706. Consistent with *Arthur Andersen*, several circuit courts of appeal have found that the phrase "corruptly persuades" must mean something more than only persuading another with the intent to hinder an investigation or prosecution. *United States v. Doss*, 630 F.3d 1181, 1189 (9th Cir. 2011); *United States v. Baldridge*, 559 F.3d 1126, 1142 (10th Cir. 2009); *Farrell*, 126 F.3d at 487; *United States v. Morrison*, 98 F.3d 619, 629 (D.C. Cir. 1996).

In *Farrell*, a defendant was charged with witness tampering after attempting to persuade a co-conspirator to refrain from disclosing incriminating information to investigators. 126 F.3d at 486. Reversing the defendant's conviction, the Third Circuit held that one "individual can 'persuade' another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating" § 1512(b). *Id.* at 489. The Third Circuit held that "corrupt persuasion" does include both bribing someone to withhold information and persuading someone to give false information. *Id.* at 488. However, it does not cover non-coercively persuading a co-conspirator who is entitled to a Fifth Amendment right to refrain from disclosing incriminating information. *Id.* Subsequently, the Third Circuit reaffirmed the principle that merely interfering with the flow of information in an

investigation is not sufficient to constitute witness tampering. *United States v. Davis*, 183 F.3d 231, 248, 250 (3d Cir. 1999) (holding that a defendant's malicious intent to expose a confidential informant, absent any corrupt behavior, was not sufficient to justify a conviction under § 1512(b)).

The Ninth Circuit adopted the Third Circuit's interpretation of "corruptly persuades" in *Doss*, holding that a defendant was not guilty of witness tampering when he asked his wife to exercise her marital privilege to refrain from testifying against him. 630 F.3d at 1189-90. Relying on this Court's analysis of § 1512(b) in *Arthur Andersen*, the Ninth Circuit held that asking a spouse to withhold testimony in accordance with marital privilege was insufficient to support a conviction of witness tampering absent additional wrongful conduct, such as coercion, intimidation, or bribery. *Id.* at 1190.

The Tenth and District of Colombia Circuits have also required corrupt conduct for convictions under § 1512(b). In *Baldridge*, the Tenth Circuit agreed with the Third and Ninth Circuits that "corruptly persuades" must mean something more than simply persuading a person with intent to influence his testimony. 559 F.3d at 1142. Similarly, in *Morrison*, the District of Columbia Circuit held that "corruptly" must refer to the manner, rather than the motive, of influencing another. 98 F.3d at 629. Thus, while influencing a person to violate a legal duty to testify truthfully would qualify as corrupt persuasion, asking a person to withhold testimony with an immoral motive would not. *Id.* at 630-31.

In contrast, the Second Circuit has inaccurately interpreted the "corruptly persuades" language to encompass all methods of persuasion intended to bring about the end result of influencing or impeding testimony. *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). The Second Circuit articulated an overbroad definition of "corruptly persuades" based on an analogy to a different statute, 18 U.S.C. § 1503(a).[7] *Id*. at 452. In *Thompson*, the Second Circuit focused on the fact that a defendant told a co-conspirator to lie. *Id.* at 453. The court also stated that § 1512(b) applies only to constitutionally unprotected activity, such as lying, and consequently does not criminalize lawful or constitutionally protected speech. *Id.* at 452.

After *Thompson*, this Court explained that any comparison of § 1512 to § 1503 is "inexact." *Arthur Andersen*, 544 U.S. at 705 n.9. Despite this Court's clear analysis in *Arthur Andersen*, the Second Circuit again analogized § 1512 to § 1503 in *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006). In *Gotti*, the Second Circuit improperly extended the overbroad definition articulated in *Thompson* to a case in which a defendant "suggested" that a witness plead the Fifth Amendment and refuse to testify. *Id.* Notably, *Gotti* involved several defendants involved with an organized crime syndicate. *Id*. at 301. A "suggestion" from a member of the mafia is inherently coercive because the mafia has "the power to do things to people if they don't do what they're told to do." *Id.* at 308. To justify the proposition that

[7] Section 1503(a) provides, in relevant part, "[w]hoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished." 18 U.S.C. § 1503(a).

encouraging a witness to invoke his Fifth Amendment privilege violates § 1512(b), the Second Circuit cited a case that only analyzed the application of § 1503. *Gotti*, 459 F.3d at 301 (citing *United States v. Cioffi*, 493 F.2d 1111, 1118 (2d Cir. 1974)). The Second Circuit provided no justification for disregarding this Court's rejection of any exact comparison between § 1503 and § 1512. Moreover, the court failed to cite any precedent or public policy to justify expanding the definition of "corruptly persuades" in § 1512(b) to include communication regarding the privilege against self-incrimination.

