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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)

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Note*

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)

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* Daniel Leddy: J.D. Candidate, University of Nebraska College of Law, 2014; B.A. University of Nebraska-Omaha, 2010. Thanks go out to all of my hard-working colleagues at the *Nebraska Law Review* who spent valuable time and effort contributing to this Note. All errors and omissions are my own. I would also like to give special thanks to my loving wife Adair and sweet daughter Fallon for their continuing support.

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I. INTRODUCTION

The prosecution and deterrence of witness tampering is unmistakably a major concern of our criminal justice system. Indeed, “[w]ithout the cooperation of victims and witnesses, the criminal justice system would cease to function.”¹ As important as this concern is, however, there must be clear limits on what type of conduct comprises witness tampering in the eyes of the law.² Congress has laid out those limits in 18 U.S.C. § 1512—the federal witness tampering statute. Section 1512(b) prohibits the corrupt persuasion of another person with the intent to impede an official proceeding.³ Unfortunately, courts apply different interpretations of § 1512(b),⁴ resulting in a troubling split among several of the federal circuit courts.⁵ These courts disagree about whether it is corrupt to persuade a witness to withhold testimony from an official proceeding when that witness has a legal right to do so.⁶ While the Second and Eleventh Circuits hold that such conduct is within the coverage of the statute,⁷ the Third Circuit holds that such conduct does not necessarily amount to witness

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1. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(a)(1), 96 Stat. 1248, 1248 (1982).
 2. See Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 645 (2006) (discussing the lack of uniformity and coherence in the federal obstruction of justice statutes and stating that a just system of penal laws should give citizens “fair notice of that which will subject them to criminal sanction”).
 3. 18 U.S.C. § 1512(b) (2006).
 4. This clause will be referred to throughout the Note as the “corruptly persuades clause.”
 5. See David Cylkowski & Ryan Thornton, *Obstruction of Justice*, 48 AM. CRIM. L. REV. 955, 982 (2011); see also Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of “Corruptly” Within the Federal Criminal Law*, 31 J. LEGIS. 129, 149–65 (2004) (recognizing the inconsistency in the definition of “corruptly” applied between the different circuits and arguing for adoption of a universal definition). But see Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 10–11 (2002) (arguing that while the circuits disagree on the textual analysis of § 1512(b), the circuits’ decisions do not go “so far as to hold that merely asking someone not to cooperate would be ‘corrupt’ within the meaning of the statute”).
 6. Petition for Writ of Certiorari at 22, *Norris v. United States*, 132 S. Ct. 250 (2011) (No. 11-91), 2011 WL 2877876, cert. denied, 80 U.S.L.W. 3059 (U.S. Oct. 3, 2011).
 7. See *United States v. Shotts*, 145 F.3d 1289, 1300–01 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452–53 (2d Cir. 1996).

tampering.⁸ The key issue is whether corrupt persuasion requires mere persuasion motivated by an improper purpose (such as self-interest in impeding an investigation)⁹ or persuasion that involves otherwise wrongful means (such as bribery or inducement to commit perjury).¹⁰ Most recently, the Ninth Circuit joined the Third Circuit in adopting a narrow interpretation of the corruptly persuades clause.¹¹

United States v. Doss represents a significant development in this circuit split because the Ninth Circuit was the first federal circuit to take a position on the issue after the Supreme Court decision in *Arthur Andersen LLP v. United States*.¹² This Note examines the arguments presented on both sides of the issue and discusses whether the Ninth Circuit applied the correct interpretation of § 1512(b) in *United States v. Doss*. Part II explains the history of federal witness tampering and of the corruptly persuades clause, in addition to further examining the circuit split as it existed before *United States v. Doss*. Next, Part III provides further backdrop by analyzing the Supreme Court's guiding opinion in *Arthur Andersen LLP v. United States*. Part IV examines the reasoning and conclusion offered by the Ninth Circuit in *United States v. Doss*. Part V then argues that the Ninth Circuit's narrow interpretation is the correct reading of the statute, evidenced by the fact that it is the only interpretation consistent with both the statutory language and the Supreme Court's guidance. Part V further argues that the legislative history is largely indeterminate and does not reveal congressional intent suggesting a broad interpretation of the corruptly persuades clause.¹³

8. See *United States v. Doss*, 630 F.3d 1181, 1189–90 (9th Cir. 2011); *United States v. Farrell*, 126 F.3d 484, 489–90 (3d Cir. 1997).

