No. 04-368

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. "CORRUPTLY" REQUIRES MORE THAN AN INTENT TO IMPEDE AGENCY FACT-FINDING

A. "Corruptly" Requires Some Violation Of A Clearly Established Duty Owed To The Public

The Government contends that the definition of "corruptly" used below—"an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding"—is its usual meaning in the obstruction statutes and the criminal law generally. But it tellingly does not cite a single case, decided under any statute, that has ever used this instruction. A search of all federal cases for "subvert," "undermine," or "impede" in the same sentence as "fact-finding ability" yields only one relevant case: this one. In fact, courts and commentators have acknowledged that "corruptly" is notoriously unclear, and model instructions vary widely.[1] The Fifth Circuit's usual instruction is "knowingly and dishonestly," but the Government successfully resisted that language because it could not prove that Andersen had any dishonest intent. Pet. Br. 3.

The better reasoned decisions recognize that "corruptly" does have a core meaning—an act "done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method" or, stated differently, "'an act done with an intent to give some advantage inconsistent with official duty and the rights of others.'" *United States v. Aguilar*, 515 U.S. 593, 616-17 (1995) (Scalia, J., concurring and dissenting) (citations

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[1] *See, e.g., United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992); *United States v. North*, 910 F.2d 843 (D.C. Cir.), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *see also* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning Of 'Corruptly' Within The Federal Criminal Law*, 31 J. Legis. 129 (2004); Model Penal Code and Commentaries, 240.1 at 5, 8 (A.L.I. 1980) (comment) ("the requirement of 'corrupt' purpose provides virtually no guidance as to the intended scope of the law," and "use of the general term 'corruptly' should be abandoned"); Study Draft of a New Federal Criminal Code 1361 at 127 (U.S. Gov't Printing Office 1970) (comment) (same).

omitted); *see also United States v. Rooney*, 37 F.3d 847, 852 (2d Cir. 1994) ("[A] fundamental component of a 'corrupt' act is a breach of some official duty owed to the government or the public at large."); *United States v. Ogle*, 613 F.2d 233, 242 (10th Cir. 1979) ("'corruptly' … means acting illegally or unlawfully"), *cert. denied*, 449 U.S. 825 (1980). The Government concedes those formulations are equivalent (Br. 25-26) but pretends the instructions here were consistent with that traditional meaning because they focused on the defendant's motive. But not all "purpose-based" instructions are the same. Andersen's proposal captured the traditional meaning well, by requiring unlawful means or persuasion urging the listener to "do something that they would not have had a lawful right to do." R. 146.

The Government argues (at 25) that "an individual who acts with an intent to obstruct an official proceeding necessarily seeks some advantage inconsistent with official duty and the rights of others," citing only *United States v. Reeves*, 752 F.2d 995, 1002 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985). That is profoundly wrong. Some § 1503 cases have permitted a presumption that conduct intended to subvert the integrity of a *known, pending judicial proceeding*—the sort of conduct punishable as contempt—is necessarily corrupt. But those cases involved conduct that violated clearly established public duties.[2] "For the conduct covered by section 1503 such a legal presumption may well be warranted," but outside the context of a pending judicial proceeding citizens frequently "impede" the government's "fact-finding ability," within bounds recognized by the law, without violating any public duty. *North*, 910 F.2d at 882; *see also Ratzlaf v. United States*, 510 U.S. 135, 144 (1994).

Reeves made precisely that point. It explained that

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[2] Thus, withholding evidence based upon a good faith assertion that it is privileged or non-responsive violates no duty and is not a crime under § 1503 even if intended to impede an official proceeding. And in *Aguilar* this Court squarely rejected the view that "*any* act, done with the intent to 'obstruct … the due administration of justice,' is sufficient to impose criminal liability," even while a grand jury is sitting. 515 U.S. at 602.

"'[c]orruptly' ordinarily describes 'an act done *with an intent to give some advantage* inconsistent with the official duty and rights of others,'" and that "[t]he special circumstances surrounding criminal proceedings which render many acts to obstruct justice *per se* corrupt do not exist in cases involving the Internal Revenue Service." 752 F.2d at 998-99. Like the D.C. Circuit in *North*, it worried that in the agency context a rule equating "'corrupt' intent" with merely an "'improper' purpose[]" or intent to obstruct the IRS would be both unconstitutionally vague, *id.* at 999, and overbroad in violation of the First Amendment, *id.* at 1001. And it ultimately held that although the defendant probably did seek an unlawful advantage inconsistent with official duty—he tried to intimidate an IRS agent into abrogating his official duties by filing frivolous liens against the agent's home—he was nonetheless entitled to a retrial because the instructions defined "corruptly" only as "with improper motive or bad or wicked purpose." *Id.* at 1002.

The Government's argument that it seeks to harmonize the meaning of "corruptly" across the obstruction statutes is therefore not well founded. In fact it is trying to pass off a rule permitting corrupt intent to be *presumed* in the unique context of § 1503 as articulating the *meaning* of "corruptly" itself, outside of the context that justifies the presumption.[3] Andersen's instruction captures the traditional meaning, and harmonizes § 1512 with the other statutes, far better.[4]

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[3] This Court has held for 100 years, for example, that "a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct." *Aguilar*, 515 U.S. at 599. If "corruptly persuades" applies before the onset of pending proceedings then Congress *cannot* have intended to import the § 1503 presumptions. And if Congress did intend for "corruptly" in § 1512 to mean "intent to obstruct" in the § 1503 sense then Andersen "necessarily lack[ed] the evil intent to obstruct."