The Eleventh Circuit applied the Second Circuit's overbroad definition of "corruptly persuades" to a defendant who asked his secretary not to speak to investigators. *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998). Unlike the defendants in both *Doss* and *Farrell*, who were legally entitled to refrain from testifying, the Eleventh Circuit noted that the secretary was not a co-conspirator and therefore could not invoke the Fifth Amendment. *Id.* Even though the Eleventh Circuit claimed to agree with the Second Circuit, it upheld jury instructions that required the additional element of corruption that the defendant must have "knowingly *and dishonestly*" acted with intent to impede an investigation. *Id.* (emphasis added).

This Court should follow its previous analysis in *Arthur Andersen* and the analysis of the Third, Ninth, Tenth and District of Columbia Circuits, which have defined "corruptly persuades" to require corrupt behavior in addition to the intent to impede testimony. Even if this Court considers applying the definition of the

Second and Eleventh Circuits, the overbroad definition of "corruptly persuades" should be construed to exclude communication pertaining to constitutional rights.

Here, Millstone's suggestion to Reynolds that they plead the Fifth Amendment is nearly identical to the type of persuasion this Court has expressly allowed. Millstone's conversation with Reynolds is comparable to a mother encouraging her son to invoke his Fifth Amendment privilege, as this Court permitted in *Arthur Andersen*. Millstone and Reynolds faced an investigation arising from their professional affiliation, and as associates in a joint venture, they had a special relationship. *Childers v. Pumping Systems, Inc.*, 968 F.2d 565, 568 (5th Cir. 1992) (finding that a special relationship exists between joint venturers and partners); *Wheeler v. Hurdman*, 825 F.2d 257, 273 (10th Cir. 1987) (noting business partnerships embody special relationships). During a meeting to discuss the possibility of criminal charges, Millstone impassionedly suggested that it would be best for the men to remain silent. Like this Court's examples of permissible persuasion, Millstone advised Reynolds, with whom he had a special relationship, to exercise a legal privilege. Thus, the Fourteenth Circuit's decision is contrary to this Court's precedent in *Arthur Andersen*, which clearly stated that persuading a person with the intent to hinder an investigation is not inherently malign.

Consistent with *Arthur Andersen*, this Court must apply the interpretation of § 1512(b) adopted by the Third, Ninth, Tenth, and District of Columbia Circuits and hold that acting with immoral motive does not constitute witness tampering absent additional wrongful behavior. Under § 1512(b), a defendant faces up to twenty

years of imprisonment in addition to fines and the stigma of a felony criminal conviction. Merely suggesting that his business partner not speak, absent coercive or dishonest behavior, is not sufficient to justify such harsh sanctions.

Even if this Court finds that intent to interfere with an investigation can be sufficient for criminal prosecution, this definition should not extend to situations in which a defendant suggests that a witness refrain from testifying in accordance with a privilege. The Third Circuit in *Farrell* and the Ninth Circuit in *Doss* specifically examined cases where a defendant non-coercively asked a witness to exercise a privilege to which the witness was entitled. The defendants in each of those cases did not commit any corrupt act by requesting that witnesses decline to testify when they had a right to do so. As in *Farrell* and *Doss*, Millstone suggested that Reynolds invoke a constitutionally protected privilege against self-incrimination. Holding that a defendant may be imprisoned for up to twenty years for merely suggesting a witness invoke a privilege the Constitution guarantees abrogates both the First Amendment right of free expression and the Fifth Amendment right to remain silent. *See* U.S. Const. amend. I, V. The First Amendment safeguards "the right of an individual to speak freely [and] to advocate ideas." *Smith v. Ark. State Highway Emp., Local 1315*, 441 U.S. 463, 464 (1979). Adopting an overbroad definition of a vague statute will curtail this fundamental First Amendment freedom and will "inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quotation omitted).