9. Throughout the Note, this interpretation of the corruptly persuades clause will be referred to as the “broad interpretation” because it encompasses a much broader range of conduct.

10. Likewise, this interpretation will be referred to as the “narrow interpretation.”

11. *Doss*, 630 F.3d at 1189–90.

12. 544 U.S. 696 (2005). The Second Circuit affirmed its adherence to the narrow interpretation one year after *Arthur Andersen* but did so in reliance on existing circuit precedent without considering the Supreme Court's decision. See *United States v. Gotti*, 459 F.3d 296, 342–43 (2d Cir. 2006) (citing *Thompson*, 76 F.3d at 452). The Ninth Circuit was therefore the first to adopt a position in this circuit split based on the Supreme Court's analysis in *Arthur Andersen*.

13. For an argument that the Ninth Circuit's holding in *United States v. Doss* is inadequate because it arguably conflicts with congressional intent and is not obviated by statutory construction, see generally 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 (2012).

II. BACKGROUND

A. History of Federal Obstruction of Justice

Federal witness tampering was historically prosecuted under 18 U.S.C. § 1503 (the general obstruction-of-justice statute), which “subjected to punishment ‘[w]hoever corruptly, or by threats or force, or by any threatening letter or communication, endeavor[ed] to influence, intimidate, or impede’ any witness, juror, or court officer.”¹⁴ Prior to 1982, this statute covered all federal obstruction of justice actions, including witness tampering.¹⁵ However, due to concerns that the statute’s broad coverage was inadequate to protect victims and witnesses in criminal proceedings,¹⁶ Congress passed the Victim and Witness Protection Act (VWPA) in 1982 to provide additional protection to victims and witnesses in federal cases.¹⁷ Section 1512 was enacted as part of the VWPA, but the statute did not initially prohibit the corrupt persuasion of witnesses.¹⁸ As originally enacted, § 1512 had a large gap in its coverage of witness tampering, which was pointed out by the Second Circuit in *United States v. King*.¹⁹

In *King*, the defendant was involved in a counterfeit money operation, and the jury found him guilty of conspiring to deal in counterfeit money and witness tampering in violation of § 1512.²⁰ The evidence showed that King attempted to bribe his coconspirator to give false information to the government, but the trial judge vacated the verdict on the witness tampering count, finding that King’s “nonmisleading, nonthreatening, [and] nonintimidating” conduct did not fall within the ambit of § 1512 as it was initially enacted.²¹ The Second Circuit had previously held that the simultaneous removal from § 1503 of any reference to witnesses coupled with the enactment of § 1512—specifically pertaining to witnesses—indicated that § 1503 no longer specifically applied to witness tampering.²² Because § 1512 did not initially include noncoercive corruption of witnesses, there existed a “gap” in the legislation.²³ The Second Circuit held that King’s conduct did not fall within the ambit of § 1512 and declined to “distort the plain language of § 1512” by reading into it the inclusion of conduct such as King’s.²⁴

14. Petition for Writ of Certiorari, *supra* note 6.

15. Tina M. Riley, Note, *Tampering with Witness Tampering: Resolving the Quagmire Surrounding 18 U.S.C. §§ 1503, 1512*, 77 WASH. U. L.Q. 249, 251 (1999).

16. *Id.* at 255.

17. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(b), 96 Stat. 1248, 1248–49 (1982).

18. *Id.* at 1249–50.