[4] The "improper purpose" referenced by § 1515(b) is more likely the traditional "intent to give some advantage inconsistent with official duty and the rights of others" than any intent to impede, particularly since it goes on to list wrongful *means* as examples. Although it identifies destruction of documents as a wrongful means of obstruction, it expressly limits its definition to pending proceedings when duties to preserve arise.

B. The More Traditional Meaning Of Corruptly Is The Only Sensible Interpretation Of § 1512

1. Requiring proof of conduct that involves the violation of some clearly established duty owed to the public makes vastly better sense of § 1512 than the Government's interpretation does. If Congress's goal had been to protect the "fact-finding ability" of possible future proceedings, it would have criminalized all conduct intended to make evidence unavailable. But it pointedly did not alter the traditional *Pettibone* rule that destroying documents in anticipation of a future official proceeding is not obstruction. It also made clear that merely persuading someone else to destroy a document *even for the specific purpose of ensuring that it is not available for use in a future official proceeding* is not criminal either. If "corruptly" is not superfluous then some such persuasion must be lawful. Congress even clarified that unintentionally lying for that purpose is not a crime. 18 U.S.C. § 1515(a)(6). Congress surely did not use the powerful word "corruptly" to draw an absurdly fine distinction between defendants who merely intend to make evidence unavailable to an official proceeding and those who intend (even in part) to impede its "fact-finding ability."

The Government's principal answer is that a defendant could "persuade another person to delete emails to prevent them from being disclosed simply because they contained embarrassing material." Br. 24. But that person intends to avoid embarrassment *by impeding the fact-finding ability of the proceeding*. And that defense would exonerate persons who are plainly guilty under the traditional understanding. A defendant surely cannot urge a witness to testify falsely, to destroy documents under an active grand-jury subpoena, or to bribe a juror in a pending case—and then escape sanction because his *reason* was to avoid embarrassment. *Pettibone v. United States* recognized that it was no defense to "obstructing or impeding an officer of the customs" that the "object of the party was personal chastisement." 148 U.S. 197, 205 (1893); *see also North*, 910 F.2d at 883-84 (a laudable "motive in committing the acts" is no defense to

obstruction); *id.* at 944 (Silberman, J., concurring and dissenting) (same); *Ogle*, 613 F.2d at 242 (corruptly means "acting illegally or unlawfully" and does not also require a "wicked or evil purpose" for doing so).

The Government's interpretation is also overinclusive. Conceding that the examples of plainly innocent conduct in Andersen's opening brief (at 24) would all be "corrupt" under the instructions given here, it grasps for reasons why those defendants might nonetheless escape prison. Br. 28-29. It invents a defense for defendants who do not "'withhold' any information to which the requesting party was legally entitled." Br. 28. That is inconsistent with the theory of this prosecution. The SEC staff investigating Enron in October 2001 did not have the power to demand *any* documents or testimony from Andersen. And parties are often "legally entitled" to materials erroneously withheld in good faith. It suggests that a mother who urges her son to take the Fifth does not intend to impede the fact-finding ability of a proceeding, but simply to protect her son. *Id.* That is just the "embarrassment" defense refuted above. It suggests that defendants who urge someone else not to comply with voluntary requests for documents *may* have a "natural and probable effect" defense if those materials could later be sought by subpoena. *Id.* That is completely inconsistent with its argument that an informal inquiry, without subpoena power, is still an "official proceeding." Finally, it suggests that all hypotheticals involving lawyers are solved by § 1515(c). Br. 29. But it does not explain how conduct that is "corrupt" and otherwise criminal under its interpretation can possibly be "lawful" or "bona fide" legal services. Elsewhere it says that conduct intended to impede fact-finding *cannot* be in good faith. Br. 32, 41. Nor can it explain why Congress would want to imprison ordinary citizens who engage in the same conduct with the same mental state as lawyers who go free. The fact that the Government feels a need to invent implausible technicalities for defendants like these ought to prompt a re-examination of its basic premises.

The Government's reading also criminalizes asking someone to discard a document when discarding it yourself is perfectly lawful. It responds that this anomaly was "deliberately created by Congress" when it chose to omit a pending proceeding requirement from § 1512. Br. 22. That just begs the question to be decided. Section 1512 was intended to relax the *Pettibone* rule for certain conduct that is wrongful because of its effect on witnesses, apart from the traditional concerns of obstruction law. But the instructions here destroyed any sensible distinction between witness tampering and obstruction, particularly in the corporate context. Corporations or partnerships act only through agents, and cannot implement a document retention policy if their agents cannot talk about it. The Government's interpretation of § 1512 and its theory of vicarious corporate liability led to Andersen's conviction for "persuading" itself to discard documents that it owned and had every right to discard. "Legal fiction" is charitable; this plainly is not what the Victim and Witness Protection Act had in mind.

