

No. _____

**In the
Supreme Court of the United States**

CALVIN BERNHARDT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

STEVEN R. MORRISON
Counsel of Record
1526 Robertson Ct.
Grand Forks, ND 58201
617-749-7817
steven.r.morrison@gmail.com

Counsel for Petitioner

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QUESTION PRESENTED

1. A person can be guilty under 18 U.S.C. § 1512(b) if he “corruptly persuades” someone else to withhold testimony or an object from an official proceeding, destroy an object with intent to impair the object’s availability for use in an official proceeding, or hinder the communication to law enforcement officers of information related to a federal crime.

The federal circuit courts of appeals that have defined “corruptly persuade” have done so in multiple divergent ways. This Court, in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), purported to define it but left its substance and bounds unclear.

Should this Court now define “corruptly persuade” and settle the matter for itself and the circuits?

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PETITION FOR WRIT OF CERTIORARI

After the close of evidence in the petitioner's 2016 trial on multiple counts, the United States District Court for the District of North Dakota instructed the jury that to convict the petitioner for two counts of attempted witness tampering, it would have to find that the petitioner used "corrupt persuasion." The district court defined "corruptly persuade" as "to persuade with consciousness of wrongdoing."

On appeal, the Eighth Circuit Court of Appeals approved of this definition. This definition, in its essence, might be shared by one dissenting judge of the Third Circuit, the Second Circuit, and the Eleventh Circuit, which define "corrupt persuasion" as "persuasion that is motivated by an improper purpose."

This definition, however, runs contrary to that of the Third Circuit, which excludes from its definition of "corruptly persuade" "influencing another to act 'immorally' or 'improperly,'" and appears to require persuasion that is coercive or that entails a request of another to violate a legal duty. The Ninth Circuit appears to concur with this definition.

The Tenth Circuit has its own unique gloss on what "corruptly persuades" is, and this Court, in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005), refrained from defining the outer limits of what the term includes.

Indeed, the Eighth Circuit, in its opinion in the instant case, recognized the confusion surrounding the definition of "corruptly persuade." *United States v. Bernhardt*, 2018 WL 4344914, *5, --- F.3d ---- (8th Cir. 2018).

This case offers to the Court the opportunity to fill in the blank left by *Arthur Andersen LLP*, and thereby resolve a multifaceted circuit split and define an element of a federal crime that is currently defined by such vague words as “wrongdoing,” “improper,” “immoral,” “bad,” and “evil.”

OPINION BELOW

The Eighth Circuit issued its opinion on September 12, 2018. It rejected all of the petitioner’s arguments except one, affirmed all of the petitioner’s counts of conviction except one, and vacated the sixth count and remanded to district court for resentencing.

JURISDICTION

The Eighth Circuit rendered its decision on September 12, 2018. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definition of “corruptly persuades” under 18 U.S.C. § 1512(b).

- (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
 - (1) influence, delay, or prevent the testimony of any person in an official proceeding;
 - (2) cause or induce any person to—
 - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding;
 - (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or
(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation
shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

In 2016, the petitioner, Calvin Bernhardt, was indicted on six counts, two of which are relevant for this petition. Bernhardt was indicted on one count of attempted witness tampering, in violation of 18 U.S.C. § 1512(b)(3), and one count of attempted witness tampering, in violation of 18 U.S.C. § 1512(b)(2).

Bernhardt's charges arose in connection with communication he had with a minor in the Philippines and her mother, and Bernhardt's successful request of the minor to send to him nude pictures of herself.

Once he became aware that law enforcement entities were investigating him, Bernhardt sent an email to the minor's mother, in which he stated, "[T]here is a police investigation going on right now concerning my conversation with princess [the minor]. If anyone with the police contacts you or princess, do not answer any questions. You don't know me. It's for all of our best interest. They are looking for human trafficking and child porn . . . Ask princess not to discuss anything with anyone. No one is trustworthy."

After Bernhardt had been arrested, and then released on bond, law enforcement agents discovered an electronic message that Bernhardt had sent to the mother, in which he stated, "Please be very careful. The police could care me [sic] and you for

corruption of a minor and child porn”; “If you get an e-mail from anyone you don’t know, do not reported [sic] to them”; “Just make sure princess doesn’t talk to anyone and delete any nude pics of her or me, ok?”; and “I think princess reported me to Facebook and the police picked it up because of her age.”