The First Amendment must safeguard communication pertaining to privileges because individuals are entitled to be informed of their constitutional rights. *See Miranda*, 384 U.S. at 460.

The Second and Eleventh Circuits also noted the importance of protecting constitutional rights in finding that courts should not interpret § 1512(b) to criminalize protected speech. In *Thompson*, when the Second Circuit articulated the broad rule that any conduct intended to impede an investigation is sufficiently corrupt to justify criminal sanctions, the defendant did not merely suggest that the witness invoke a constitutional privilege. In fact, the defendant used blatantly corrupt behavior when he demanded that a co-conspirator lie to investigators. Even the Eleventh Circuit's analysis in *Shotts* is not analogous to this case because the witness there did not have the right to invoke any privilege. Additionally, *Shotts* is not persuasive here because it required a higher standard than the Fourteenth Circuit did by upholding a jury instruction that required the defendant to have acted dishonestly.

Although the Second Circuit extended the scope of § 1512(b) to apply to a defendant who forced a witness to invoke his Fifth Amendment privilege, it did so in a two-sentence cursory statement without citing any substantive justification. Rather, the Second Circuit cited the definition of "corruptly persuades" from a case interpreting § 1503, despite this Court's analysis rejecting the analogy between § 1503 and § 1512. Even though the Second Circuit properly applied § 1512(b) where a defendant encouraged a witness to lie to investigators, this Court must not accept

the unjustified extension of § 1512(b) to a defendant suggesting that a witness invoke a privilege.

To defend the integrity of the Fifth Amendment privilege against self-incrimination, this Court must provide the highest protection to speech conveying information regarding this right. Millstone simply informed Reynolds that it would be in both of their interests to invoke their Fifth Amendment privileges, a constitutionally sanctioned behavior. In contrast to conduct that other circuits have held as definitively corrupt, there is no indication that Millstone overtly threatened, bribed, or in any way coerced Reynolds to withhold testimony. Millstone's speech here is protected under the First Amendment. To preserve constitutional rights, this Court must require additional corrupt behavior beyond the intent to impede an investigation to sustain a conviction of witness tampering under § 1512(b).

B. To Ensure Fair Warning of Criminal Liability, This Court Must Apply Principles of Statutory Interpretation and Narrowly Construe the Term "Corruptly" in § 1512(b).

An unclear or vague law chills speech because people will have to guess the meaning of the law and will consequently interpret its application differently. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 889 (2010). This Court must interpret § 1512(b) in accordance with well-settled principles of statutory construction by giving meaning to every word, reading the terms in the context of the statute, and applying the rule of lenity.

1. This Court must construe the term "corruptly" in the context of § 1512, which is not analogous to the use of "corruptly" in § 1503.

Most words are subject to several interpretations, and may therefore take on alternate meanings when used in different statutes, or even when used more than once in the same statute. *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). This Court has held that courts must interpret the language of a statute in context, and analyze each word in light of the terms surrounding it. *Leocal*, 543 U.S. at 9. Both the Second Circuit and the Eleventh Circuit violated this principle of statutory interpretation by improperly relying on § 1503 to conclude that the term "corruptly" in § 1512 means "motivated by an improper purpose." *Thompson*, 76 F.3d at 452; *Shotts*, 145 F.3d at 1300. Even if this Court finds this analogy applicable, "corruptly" in § 1503 also requires more culpability than Millstone manifested in this case.

As this Court has explicitly acknowledged, the language used in § 1512 invalidates any analogy to that in § 1503 because the latter statute lacks the modifier "knowingly." *Arthur Andersen*, 544 U.S. at 705 n.9. Unlike § 1503, where "corruptly" provides the mens rea element, § 1512 already contains the mens rea requirement "knowingly." 18 U.S.C. §§ 1503, 1512. Therefore, the term "corruptly" does not have the same meaning in each statute. Although it is acceptable to define "corruptly" as "motivated by an improper purpose" in § 1503, the Fourteenth Circuit erred in importing this definition to § 1512 without considering the context of the language. (R. 14.)