Reading "corruptly" to require conduct that knowingly violates or induces violations of public duties resolves all of these absurdities. It would not require acquittal of defendants who intentionally obstruct justice just because their purpose was to avoid embarrassment—or to bring down the President, annoy the judge, or make money in the stock market. It would answer all of the innocent conduct hypotheticals without gymnastics: advising someone in good faith to assert a privilege, to decline a voluntary request for information, or to refrain from volunteering information would all be lawful because they do not counsel any violation of official duty. It would avoid offense to the basic values of our society by not labeling ordinary legal advice, or any other speech intended to impede governmental power within the bounds of the law, as "corrupt." And it harmonizes "corruptly persuades" with the obvious witness-protection purpose of the statute. Persuading a potential witness to violate a public duty harms them and is wrongful whether or not it makes evidence unavailable.

2. The Government offers no persuasive justification for avoiding that plainly correct interpretation. It quibbles that only verbs can be "transitive." But persuasion can be "corrupt" in nature because it "corrupts" the listener or because the speaker is "corrupt."[5] The former makes more sense in a witness tampering statute, but regardless the Government's formulation is wrong. Whether transitive or intransitive, "corruptly" requires a violation of public duty.

The Government argues that Andersen's reading "would criminalize little, if any, conduct that is not already criminalized by other provisions." Br. 31. But criminal statutes frequently provide tougher penalties for conduct that would have been criminal anyway. Every burglary is also a larceny and a trespass. Penalties for aiding and abetting or subornation of perjury are often substantially lower than for obstruction of justice, because of the higher *mens rea* obstruction requires. Nor does Andersen's interpretation impose a pending proceeding limitation on "corruptly persuades." Br. 31 n.14. Urging a witness to destroy evidence of a crime "knowing that an offense against the United States has been committed," 18 U.S.C. § 3, or to lie at a future proceeding, would be "corrupt" before proceedings begin so long as an appropriate "nexus" to the proceeding is proven. Section 1512(f)(1) is not superfluous just because, in some fact patterns, the duties that make persuasion "corrupt" will not exist until proceedings begin.

Finally, the only legislative history the Government cites for the claim that "corruptly persuades" was designed to "reach beyond cases in which the defendant used an improper means or induced an unlawful act" is Senator Biden's statement that the statute might encompass

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[5] "[T]he adverbial form 'corruptly' may have either the transitive or the intransitive sense" of the verb, because it can mean either "'by means of corruption or bribery,' *i.e.*, by means of corrupting another, or acting oneself 'in a corrupt or depraved manner.'" *Poindexter*, 951 F.2d at 379 (quoting 3 Oxford English Dictionary 974 (2d ed. 1989)); *United States v. Russell*, 255 U.S. 138, 143 (1921) ("corruptly endeavor" refers to "the corruption of a juror").

"induc[ing] a witness to become unavailable to testify." Br. 34-35. But, as it points out (Br. 40), that conduct *does* violate official duty when a proceeding is pending. Senator Biden's use of the word "witness" suggests that is what he meant. And the two cases it cites as examples of witness tampering previously prosecuted under § 1503 (Br. 19) make clear that violation of a duty is necessary to make conduct "corrupt."[6]

C. The Government's Interpretation Of "Corruptly" Violates Lenity And Constitutional Doubt

1. If there were any doubt that the instructions misdefined "corruptly" in this case, it would be resolved by the rule of lenity and the doctrine of constitutional doubt. The Government's suggestion that "corruptly" *clearly and unambiguously* means nothing more than an "intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," Br. 38, is directly refuted by *Reeves* and the two witness tampering cases it cites. Regardless, "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted). This Court will reject even the "most natural grammatical reading" of a statute to avoid First Amendment problems. *United States v. X-Citement Video*, 513 U.S. 64, 68-69 (1994).

The Government claims that "there is no protected First Amendment right to persuade another person to withhold testimony or withhold or alter documents with an intent to obstruct justice." Br. 39. But the phrase "intent to obstruct justice" is a term of art meaning an intent to subvert the integrity of a known, pending judicial proceeding. Even in

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6 *See United States v. Jackson*, 607 F.2d 1219, 1221 (8th Cir. 1979) ("'[C]orruptly' means willfully, knowingly, and with the specific intent to influence a juror to abrogate his or her legal duties as a petit juror."), *cert. denied*, 444 U.S. 1080 (1980); *United States v. Howard*, 569 F.2d 1331, 1337 (5th Cir.) (holding that sale of secret grand jury transcripts to a witness was "corrupt[]" because defendant violated a duty punishable by contempt even though the court's analysis did not suggest that sales were motivated by a purpose to obstruct), *cert. denied*, 439 U.S. 834 (1978).

that context, advising someone to invoke their Fifth Amendment rights, or suggesting that they answer only the question asked, may well be constitutionally protected. In the context of agency or congressional proceedings, the Government cannot possibly be right. Union leaders who urge others not to voluntarily assist the fact-gathering of a congressional committee hostile to union interests are surely engaging in protected speech. *North*, 910 F.2d at 942 (Silberman, J., concurring and dissenting). And § 1512(b)(1) also governs truthful speech seeking to "influence" testimony, which is plainly protected unless truly "corrupt" in the sense argued by Andersen. The Government's reading criminalizes all advocacy of lawful non-cooperation with the fact-finding efforts of the political branches—which surely is substantial overbreadth. And it does not even respond to the First Amendment vagueness argument.