19. *United States v. King*, 762 F.2d 232, 238 (2d Cir. 1985).

20. *Id.* at 234–35.

21. *Id.* at 235, 238.

22. *United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984).

23. *King*, 762 F.2d at 238.

24. *Id.*

Instead, the court invited “Congress to enact legislation to close the gap.”²⁵

Congress accepted the Second Circuit’s invitation in 1988, when it amended § 1512(b), by striking “or threatens” from the original language and replacing it with “threatens or corruptly persuades.”²⁶ This amendment was included in the Anti-Drug Abuse Act of 1988²⁷ and did not expressly define the type of conduct covered by the new corruptly persuades clause.²⁸ The addition of this clause without an explicit definition of its intended coverage has led to the current circuit split over the meaning of the language.

B. Circuit Split

Before the Ninth Circuit considered the issue in *United States v. Doss*, there were three federal circuits involved in the split—the Second, Third, and Eleventh. The Third Circuit adheres to the narrow interpretation of the corruptly persuades clause,²⁹ while the Second and Eleventh Circuits adhere to the broad interpretation.³⁰

1. *The Second Circuit*

The Second Circuit first weighed in on this issue in *United States v. Thompson*.³¹ In *Thompson*, the defendant was involved in a drug distribution operation. He was convicted of witness tampering under § 1512(b) for encouraging a coconspirator to affirmatively lie before a grand jury regarding the number of drug transactions that had occurred between them.³² Thompson also attempted to dissuade other coconspirators from providing information about the drug operation to federal investigators.³³ On appeal, Thompson argued that § 1512(b) violates the First Amendment by broadly prohibiting persuasion—

25. *Id.*

26. Riley, *supra* note 15, at 265.

27. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-169, sec. 7029(c), § 1512(b), 102 Stat. 4181, 4397–98 (1988) (codified as amended at 18 U.S.C. § 1512(b) (2006)). The obstruction-of-justice amendment takes up only about half of a page in the 364-page bill.

28. The amendment did add to § 1515(a) that “the term ‘corruptly persuades’ does not include conduct which would be misleading conduct but for a lack of a state of mind.” *Id.* at 4398. However, this explanation offers no guidance as to whether the conduct discussed in this note—persuasion with an improper purpose (such as self-interest in impeding an official proceeding)—is covered by the clause.

29. *United States v. Farrell*, 126 F.3d 484, 487–90 (3d Cir. 1997).

30. *United States v. Shotts*, 145 F.3d 1289, 1300–01 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452–53 (2d Cir. 1996).

31. *Thompson*, 76 F.3d 442.

32. *Id.* at 446–47.

33. *Id.*

which is protected speech—and that the statute is unconstitutionally vague.³⁴

The Second Circuit rejected this first argument by explaining that § 1512(b) does not prohibit all persuasion—only persuasion that is corrupt.³⁵ Relying on other courts’ interpretations of the “parallel provision” in § 1503, the Second Circuit concluded that the presence of “corruptly” as a modifying term “means that the government must prove that the defendant’s attempts to persuade were motivated by an improper purpose.”³⁶ This broad interpretation was embodied in the trial court’s jury instructions, which instructed that “[t]o act ‘corruptly’ . . . means to act deliberately for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice.”³⁷ The court held that § 1512 is not unconstitutionally vague and concluded that the evidence was plainly sufficient to permit the jury to convict Thompson because he attempted to persuade one of his coconspirators to affirmatively lie to a grand jury.³⁸ Although Thompson’s conduct could fall within the coverage of § 1512(b) under either the broad or narrow interpretation, the Second Circuit clearly adopted the broad interpretation.³⁹

2. *The Third Circuit*

Just a year after *United States v. Thompson* was decided, the Third Circuit considered a similar case and declined to adopt the Second Circuit’s broad interpretation of the corruptly persuades clause.⁴⁰ In *United States v. Farrell*, the defendant was under investigation by the United States Department of Agriculture (USDA) for involvement in a conspiracy to sell adulterated meat.⁴¹ The defendant was charged with witness tampering under § 1512(b) for attempting to prevent a coconspirator from providing information to the USDA.⁴² The defendant was convicted but argued on appeal that his conduct was not prohibited under the statute.⁴³ Relying on *United States v. Thompson*, the government argued that “corruptly” should have the same meaning under § 1512(b) as it does in § 1503—“motivated by an improper

34. *Id.* at 452.