Interpreting "corruptly" in the context of § 1512(b), "corruptly persuades" must correspond to the manner of behavior, not the intent motivating the behavior. As the court in *Morrison* noted, the term "corruptly" refers to the *manner* of persuasion instead of the *motive*. 98 F.3d at 630. Congress included the phrase "corruptly persuades" in § 1512(b) in a list of improper methods of persuasion, rather than with the improper motives enumerated at the end of the statute. Thus, the proper interpretation of "corruptly" within the context of § 1512(b) requires more than only the motive to hinder an investigation by encouraging a witness to invoke a constitutional right. The context of the statute requires a corrupt manner of conduct.

Even if this Court finds that the interpretation of "corruptly" in § 1503 may help discern the meaning of "corruptly" in § 1512, a witness tampering charge still requires more culpability than mere intent to impede an investigation. A high level of culpability is necessary for liability under § 1503. *United States v. Aguilar*, 515 U.S. 593, 602 (1995). In *Aguilar*, this Court chastised the dissenting opinion for suggesting "*any* act, done with the intent to obstruct . . . the due administration of justice, is sufficient to impose criminal liability." *Id.* (quotation omitted). This Court provided an example of a man lying to his wife about an alibi in hopes that she would pass the false information along to investigators. *Id.* Despite the intent to obstruct justice, this Court held that the culpability in that example would be insufficient to impose criminal liability under § 1503. *Id.*

Following this Court's analysis in *Aguilar*, Millstone's actions are not sufficient to justify a conviction under § 1503. If a man purposely deceiving his wife is insufficient to justify criminal liability under § 1503, Millstone's actions here certainly cannot support a criminal conviction. Millstone's advice that Reynolds invoke his constitutional privilege involves definitively less "corrupt" activity than affirmatively lying with the intent to frustrate a government investigation. Accordingly, even interpreting § 1512 in accordance with § 1503, Millstone's actions are insufficient to support a conviction of witness tampering.

2. Interpreting "corruptly" to mean motivated by an improper purpose renders the term superfluous.

Courts should read a statute so as to give meaning to every word. *Leocal*, 543 U.S. at 12. This Court has held that courts must avoid interpretations that render a term superfluous, and this is especially true when interpreting an element of a criminal offense. *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994). In order to give meaning to every word in § 1512, this Court must hold that "corruptly persuades" refers to the means, not the motive, of persuasion. This necessarily follows from this Court's finding in *Arthur Andersen* that "persua[sion] is by itself innocuous." 544 U.S. at 703.

To give meaning to all the words in the statute, "corruptly persuades" must mean more than persuading with the intent to influence a person to withhold testimony. The Second and Eleventh Circuit's interpretation of "corruptly persuades," which includes actions intended to cause a person to withhold testimony in the absence of additional corrupt behavior, renders the terms

"corruptly persuade" superfluous. The statute already expressly includes the requirement of improper motives with the condition that the persuasion "hinder, delay, or prevent" communication with investigators. 18 U.S.C. § 1512(b)(3). Under the interpretation urged by the Second and Eleventh Circuits, § 1512(b) would read: whoever knowingly, with the intent to cause or induce a person to withhold testimony, causes or induces any person, to withhold testimony, shall be fined or imprisoned not more than twenty years. It is illogical that Congress amended the statute to add glaringly repetitive language. Consequently, to give meaning to every word of § 1512(b), some corrupt behavior, in addition to motive, is required. In light of *Arthur Andersen*, Millstone's statements to Reynolds are not sufficient to constitute a conviction for witness tampering under § 1512(b).

3. This Court must adopt a narrow definition of "corruptly persuades" to ensure fair notice of criminal liability.

Even if this Court finds that multiple interpretations of § 1512(b) are plausible, construction of a criminal statute must be construed narrowly to provide fair warning of criminal liability. *Liparota*, 471 U.S. at 427. To ensure fair warning, this Court has held that the rule of lenity requires courts to resolve ambiguity in a statute to prohibit only conduct that the statute clearly covers. *United States v. Lanier*, 520 U.S. 259, 266 (1997). When courts may reasonably interpret a criminal statute in multiple ways, the "ambiguity concerning the ambit of [the statute] should be resolved in favor of lenity." *Liparota*, 471 U.S. at 427 (quotation omitted). Section 1512(b) is sufficiently ambiguous to warrant the application of the principle of lenity. As the Ninth and Tenth Circuits have noted,

"all courts that have considered the issue have found the phrase 'corruptly persuades' to be ambiguous." *Baldridge*, 559 F.3d at 1142; *Doss*, 630 F.3d at 1186.