2. In an effort to show that Andersen had fair warning, the Government relies on distinctions it elsewhere disavows. It points to cases holding that destruction can be criminal prior to receipt of a subpoena (Br. 40) but those precedents establish that the defendant must know that there is a pending judicial proceeding *and* know that a subpoena was "likely."[7] And it resorts to rhetoric (unsupported by the record, *see infra* at 18-20) suggesting that Andersen's conduct was "corrupt" because it knew an official proceeding was "looming," "likely," or "highly probable." *E.g.*, Br. 41. But its actual position is that an abstract intent to impede an agency's fact-finding ability violates §1512 "even if [the defendant] believes that there is only a *possibility* that … an official proceeding will be commenced" at any point in the future. Br. 44. After defeating every instruction that would have required the jury to find that Andersen believed the

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[7] *E.g., United States v. Gravely*, 840 F.2d 1156, 1160 (4th Cir. 1988). *Aguilar* emphasized that even criminalizing false statements made to a possible witness during a pending proceeding based solely on proof of "the intent to obstruct justice" would make "culpability … a good deal less clear from the statute than we usually require in order to impose criminal liability." 515 U.S. at 602.

proceeding was likely or that its conduct violated any law, it cannot now argue that the (alleged) imminence of a proceeding solves its obvious fair warning problems.

In addition, Andersen pointed out that it may well have been convicted solely on the basis of Nancy Temple's edits to a draft Duncan memorandum, offered in the course of providing "legal guidance." Tr. 1802. The Government's protest that we do not know the *actual* basis for the jury's verdict is beside the point. The instructions permitted conviction on that theory. The Government told the jury that Temple gave "illegal advice," R. 1415, and has insisted that her edits "figured prominently in the trial and in the government's jury addresses" and that "the jury was explicitly asked to pay particular attention to [them] as 'devastating proof'" of criminality.[8] It now apparently concedes that her conduct was not criminal, and Andersen is entitled to a new trial for that reason alone. It suggests (Br. 29 n.12) that Andersen waived the issue by failing to request a § 1515(c) instruction, but the cases it cites make clear that even if that section is (implausibly) read as an "affirmative defense" it is the kind of defense that negates an element—and thus the burden of proof remains on the Government so long as the defendant proffers evidence "tending to show that the defendant is a licensed attorney who was validly retained to perform the legal representation which constitutes the charged conduct." *United States v. Kloess*, 251 F.3d 941, 948 (11th Cir. 2001). At that point "the defendant is entitled to an acquittal unless the jury finds that the government proved beyond a reasonable doubt that the defendant's conduct did not constitute lawful, bona fide

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[8] JA 215-16 & n.6. The Government incorrectly asserts that Andersen "had informed Enron that it believed that the term ['non-recurring'] was misleading" and that Temple's edits hid this fact. Br. 6 n.4. In fact, Duncan testified that he told Enron that the firm "*had not concluded* that it was misleading" but that Enron should "discuss the language with [its] counsel" because it was "problematic." Tr. 1798. Duncan's draft memo accurately stated that he advised Enron that "we had strong concerns that the presentation of the charges as non-recurring could be misconstrued" and Temple did not edit that sentence. JA 101, 99.

legal representation." *Id.* at 949.

D. Andersen Is Entitled To Acquittal

1. The Government wrongly suggests that Andersen persuaded its employees to violate their official duty because an official proceeding was already ongoing. If that were true, surely the Government would have charged Andersen under § 1505.[9] It has never otherwise argued that Andersen violated, or urged the violation of, any public duty—and thus has waived the issue.

Nor could it have established that Andersen violated any public duty. As the *Pettibone* rule reflects, citizens have no general duty to preserve documents before an official proceeding begins. Congress has, by statute, required retention of documents known to be evidence of a crime or the subject of a pending search warrant. *See* 18 U.S.C. §§ 3, 2232. Other statutes require regulated entities to retain certain records for specific periods.[10] But no such duty required Andersen to retain these documents. Congress and the SEC have *since* codified a duty for accountants to retain audit records for five years, *see* 18 U.S.C. § 1520, but even those rules—like Andersen's policy—simply require retention of work papers sufficient to allow an experienced outside auditor to understand the audit. They still do not require retention of "[s]uperseded drafts of memoranda," "[n]otes … that reflect incomplete or preliminary thinking," and "[d]uplicates"—the very materials that Andersen was prosecuted for discarding.[11] The most the jury could have found is that David Duncan was partially motivated by an intent to impede the fact-finding ability of "possible" future proceedings by not preserving preliminary drafts and notes

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[9] Even if an official proceeding against Enron was pending at the time, no violation of §1505 was established because the jury was not required to find knowledge that a subpoena was likely. *See supra* at 9.

[10] *See, e.g.*, 29 U.S.C § 1821(d)-(e); 19 U.S.C. § 1508; 15 U.S.C. § 5409; 18 U.S.C. §§ 551, 2703(f); 21 U.S.C. §§ 335b, 350a(g); 42 U.S.C § 1485(z).

[11] Retention of Records Relevant to Audits and Review; Part IV, 68 Fed. Reg. 4862, 4863 (Jan. 30, 2003). The FBI similarly does not violate the Jencks Act, 18 U.S.C. §3500, by destroying notes used to prepare interview memos. *United States v. Martin*, 565 F.2d 362 (5th Cir. 1978).

that could be misleading.[12] That violates no public duty.