After the parties rested their cases in a trial in late 2016, the United States District Court instructed the jury that one of the elements of attempted witness tampering under § 1512(b)(3) was that Bernhardt “knowingly used intimidation, threats, or corrupt persuasion against a witness,” and that one of the elements of attempted witness tampering under § 1512(b)(2) was that Bernhardt “knowingly attempted, by use of intimidation, threats, or corrupt persuasion of another person,” to prevent the use of images in an official proceeding.

The district court defined “corruptly persuade someone” as “to persuade with consciousness of wrongdoing.”

The jury found Bernhardt guilty on all six counts. He appealed to the Eighth Circuit Court of Appeals, which affirmed five convictions and vacated one for insufficient evidence. The vacated count is not relevant to this petition.

As to the issue before this Court, the Eighth Circuit, in its opinion in the instant case, noted a split of opinion regarding the definition of “corruptly persuade” between the Third Circuit and the Ninth Circuit, on the one hand, and a dissenting judge of the Third Circuit, the Eleventh Circuit, and the Second Circuit on the other hand. *Bernhardt*, 2018 WL 4344914, *5. To add to the confusion surrounding this split, the Eighth Circuit refrained from taking sides, concluding instead that

“[w]ithout rehearsing the arguments on each side of the debate, it is sufficient on plain error review to say that the [Third Circuit] majority’s view is at least subject to reasonable dispute, and that the judges who disagree with [the Third Circuit] are not obviously wrong.” *Id.*

REASONS FOR GRANTING THE PETITION

I. In *Arthur Andersen LLP v. United States*, the Court addressed the meaning of “corruptly persuade” under 18 U.S.C. § 1512, but did not settle the issue and refrained from defining its outer limits

Arthur Andersen LLP was the auditor for Enron as it was “implode[ing] in a wave of accounting scandals” in 2001. *Arthur Andersen LLP*, 544 U.S. at 698-99.

The *Wall Street Journal* broke the story on August 28, 2001, suggesting “improprieties at Enron.” *Id.* at 699. On the same day, the SEC opened an informal investigation. *Id.* Arthur Andersen formed a “crisis-response” team and retained outside counsel “to represent it in any litigation that might arise from the Enron matter.” *Id.* On October 9, Arthur Andersen’s in-house counsel observed that “some SEC investigation” was “highly probable.” *Id.*

On October 17, the SEC notified Enron by letter that it had opened an investigation in August. *Id.* at 700. On October 19, Enron sent that letter to Arthur Andersen. *Id.*

Throughout this timeline, Arthur Andersen’s policy was to follow its firm’s document retention policy. *Id.* at 700-02. During this time, Arthur Andersen employees engaged in “substantial destruction of paper and electronic documents despite reservations by some of [Arthur Andersen’s] managers.” *Id.* at 701.

In fact, one Arthur Andersen partner, urging employees to follow the document retention policy, said, “[I]f it’s destroyed in the course of [the] normal policy and litigation is filed the next day, that’s great [W]e’ve followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.” *Id.* at 700.

Document retention policies, this Court noted, “are created in part to keep certain information from getting into the hands of others, including the Government.” *Id.* at 704.

Arthur Andersen’s destruction of documents amidst a government investigation, of which it was aware, was the basis for charging Arthur Anderson with crimes under 18 U.S.C. §§ 1512(b)(2)(A) and (B). *Id.* at 698. A jury found the company guilty. *Id.*

The issue in *Arthur Andersen LLP* was whether the jury instructions on the definition of “corrupt[t] persua[sion]” were correct. *Id.*

The district court instructed the jury that “[a]n improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding,” and so “corruptly,” according to the Fifth Circuit, was defined as “motivated by an improper purpose.” *United States v. Arthur Andersen LLP*, 374 F.3d 281, 293, 296 (5th Cir. 2004).

This Court concluded that the Fifth Circuit approved of a district court instruction that did not require the jury to “find any consciousness of wrongdoing.” *Arthur Andersen LLP*, 544 U.S. at 702.

This Court granted certiorari “[b]ecause of a split of authority regarding the meaning of § 1512(b)” between, for example, *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998), on the one hand, and *United States v. Farrell*, 126 F.3d 484, 489-90 (3d Cir. 1997), on the other hand. *Id.* at 702, 702 n.7.

The Court specifically tasked itself with determining what it means to “knowingly . . . corruptly persuad[e]” another person “with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.” *Id.* at 703.

This Court treaded carefully, exercising its traditional restraint in assessing the reach of a federal criminal statute. *Id.* That restraint was particularly important in *Arthur Andersen LLP* because simply persuading someone with intent to cause that person to withhold documents from a Government official “is not inherently malign.” *Id.* at 703-04.