Applying the principle of lenity, the Second and Eleventh Circuits' interpretation is far too broad to give a defendant fair notice of criminal liability. Where a defendant's conduct is not inherently malign, such as in this case where Millstone suggested that Reynolds exercise a constitutional right, the defendant has no reason to anticipate he faces severe criminal sanctions. Rather than making Millstone criminally liable, this Court should protect Millstone's speech. As a former police officer, Millstone was familiar with the importance of informing individuals of their constitutional rights. In line with *Arthur Andersen*, Millstone's advice that Reynolds invoke his Fifth Amendment privilege is insufficient to justify criminal liability.

Following the principles of statutory interpretation, the context of § 1512 requires that the terms "corruptly persuades" refer to a manner of persuasion rather than motive to give meaning to every word of the statute. The principle of lenity demands that this Court interpret § 1512(b) narrowly. Accordingly, this Court must hold that a conviction of witness tampering requires additional corrupt behavior beyond the intent to impede an investigation.

CONCLUSION

In sum, this Court must reverse the unsubstantiated decision of the Fourteenth Circuit. Under principles of statutory interpretation, a proper jury instruction under 33 U.S.C. § 1319(c)(1) necessitates a gross negligence standard.

According to both *Black's* and the MPC, gross negligence is the only meaning of the term "negligently." In addition to this plain meaning, a gross negligence standard provides the required mens rea for the offense, is consistent with the structure of penalties under the CWA, comports with other federal environmental acts, and fulfills the obligation of notice under the rule of lenity. The Fourteenth Circuit's incorrect application of ordinary negligence undermined these principles of statutory interpretation.

Consistent with this Court's precedent in *Staples*, the CWA cannot be a public welfare statute because there is no evidence that Congress intended the CWA to lack a mens rea element. The Fourteenth Circuit failed to justify disregarding due process protections when it extended the public welfare doctrine to the CWA because § 1319 does not meet any of the six factors this Court has considered in classifying public welfare statutes. To protect the nation's waterways as Congress envisioned, only a gross negligence standard under the CWA can deter future violations. Millstone was not in a position to prevent the accident and was not on notice that his traditionally lawful business conduct was criminal. These factors, in conjunction with the potential for severe penalties and prosecutorial abuse under an ordinary negligence standard, bar this Court from expanding the public welfare doctrine to include the CWA. Simply because Millstone is the last person left to absorb blame for this accident does not mean that principles of justice are served by his conviction under ordinary negligence. Unlike defendants in *Hanousek* and *Ortiz*, Millstone's conduct lacked any degree of culpability for this accident, which

resulted from a succession of independent acts. Millstone adequately trained Bigle security guards and did not have a duty to inspect the Sekuritek vehicles. Thus, fair enforcement of §1319(c)(1)(A) requires a gross negligence standard of culpability to prevent due process erosion in light of hefty demands for a public scapegoat.

Furthermore, this Court must find that a conviction under § 1512(b)(3) necessitates more culpable behavior than Millstone demonstrated. This Court's precedent in *Arthur Andersen* requires independently coercive behavior to sustain a conviction for witness tampering. Principles of statutory interpretation further support an interpretation that "corruptly persuades" must mean more than simply persuading with the intent to impede an investigation. To preserve the sanctity of the privilege against self-incrimination, this Court must afford First Amendment protection to communication regarding Fifth Amendment rights. Millstone merely encouraging Reynolds to invoke his constitutional privilege is woefully insufficient to support a conviction for witness tampering.

Dated: December 5, 2011

Respectfully Submitted,

Team #49
Attorneys for Petitioner

APPENDIX A

United States Code (excerpted)

18 U.S.C. § 1503 (2011) 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.

18 U.S.C. § 1512(b) (2011) 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—

. . .

(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.

33 U.S.C. § 1319(c) (2011) 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.

33 U.S.C. § 1321(b)(7) (2011) Oil and Hazardous Substance Liability

(7) Civil penalty action

(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.

APPENDIX B

United States Constitution (excerpted)

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.