2. Regardless, the plain meaning of "corruptly," the rule of lenity, and basic fair warning values all require that any public duty that makes conduct "corrupt" must either be an independent crime or a duty known to the defendant.[13] Violating a court order cannot be criminal contempt under 18 U.S.C. § 401, for example, unless the defendant willfully violates a clear, known duty. *See Harris v. City of Phila.*, 47 F.3d 1342, 1349-50 (3d Cir. 1995) (requiring "specific notice of the norm to which they must pattern their conduct") (collecting cases). Contempt and obstruction were once the same statute, and the original obstruction statute was

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[12] The Government incorrectly asserts that Andersen "does not attempt to account for the conduct of any of its" employees other than Nancy Temple. Br. 41 n.22. Andersen explained that an acquittal is required because *none* of its employees committed or sought any breach of official duty, or believed that their behavior was wrongful. Pet. Br. 5-15. Its point in 50 n.44 was that the Government's argument that Andersen believed an official proceeding was "likely" focuses almost entirely on Nancy Temple—but her conduct cannot possibly have been "corrupt." *See* Br. 29 & n.12. The nexus issues thus independently require acquittal.

[13] That is particularly true here, where "corruptly" is modified by "knowingly." There is no "or" between "intimidation" and "threatens," and 18 U.S.C. §1515(a)(6) would make no sense if "knowingly" did not travel all the way down the sentence to "engages in misleading conduct." The Government claims fair warning (Br. 27 & n.11) from a supposedly "prevailing view" that document destruction was improper once litigation was "deemed to be likely." Of course Andersen *did not* believe an official proceeding was likely (*infra* at 18-20) and the jury was not required to make any such finding. Regardless, there is no such consensus. *See, e.g.*, Arthur J. Schwab *et al.*, *E-Commerce Litigation*, ACLEA GLASS-CLE 205, 213 (Nov. 2000) ("It is generally accepted that the obligation to preserve relevant evidence attaches at the time the complaint is filed."). Regardless, three of its four citations rely on language from *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988), that has been repudiated by that court. *Stevenson v. Union Pac. R.R.*, 354 F. 3d 739, 746 (8th Cir. 2004) (pre-litigation destruction will not even support an adverse spoliation inference unless done in an intentional bad faith effort to "suppress the truth"). In any event, permitting an adverse inference as a rule of evidence does not remotely imply a breach of public duty that would support criminal punishment. (Taking the Fifth would also permit an adverse inference in civil litigation, for example.)

designed to be "'declaratory of the law concerning contempts of court.'"[14] As *Pettibone* explained, 148 U.S. at 207, the presumption that ignorance of the "penal laws" is no excuse is not violated in this context, because "evil intent is lacking" if the defendant is unaware of the duty.[15] In other contexts when criminal liability is predicated on violation of duties, this Court requires them to be clearly established.[16]

The Government claims that Andersen "was conscious of its wrongdoing," but its only support is an assertion that such awareness may be presumed. Br. 37. Perhaps "in the context of obstructing [pending] jury proceedings, any claim of ignorance of wrongdoing is incredible." 515 U.S. at 617 (Scalia, J., concurring and dissenting). But hypothetical agency proceedings are well outside the historic duties imposed in the context of pending judicial proceedings. Andersen's policy required retention of all information needed to understand the audit conclusions; and no one ever proposed any effort to identify and destroy harmful

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[14] *Pettibone*, 148 U.S. at 206; *Nye v. United States*, 313 U.S. 33 (1941).

[15] The Government's skepticism about how § 1512 might require conscious wrongdoing without requiring knowledge of *criminality* (Br. 37) is accordingly unfounded. The United States wrongly suggests that *Ratzlaf* required knowledge of illegality only because "absent such proof, [currency structuring] was not … 'invariably motivated by a desire to keep the Government in the dark.'" Br. 36 (quoting 510 U.S. at 145). This Court held that knowledge of illegality was required because structuring was not "inevitably nefarious" *even if* the defendant's specific intent was to "'depriv[e] the Government of the information that [the reporting statute] is designed to obtain.'" 510 U.S. at 144 (citation omitted).

[16] *See, e.g., McNally v. United States*, 483 U.S. 350, 355, 359-60 (1987) (mail fraud conviction cannot be based on alleged duty to render "honest and impartial government" absent clear statement by Congress). The fact that an Andersen executive once characterized Duncan's conduct as a "failure of judgment," GX 2002K, *cited in* Br. 26, hardly establishes that Duncan had fair warning that he was violating a public duty. As this Court recognized in *Dirks v. SEC*, 463 U.S. 646, 661 n.21, 665 (1983), there are "'significant distinctions between actual legal obligations and ethical ideals.'" (Citation omitted); *see also Chiarella v. United States*, 445 U.S. 222, 232-33 (1980) (holding that Congress had not clearly criminalized conduct, although defendant was fired when allegations came to light).

information, or to mislead the SEC.[17] The jury's finding that *part* of someone's motivation was to "impede the fact-finding ability" of possible proceedings does not make "incredible" the consistent testimony that they sincerely believed it was proper to comply with the policy.[18] Yet the instructions affirmatively told the jurors that they could not consider Andersen's proof that it "honestly and sincerely believed that its conduct was lawful." JA 213; *see North*, 910 F.2d at 943-44 (Silberman, J., concurring and dissenting)