35. *Id.*

36. *Id.* (citing *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981); *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978)).

37. *Id.* at 453.

38. *Id.* at 452–53.

39. *Id.* at 452.

40. *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997).

41. *Id.* at 486.

42. *Id.* at 487.

43. *Id.*

purpose.”⁴⁴ However, the court found this argument unpersuasive because of the structural differences between the two statutes.⁴⁵

Section 1503 uses the word “corruptly” broadly to describe the requisite intent for obstruction of justice, but in § 1512(b), “corruptly” is used in conjunction with the word “knowingly” to require some specific intent beyond mere knowledge.⁴⁶ Since the “improper purposes” that justify application of § 1512 are already listed in the statute as required elements, the court reasoned that interpreting “corruptly” the same way it is used in § 1503 renders it mere surplusage in § 1512.⁴⁷ Such an interpretation directly conflicts with the Supreme Court’s recognition that “courts should give meaning to all statutory terms, especially those that ‘describe an element of a criminal offense.’”⁴⁸

The court also examined the legislative history but found it unhelpful in deciphering the meaning of the corruptly persuades clause.⁴⁹ In a House Judiciary Committee report discussing the 1988 amendment of § 1512(b), the Committee explains that the corruptly persuades clause covers culpable conduct that is not coercive or misleading.⁵⁰ Although the report does not define “culpable conduct,” it cites the defendant’s conduct from *United States v. King* (which included both bribery and inducement to commit perjury) as an example of such conduct.⁵¹ Thus, the only conclusion the court gleaned from the legislative history was that the corruptly persuades clause does prohibit both bribery and persuasion to commit perjury.⁵²

The majority ultimately adopted the narrow interpretation of the corruptly persuades clause that “does 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 the investigators.”⁵³ Thus, the court held Farrell’s noncoercive attempt to dissuade his coconspirator from revealing information about the conspiracy did not violate § 1512(b).⁵⁴

In a separate dissenting opinion, Senior Circuit Judge Campbell broadly interpreted the corruptly persuades clause to mean “persuasion motivated by an improper purpose.”⁵⁵ The dissent considered

44. *Id.* at 489–90 (citing *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996)).

45. *Id.*

46. *Id.* at 490.

47. *Id.*

48. *Id.* at 487 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994)).

49. *See id.* at 488.

50. *Id.* (citing H.R. REP. NO. 100-690, at 12 (1987)).

51. *Id.* (citing H.R. REP. NO. 100-690, at 12 (1987)).

52. *Id.*

53. *Id.*

54. *Id.* at 490.

55. *Id.* at 494 (Campbell, J., dissenting).

comments made by Senator Joe Biden—who had taken the lead in drafting the criminal provisions of the Anti-Drug Abuse Act of 1988.⁵⁶ Senator Biden stated the purpose of the 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.”⁵⁷ Judge Campbell reasoned that because Congress would have been aware of judicial precedent defining the word “corruptly” under § 1503 as meaning motivated by an improper purpose, Congress must have intended to attribute this same meaning to “corruptly” under § 1512(b).⁵⁸

Furthermore, the dissent was not persuaded by the majority’s argument that the broad interpretation rendered the word “corruptly” meaningless.⁵⁹ Judge Campbell offered examples of conduct that he claimed fell outside the coverage of § 1512(b) to prove that the word “corruptly” does in fact limit the coverage of the statute under the broad interpretation.⁶⁰ Ultimately, Judge Campbell followed the Third Circuit’s reasoning in *United States v. Thompson* and would have affirmed Farrell’s conviction because Farrell’s conduct was motivated by his own interest in avoiding an honest investigation.⁶¹