In its restraint, the Court did not clearly answer the question it set itself to answer. It noted, for example, that “[c]orrupt” and “corruptly” “are normally associated with wrongful, immoral, depraved, or evil.” *Id.* at 705. And the Court settled on a definition of “corruptly persuade” as Delphic as ever: “[o]nly persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuad[e].’” *Id.* at 706.

But what does “wrongdoing” mean? Does it mean violating a law or just a moral imperative? Does it mean impeding an actual, official investigation or would a potential investigation do? If the latter, how likely must it be that that potential

investigation turn into an official one? If the former, what does it mean for an investigation to be “official” or “actual”?

If the flipside of “corrupt” persuasion is “innocent” persuasion, neither side of the coin gives clarity. The Court observed that a person may “persuade[] another to withhold information from the Government” and thereby “get in the way of the progress of the Government” but do so “innocently.” *Id.* at 707.

What does “innocently” mean? Does it mean lacking any awareness of an actual, official investigation or of the potential for one? Does it mean acting negligently or recklessly in regards to one’s awareness of such an investigation?

The line between “corrupt” and “innocent” persuasion remains as murky as ever. This Court in *Arthur Andersen LLP* claimed to have addressed it, but also noted that “[t]he outer limits of this element [of knowingly corruptly persuading] need not be explored here.” *Id.* at 706. It is that very outer limit that needs to be explored and defined so that lower courts can have the clarity needed to adequately adjudicate § 1512 cases.

These courts continue to be stymied by vague and various definitions of “corruptly persuade” that circuits produce. See David N. Cassuto, *Crime, War & Romanticism: Arthur Andersen and the Nature of Entity Guilt*, 13 VA. J. SOC. POL’Y & L. 179, 194 n. 52 (2006) (The Court in *Arthur Andersen* “declined to explicitly define the term [corruptly]”); Jeffrey W. Debeer, *Corruptly Persuading Privilege: The Effect of United States v. Doss on the Marital Privilege, the 5th Amendment, and Federal Witness Tampering Statute § 1512(b)*, 80 U. CIN. L. REV. 591, 603-04

(2011) (“Despite the Supreme Court’s holding in *Arthur Andersen*, the circuits remain split over the correct interpretation of corruptly persuades as it pertains to the Fifth Amendment and the marital privilege.”); Harvard Law Review, *Required Elements*, 119 HARV. L. REV. 404, 408 (2005) (“Despite its significance as a cautionary flag . . . *Arthur Andersen* may prove just as notable for the guidance it failed to provide it failed to resolve a circuit split on the meaning of ‘corruptly’ and to define the required nexus with an official proceeding.”); Note, Daniel Leddy, *Interpreting the Meaning of “Corruptly Persuades”: Why the Ninth Circuit Got It Right in United States v. Doss*, 630 F.3d 1181 (9th Cir. 2011), 92 NEB. L. REV. 966, 974, 977 (2014) (The Court in *Arthur Andersen* “did not ultimately resolve the split” regarding the meaning of “corruptly persuades,” nor did it “define the correct interpretation of the corruptly persuades clause in § 1512(b)”; Diane A. Shrewsbury, *Degrees of Corruption: The Current State of “Corrupt Persuasion” in 18 U.S.C. § 1512*, 2012 U. CHI. LEGAL F. 375, 381 (The Court in *Arthur Andersen* “did not specifically define ‘corruptly persuades’ [circuit courts may] not believe that *Arthur Andersen* created a concrete rule regarding the meaning of corrupt persuasion.”).

II. The circuits that have considered the definition of “corruptly persuade” have come to many divergent definitions

Section 1512’s term “corruptly persuade” is ambiguous. *United States v. Farrell*, 126 F.3d 484, 487 (3d Cir. 1997). The most detailed judicial treatment of the term comes from the Third Circuit in *United States v. Farrell*. See *id.*

The Third Circuit in *Farrell* considered a prosecution under § 1512(b)(3) in which the defendant suggested that he and his coconspirator “stick together” on their false story and told his coconspirator, “If you crucify me, I’ll have to turn around and crucify you.” *Id.* at 486.

The Third Circuit held that “corruptly persuade” could not mean simply “persuades with the intent to hinder communication to law enforcement.” If it did, then the word “corruptly” in the term would be rendered meaningless. *Id.* at 487. The phrase could also not “include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.” *Id.* at 488. Thus, someone can legally persuade another not to disclose information to law enforcement, even if he does so with the intent to hinder an investigation. *Id.* at 489.