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[17] The policy called for "all information related to the engagement," and "[i]nformation having relevance to our opinion or findings" to be retained. JA 45, 47. Temple accordingly ensured retention of documents that *undermined* the audit (Pet. Br. 8-9; Tr. 2440-41; GX NT1009), and others deleted only "extraneous" documents, focusing on "inclusion rather than exclusion." Pet. Br. 12 n.16, 13; JA 164-67; Tr. 2069-70, 3369. The fact that some members of the Houston team were behind in compiling the Enron work papers does not remotely establish that Andersen's retention policy was "dormant." Some team members were already in compliance (Tr. 5138-39, 5170, 5178), others knew they should be (Tr. 3339), many witnesses testified that compliance was the norm (Tr. 898-904, 3335-36, 3391-93, 4715-18, 5000, 5240-42), and compliance reminders unrelated to Enron were sent in April and August of 2001 (DX 504; DX 509; Tr. 5799-806, 2577). Nor does the volume of documents discarded imply conscious wrongdoing. The Houston team sent only an average of one half box per person to the shredder between October 24 and 26 (Tr. 2182-84, 3996) and nothing of magnitude after that date. Tr. 3989.

[18] The Government asserts that the policy plainly prohibited destruction when litigation was "deemed to be likely." Br. 27, 47 n.26. That language is not found in the retention policy, but in a related policy (Br. 45) that only requires "notification" to the legal group of "[a]ny situation that may result in a claim," JA 40, including when litigation is "judged likely." JA 29. The retention policy, in contrast, states that it is triggered only by "threatened litigation," which is described in the notification policy as "notification from [potential plaintiffs] threatening legal action." Pet. Br. 10 n.14; JA 40. Although the Government asserts that a Portland partner "refused to comply" with a request from Houston to follow the policy (Br. 8), the office took no action because Portland's Enron files already conformed to the policy. Tr. 5170, 5178. Inexplicably, even though one partner testified that he did not recall the compliance request or his reaction to it (Tr. 5194-97), the Government says he "explained his reaction" by saying "[f]or God's sake, just don't" destroy documents. Br. 8. In fact, that comment was merely a response to a question about his view of the policy. Tr. 5210.

(when means of obstruction are not "independently criminal" instructions must permit jury to consider whether the defendant "believed that the nature of his [document destruction]" was "in accordance with the law").

3. The Government nevertheless suggests, for the first time, that it should get a second chance to meet its burden under "any new legal standard that might be adopted." Br. 41 n.22. That would violate the Double Jeopardy Clause. *See Burks v. United States*, 437 U.S. 1, 18 (1978) (double jeopardy "precludes a second trial once the reviewing court has found the evidence legally insufficient").[19] This Court has consistently indicated that acquittal is required if the evidence was insufficient under a correct understanding of the law.[20] Regardless the Government was informed of Andersen's interpretation before trial (R. 144-46, 429-40, 941-45, 1160-61), and the law certainly was not settled in its favor, in the Fifth Circuit or generally. It thus had every incentive to introduce evidence of violations of duty or consciousness of wrongdoing if it had any. Even now it has not identified any evidence that it wishes it had introduced.

II. THE NEXUS AND OFFICIAL PROCEEDING INSTRUCTIONS REQUIRE REVERSAL

A. Informal Inquiries Are Not Official Proceedings

The Government claims that Andersen waived any challenge to the definition of "official proceeding" by initially presenting its argument to the Fifth Circuit in a footnote. Br. 47. But the 200-word footnote, citing numerous authorities, was impossible to miss; the Government responded on the merits; and Andersen returned to the issue in the text of its reply. JA 221-26. After questioning

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[19] *Lockhart v. Nelson*, 488 U.S. 33, 40-41 (1988), held only that whether a new trial is permissible after reversal based on a classic "trial error"—improper admission of evidence—is determined by reference to "all of the evidence *admitted by the trial court*." It does not permit a new trial where the evidence admitted below was insufficient as a matter of law.

[20] *See, e.g.*, *United States v. Kozminski*, 487 U.S. 931, 953 (1988); *United States v. Staples*, 30 F.3d 108, 109 (10th Cir. 1994) (evidence insufficient under new standard after remand from this Court); *Aguilar*, 515 U.S. at 533 (affirming judgment of acquittal under new standard).

the Government on the merits of the issue at argument, the Fifth Circuit necessarily resolved the issue in Andersen's favor when it found that "[p]ossible proceedings" did not become a "reality" until November 8. Pet. App. 5a.

The Government asserts that *everything* an agency does is an "official proceeding" as long as an agency has subpoena power. Br. 49-50. That strips "official proceeding" of any limiting force and renders the term synonymous with "matter[s] within the jurisdiction of" the agency. Pet. Br. 45. The informal inquiry here began when an SEC staff employee read an article in the Wall Street Journal that concerned conflicts of interest at Enron (not GAAP violations) (Tr. 656), which prompted him to "complete a form," and make an entry in "the SEC's internal computer system." Tr. 659. He then reviewed Enron's filings, browsed the Internet, and "checked out the chat rooms." Tr. 665-66. As *United States v. Batten* explained, an official proceeding must be "more than a mere police investigation." 226 F. Supp. 492, 494 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965). It surely must be more than surfing the web and visiting chat rooms. And while not "every aspect of the investigation must proceed under'" the authority to issue subpoenas or administer oaths (Br. 49 (citation omitted)), § 1512(b) is not triggered until at least *some aspect* carries that authority. The SEC staff never has subpoena power until the Commission votes to initiate a formal investigation.

The statutes and regulations cited by the Government confirm this view. 15 U.S.C. § 78u(a)(1) does not treat "all investigations as 'proceedings.'" Br. 48. It speaks to formal investigations initiated by a vote of the Commission, and is silent as to the informal inquiries made by the staff. And § 78u(b)'s reference to "investigation, or any other proceeding" merely suggests what 17 C.F.R. § 201.101(a)(9) makes explicit—that an investigation initiated by a vote of the Commission is a "proceeding," but an informal staff investigation is not.[21] Although the Government previously

[21] In every case cited by the Government, the "proceeding" had been

conceded that SEC regulations exclude informal inquiries from its definition of a "proceeding" (Opp. 29 n.20), it now asserts that this definition only applies to adjudicative proceedings. But § 201.100(b)(1) merely states that investigations need not comply with the elaborate procedures set out for adjudications. The mere fact that the *prescriptive* rules do not apply to investigations does not mean that the *descriptive* definition of a "proceeding" sheds no light on the meaning of that term in the context of investigations. To the contrary, § 201.101(a)(9)'s definition of "proceeding" fully conforms to the use of that word in the regulations governing investigations in Parts 202 and 203. They use "proceeding" to refer to investigations initiated by a vote of the Commission, and consistently refrain from using that word to describe informal inquiries initiated by the staff.[22] And thus the SEC's own letter of October 17, 2001 only advised Enron that it was conducting a voluntary "inquiry"—not a "proceeding." JA 103-06.

B. The Jury Was Not Required To Find Nexus

1. The Government suggests (Br. 42) that Andersen waived the nexus issue by failing to request an instruction phrased in terms of whether it believed an official proceeding was "likely." Andersen proposed "ongoing or … scheduled to be commenced" and "particular" because those were the formulations supported by Fifth Circuit law at the time. But it also clearly objected to the instruction given on

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given the power to issue subpoenas or administer oaths. *See* Pet. Rep. 3 n.2. Its assertion that the investigator in *United States v. Fruchtman*, 421 F.2d 1019 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970), did not have that power (Br. 49 n.28), is inaccurate. The FTC at the time expressly delegated investigative authority to staff members, who could administer oaths. 27 Fed. Reg. 4607, 4610 § 1.32 (May 16, 1962); Pet. Rep. 4 n.2.

[22] Part 203 Subpart B, which governs investigations "pursuant to a Commission order" is captioned "Formal Investigative Proceedings," and § 203.4(a) defines "formal investigative proceeding" as "a proceeding pursuant to a Commission order for investigation or examination." The section authorizing staff inquiries (in which "no process is issued or testimony compelled") is captioned "Enforcement *activities*." 17 C.F.R. § 202.5 (emphasis added); *see also id.* (conferring the authority for preliminary investigations, and never using the word "proceeding").

the ground that it required "insufficient nexus" to an official proceeding, citing *Aguilar*. R. 424-25, 931, 938. And the Fifth Circuit recognized that Andersen's appeal properly raised the issue of "the concreteness of the defendant's expectation of a proceeding." Pet. App. 26a.

Aguilar required proof of a nexus between the defendant's conduct and an actual official proceeding. Otherwise Judge Aguilar might have been convicted merely for lying to investigating FBI agents—which, although criminal, is not obstruction. 515 U.S. at 599-601. Although § 1512 does not require a pending proceeding, it does preserve the traditional distinction between obstructing an "official proceeding" and mere interference with preliminary investigations. As in *Pettibone* and *Aguilar*, Andersen could not have known that its conduct would have the natural and probable effect of obstructing an official proceeding *at least* until it knew that proceeding was probable.

2. The Government does not even argue that the incorrect nexus instructions were harmless beyond a reasonable doubt (the correct standard), but suggests that they did not affect Andersen's "substantial rights" because Andersen knew an official proceeding was likely or imminent.[23] Again it strategically blurs the distinction between the informal inquiry and an actual "official proceeding." Although Andersen learned of the informal inquiry on October 17, the SEC's letter concerned allegations that Enron inadequately disclosed conflicts of interest with its CFO—not allegations of GAAP violations that would directly implicate Andersen's audits. Tr. 656-57; GX 1017B; GX 1019C, D. In addition, Andersen was told at the time that the SEC was only planning to send Enron an "accounting letter," which in its experience never involved a request for auditor documents.[24] The fact that Andersen

[23] The Government's suggestion (at 43) that plain error review applies "assuming … petitioner's claim has been preserved," must be a mistake. In any event, *Pettibone* and *Aguilar* made the error plain.

[24] Tr. 5888, 1854, 1857, 1449; GX NT1023 (contemporaneous Temple notes stating that the "accounting letter" not received yet); GX 1025B.

may have anticipated "SEC document requests" directed at Enron, or that Temple *may* have thought some "SEC investigation" "'highly probable,'" Br. 3-4, 45, is irrelevant.

Instead, the undisputed facts establish that Andersen *correctly understood* that the SEC would not open an "official proceeding" seeking access to *Andersen's* files unless Enron restated its earnings.[25] There is no dispute that Andersen resolved the Raptors impairment issue which was the only earnings restatement issue on the horizon prior to October 27. On that date, Enron informed Andersen that there were possible problems with Chewco. Tr. 1934-35. Andersen only discovered the Chewco fraud that triggered the restatement and the SEC subpoena in November. *Id.*. Before then, Andersen accurately perceived that an earnings restatement (and subsequent subpoena) was no more than a "reasonable possibility."[26] Although the

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The SEC sends thousands of such requests per year and less than one percent ever lead to any investigation, let alone a formal one. Tr. 5877-78, 5889; *see also* Tr. 410, 421 (SEC witness testifies that such letters "might" lead to investigation if answer is unsatisfactory).