Two years after *Farrell*, the Third Circuit once again considered the meaning of “corruptly persuade.” In *United States v. Davis*, the Third Circuit observed that “[s]imply interfering with the flow of information to the government is not enough to constitute witness tampering” under § 1512(b). 183 F.3d 231, 248 (3d Cir. 1999). The Court rejected a definition of “corruptly persuade” as “influencing another to act ‘immorally’ or ‘improperly,’” since such a definition did nothing to resolve the term’s ambiguity. *Id.* at 249.

Instead, the Third Circuit found that corrupt persuasion referred to influencing someone to violate a legal duty. *Id.*

There is a minority view of “corruptly persuade” that departs from *Farrell*, *Davis*, and, arguably, *Arthur Anderson*. In *United States v. Shotts*, the Eleventh Circuit considered a defendant’s argument that the “corruptly persuade” language in § 1512(b) was unconstitutionally vague and overbroad. 145 F.3d 1289, 1299 (11th Cir. 1998). The *Shotts* Court considered both *Farrell*’s definition and the definition in *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996), which interpreted “corruptly persuade” to cover “only persuasion with an improper purpose.” *Id.* at 1300. The Eleventh Circuit sided with the Second Circuit and held that “corruptly persuade” means to persuade someone “motivated by an improper purpose.” *Id.* at 1301. In reaching this conclusion, the Eleventh Circuit was moved by the dissenting opinion in *Farrell*. *Id.* at 1300.

All roads that define “corruptly persuade” thus lead back to *Farrell*. Where the *Farrell* majority found “corruptly persuade” to be ambiguous and its legislative history of little use except to confirm that bribing someone for their silence or asking another person to outright lie to law enforcement agents comprises corrupt persuasion, *Farrell*, 126 F.3d at 488, the *Farrell* dissent saw a legislative history that permitted a much broader interpretation of “corruptly persuade.”

The dissent found legislative support for defining “corruptly persuade” as “persuasion that is motivated by an improper purpose.” *Id.* at 492 (Campbell, J., dissenting). It observed that § 1512 was enacted in 1982 to replace 18 U.S.C. § 1503, the obstruction of justice statute, and that the “corrupt persuasion” language was inserted into the statute in 1988. *Id.* Then-Senator Joseph Biden stated that the

intention of the 1988 Amendments (of which there were more than just the “corrupt persuasion” amendment) was “merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503.” *Id.* According to the dissent, § 1503’s “corruptly” language meant “motivated by an improper purpose.” *Id.*

The *Farrell* dissent oversold its version of legislative history. This very Court, prior to 1988, had declined to approve the “improper purpose” interpretation of “corruptly” in the § 1503 context. In *United States v. Jackson*, this Court considered jury instructions on § 1503 in which “corruptly” was defined as acting “with the specific intent of influencing [someone] . . . in the discharge of their duties and to influence, obstruct and impede the due administration of justice,” and acting “willfully, knowingly, and with the specific intent to influence a juror to abrogate his or her legal duties as a petit juror.” 607 F.2d 1219, 1221 (8th Cir. 1979). This Court held that these jury instructions were proper. *Id.* at 1222.

Around the same time as *Jackson*, the Fifth Circuit presciently anticipated the *Farrell* majority and rejected the *Farrell* dissent’s position. Of “corruptly” in 26 U.S.C. § 7212(a), the Fifth Circuit wrote, “It is unlikely that ‘corruptly’ merely means ‘intentionally’ or ‘with improper motive or bad or evil purpose.’” To so interpret the term would be “to render ‘corruptly’ redundant. A statute should be read to avoid rendering its language redundant if reasonably possible.” *United States v. Reeves*, 752 F.2d 995, 998 (5th Cir. 1985).

Again before 1988, the Seventh Circuit considered a § 1503 case, noting that § 1503 “requires the government to prove a specific intent to obstruct or impede the administration of justice.” *United States v. Machi*, 811 F.2d 991, 995 (7th Cir. 1987). There was no mention in this case of any “improper purpose” or “improper motive” standard.

More recently, the Ninth Circuit in *United States v. Doss* took up the question “whether one can be convicted for witness tampering under 18 U.S.C. § 1512 by encouraging a witness to withhold testimony when that witness possesses a legal right or privilege not to testify.” 630 F.3d 1181, 1183 (9th Cir. 2011). The issue was of course the meaning of “corruptly persuades.” *Id.* at 1186. Acknowledging the split between *Shotts* and *Thompson*, on the one hand, and *Farrell* on the other, *Doss*, 630 F.3d at 1186, the Ninth Circuit adopted the *Farrell* reasoning as “more persuasive and the most consistent with the Supreme Court’s later analysis of § 1512 in *Arthur Andersen*.” *Id.* at 1189. Thus, where a defendant merely asks another person not to testify based on some privilege, there can be no corrupt persuasion. *Id.* at 1190.