[25] The Government (at 4 n.2) seeks to discredit John Riley's testimony that only an earnings restatement would prompt an SEC request to an auditor even though his view was based on a decade of experience working at the SEC (Tr. 5875) and his expectation proved to be *accurate*. Enron announced on October 16 that it was "reducing its outstanding shareholder equity by approximately $1.2 billion," and yet the SEC did not seek anything from Andersen until Enron announced an earnings restatement on November 8. Br. 6-10; Tr. 568, 763-64. Nor did the Government proffer any contradictory testimony. Thomas Newkirk, one of its SEC witnesses, did not "testif[y] that *any* restatement … would result in a formal SEC investigation." Br. 4 n.2. He only discussed earnings restatements (Tr. 415, 424; Pet. App. 11a) and acknowledged that the Waste Management and Sunbeam subpoenas to Andersen were both prompted by earnings restatements. Tr. 450, 467. None of Temple's extensive notes suggest she knew about the balance sheet issue at the time of her alleged acts, and Duncan testified that he only knew that error "might or not" require a restatement as of the relevant date. Tr. 2615.

[26] Pet. Br. 11 n.15. This explains why counsel was retained to provide advice on "*possible* litigation" (Tr. 4183) and why Temple designated the matter as a "*potential*" regulatory investigation. Pet. Br. 11. The Government nevertheless relies on undated Temple notes to suggest that she believed all along that the SEC would subpoena Andersen records

Government does not challenge Andersen's showing that all of the alleged acts of "corrupt persuasion" occurred no later than October 26 (Pet. Br. 4 & n.5) it nonetheless relies on a series of events that occurred *after October 26* to suggest knowledge of a probable proceeding. *Compare* Br. 8-9 ("from October 19") *with* JA 120-21, 122-24; Tr. 1934, 4591, 4605, 5601-02, 5919-20 (events after October 26). It even cites Andersen's "recei[pt of] a subpoena for Enron-related documents" (Br. 9) without disclosing that the subpoena was served on November 6. Tr. 3066, 5157; GX 1106A. There is no evidence refuting its own cooperating witness's emphatic testimony that he and his colleagues only viewed a proceeding as "possible" during the relevant time. This Court acquitted Judge Aguilar because the evidence showed only that he knew his conduct "might or might not" obstruct a proceeding. 515 U.S. at 600. The same is true here.

As a fallback, the Government suggests that the instructions allowed Andersen to argue that it lacked criminal intent because it did not believe an official proceeding was likely. But the jury was told that an official proceeding was *already ongoing*, and that the prosecution "need only prove" an intent to impede some "regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." JA 213. The instructions left no room for a nexus defense.

CONCLUSION

The conviction must be reversed and remanded with instructions to enter a judgment of acquittal or a new trial.

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prior to a restatement. Br. 4 n.2. Those notes, however, were obviously written in November, as they reference the contents of Enron's restatement. GX NT-Undated, at A-004609. And undisputed testimony showed that Andersen did not receive any request for documents from the SEC until after Waste Management restated its earnings. Tr. 466-67. The Government also tries to impute knowledge of a future subpoena based on Sherron Watkins's statement that Enron could "implode in a wave of accounting scandals." Br. 2. During the relevant period, however, Duncan and his colleagues understood that her allegations had already been discredited by an investigation conducted by Vinson & Elkins. *See, e.g.*, Tr. 2333, 2373-76, 2419; GX 1015D.

Respectfully submitted,

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APPENDIX

1. Title 17, Section 201 of the Code of Federal Regulations provides in pertinent part:

§ 201.100 Scope of the rules of practice.

(a) Unless provided otherwise, these Rules of Practice govern proceedings before the Commission under the statutes that it administers.

(b) These rules do not apply to:

(1) Investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter

* * *

§ 201.101 Definitions.

(a) For purposes of these Rules of Practice, unless explicitly stated to the contrary:

* * *

(7) Order instituting proceedings means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing;

* * *

(9) Proceeding means any agency process initiated:

(i) By an order instituting proceedings; …

* * *

2. Title 17, Section 202 of the Code of Federal Regulations provides in pertinent part:

§ 202.5 Enforcement activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. The Commission may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or the rules of a self-regulatory organization of which the person is a member or participant. Unless otherwise ordered by the Commission, the investigation or examination is non-public and the reports thereon are for staff and Commission use only.

(b) After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution. …

* * *

3. Title 17, Section 203 of the Code of Federal Regulations provides in pertinent part:

§ 203.4 Applicability of §§ 203.4 through 203.8.

(a) Sections 203.4 through 203.8 shall be applicable to a witness who is sworn in a proceeding pursuant to a Commission order for investigation or examination, such proceeding being hereinafter referred to as a formal investigative proceeding.

(b) Formal investigative proceedings may be held before the Commission, before one or more of its members, or before any officer designated by it for the purpose of taking testimony of witnesses and received other evidence. The term officer conducting the investigation shall mean any of the foregoing.