Similarly, in *United States v. Weiss*, the Tenth Circuit offered a definition culled from *United States v. Baldrige*, 559 F.3d 1126, 1143 (10th Cir. 2009): “corruptly persuade” means a defendant’s action that is “done voluntarily and intentionally to bring about false or misleading testimony or to prevent testimony with the hope or expectation of some benefit to the defendant or another person.” *Weiss*, 630 F.3d 1263, 1273 (10th Cir. 2010). While the Tenth Circuit kept open the possibility of formally adopting the *Farrell* definition, *id.* at 1275, the facts in *Weiss* prevented it

from doing so. Not only did Weiss allegedly ask three witnesses to lie (clearly corrupt persuasion), *id.* at 1274, but the jury instructions “foreclosed the possibility the jury convicted Weiss of innocently persuading [a witness] to exercise his constitutional right to remain silent.” *Id.* at 1275.

Baldrige itself rested heavily on *Farrell*. *Baldrige*, 559 F.3d at 1142. The *Baldrige* Court cited to *Farrell* for the proposition that “corruptly persuade” “cannot simply mean persuade with intent to influence the statements of another person because such an interpretation would render the word ‘corruptly’ meaningless.” *Id.* The *Baldrige* Court avoided any citation to *Shotts*. The Tenth Circuit’s caselaw in *Weiss*, therefore, has its roots squarely in the *Farrell* majority.

III. Considered together, the many definitions of “corruptly persuade” established by the circuits lead to the unavoidable conclusion that the term is vague, multidefinitional, and requires clarification by this Court

It appears that there are at least four different definitions of “corruptly persuade.”

The Third Circuit and the Ninth Circuit require coercion or a request of another to violate a legal duty, and would exclude from liability influencing another to act “immorally” or “improperly.”

The Second and Eleventh Circuits would require “persuasion with an improper purpose.”

The Tenth Circuit would require persuasion “done voluntarily and intentionally . . . with the hope and expectation of some benefit.”

Finally, the district court in the petitioner's case, and this Court in *Arthur Andersen LLP*, required persuasion "with consciousness of wrongdoing."

But, as commentators have noted, the definition in *Arthur Andersen LLP* doesn't clarify anything. What does "wrongdoing" mean? Does it mean to commit a crime? To violate an ethical duty? To violate a moral precept? Does it mean to act with the intention to undermine an actual law enforcement investigation? What if one were acting recklessly in regards to a law enforcement investigation that was highly likely to begin soon? What is "wrong" is an important philosophical question, but the law requires a clear definition.

Furthermore, the *Arthur Andersen LLP* definition doesn't add anything to other definitions. What is the difference between engaging in "wrongdoing" versus acting with an "improper purpose" versus acting "immorally" or "improperly"? To the extent that *Arthur Andersen LLP* sought to resolve vagaries in the definition of "corruptly persuade," it failed.

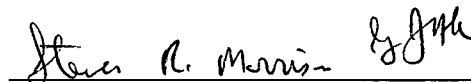
To put a final, case-specific point on this issue, the Eighth Circuit in the instant case found that the district court in the petitioner's case didn't err in giving the instruction it did because "the district court's jury instruction required not merely an 'improper purpose,' but a 'consciousness of wrongdoing,'" *Bernhardt*, 2018 WL 4344914, *5, as though there were some facially obvious difference between these two standards.

CONCLUSION

This case presents the Court with the chance to clarify the very term it had hoped to clarify in *Arthur Andersen LLP*. The impact of this ruling will redound to many areas of criminal law, as the case at bar and *Arthur Andersen LLP* attest. It will provide clarity for corporations' in-house counsel as they seek to establish document retention policies. It will allow prosecutors to make nuanced decisions regarding an array of crimes, to ensure that they charge actual witness tampering, and not innocent entreaties. It will provide defendants with fair notice of what the law requires and what the law prohibits.

The Court should grant certiorari so that it can define an important term in the criminal code that has, until now, remained mired in vague terminology.

Respectfully submitted,



STEVEN R. MORRISON
Counsel of Record
1526 Robertson Ct.
Grand Forks, ND 58201
617-749-7817
steven.r.morrison@gmail.com

Counsel for Petitioner

October 5, 2018