3. *The Eleventh Circuit*

One year later, the Eleventh Circuit decided *Shotts v. United States* and followed the Third Circuit’s reasoning, holding that corrupt persuasion includes persuasion motivated by an improper purpose without requiring any additional level of culpability.⁶² In *Shotts*, the Federal Bureau of Investigation investigated allegations of corruption concerning a state district court judge in Alabama and his involvement with a bail bond business.⁶³ The defendant was a criminal defense attorney who had involvement with the judge and the bail bond business and was convicted of several crimes, including witness tampering under § 1512(b) for corruptly persuading the secretary of his law office to withhold information from law enforcement agents who were investigating the judge.⁶⁴ The defendant—relying on *United States v. Poindexter*⁶⁵—argued that the corruptly persuades language

56. *Id.* at 492.

57. *Id.* (quoting 134 CONG. REC. 32701 (1988)).

58. *Id.*

59. *Id.* at 493.

60. *Id.*

61. *Id.* at 494.

62. *United States v. Shotts*, 145 F.3d 1289, 1300–01 (11th Cir. 1998).

63. *Id.* at 1291.

64. *See id.* at 1299.

65. *United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991) (holding that the term “corruptly” is unconstitutionally vague as used in another federal obstruction of justice statute, 18 U.S.C. § 1505 (2006)).

of § 1512(b) is unconstitutionally overbroad.⁶⁶ The court had recently denied a similar argument in regard to § 1503, holding that the differences between §§ 1503 and 1505 precluded useful comparison between the two statutes.⁶⁷ The court rejected Shotts's argument that § 1512 is unconstitutionally vague, noting, "*Poindexter* should be read narrowly, and not as a broad indictment of the use of 'corruptly' in the various obstruction-of-justice statutes."⁶⁸

Interestingly, the Eleventh Circuit had no trouble applying § 1503's definition of "corrupt"—as "motivated by an improper purpose"—to § 1512,⁶⁹ even with the obvious structural difference between the two statutes.⁷⁰ The court adopted the broad interpretation of § 1512(b), found the statute was not unconstitutionally vague, and ultimately affirmed Shotts's conviction.⁷¹

The Supreme Court acknowledged this split of authority regarding the meaning of the corruptly persuades clause under § 1512(b) and granted certiorari in *Arthur Andersen LLP v. United States*.⁷² Although the Court did not ultimately resolve the split in that case, the Court's analysis offers valuable guidance on how to correctly interpret the statute and seems to favor the narrow interpretation of the corruptly persuades clause.

III. *ARTHUR ANDERSEN LLP V. UNITED STATES*, 544 U.S. 696 (2005)

A. Facts and Procedural History

Arthur Andersen involved the investigation and eventual downfall of the Enron Corporation (Enron) and the accounting firm Arthur Andersen LLP (Arthur Andersen).⁷³ When Enron's performance began to suffer in late 2001, the Securities and Exchange Commission (SEC) initiated an informal investigation into possible improprieties at Enron.⁷⁴ In response, Arthur Andersen formed an Enron "crisis response" team and obtained outside counsel for possible litigation.⁷⁵ After the firm's counsel concluded that an SEC investigation was

66. *Shotts*, 145 F.3d at 1299.

67. *Id.* (citing *United States v. Brenson*, 104 F.3d 1267 (11th Cir. 1997)).

68. *Id.* at 1300.

69. Compare *id.* at 1299 (citing *Brenson*, 104 F.3d at 1280) ("Section[s] 1505 and 1503 are too materially different for the construction of one to guide the construction of the other."), with *id.* at 1301 ("It is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a).").

70. See *infra* section V.B.

71. *Shotts*, 145 F.3d at 1301.

72. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

73. *Id.*

74. *Id.* at 699.

75. *Id.*

highly likely, one of the firm’s supervising partners urged eighty-nine employees—including ten members of the Enron crisis-response team—to comply with the firm’s document retention policy.⁷⁶ The destruction of documents pursuant to this policy continued for about a month, until Arthur Andersen was subpoenaed for records.⁷⁷

Arthur Andersen was indicted for violating § 1512(b)(2)(A) and (B) by corruptly persuading employees to withhold and alter documents for use in official proceedings.⁷⁸ After ten days of deliberation, the jury returned a guilty verdict, and Arthur Andersen subsequently appealed to the Fifth Circuit.⁷⁹ Arthur Andersen argued on appeal that the jury instructions failed to properly explain the meaning of corruptly persuades.⁸⁰ The district court instructed the jury that “[t]o ‘persuade’ is to engage in any non-coercive attempt to induce another person to engage in certain conduct,” that “[t]he word ‘corruptly’ means having an improper purpose,” and that “[a]n improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.”⁸¹ Relying on *United States v. Farrell*,⁸² Arthur Andersen argued that these instructions rendered the term “corruptly” superfluous, but the Fifth Circuit concluded that the terms, “subvert,” “undermine,” and “impede” implied the appropriate degree of culpability required by § 1512(b).⁸³ The court also relied on the congressional records mentioned by the dissent in *Farrell* to conclude that the term “corruptly” in § 1512(b) should be defined in the same way it was in § 1503.⁸⁴ Ultimately, the Fifth Circuit held that the corruptly persuades language was correctly defined for the jury and affirmed the lower court’s decision.⁸⁵ The Supreme Court subsequently granted certiorari.⁸⁶

76. *Id.* at 699–700. The document retention policy generally called only for preservation of documents relevant to the firm’s work, but in the case of commenced or threatened litigation, the policy also called for preservation of information related to such litigation. *Id.* at 700 n.4.

77. *See id.* at 701–02.

78. *Id.* at 702. Although this case involved corrupt persuasion to withhold documents and not testimony, the Court’s opinion provides useful guidance on the correct interpretation of the corruptly persuades clause itself, which applies to both forms of tampering.

79. *Id.*

80. *United States v. Arthur Andersen LLP*, 374 F.3d 281, 292 (5th Cir. 2004).

81. *Id.* at 293.

82. *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997).

83. *Arthur Andersen*, 374 F.3d at 295.

84. *Id.* at 296; *Farrell*, 126 F.3d at 492 (3d Cir. 1997) (Campbell, J., dissenting).

85. *Arthur Andersen*, 374 F.3d at 281.

86. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 (2005).

B. Analysis and Opinion

During oral argument, Arthur Andersen contended that the Fifth Circuit's broad interpretation of § 1512(b) was incorrect because it made a mere request to engage in otherwise lawful conduct a federal crime.⁸⁷ Both parties conceded that it would have been completely innocent for the employees to follow the document retention policy on their own volition, but the government argued that Arthur Andersen committed witness tampering through corrupt persuasion by requesting that the employees follow the policy.⁸⁸ Despite the clear statutory structure and the absence of a grammatical break between the two words, the government argued that "knowingly" does not modify "corruptly." Under this line of reasoning, it was irrelevant whether Arthur Andersen's officers were conscious of the corrupt nature of the persuasion.⁸⁹

Chief Justice Rehnquist's opinion for the unanimous Court suggests that the Court was not persuaded by the government's arguments and did not favor the broad interpretation.⁹⁰ In interpreting the statute, the Court noted its traditional practice of exercising "restraint in assessing the reach of a federal criminal statute."⁹¹ Such restraint is exercised both out of deference to Congress and out of a concern that fair notice should be given in commonly understood language of what the law intends to do if a certain line is passed.⁹² This practice is important in interpreting the corruptly persuades clause because persuasion by itself is completely innocent conduct.⁹³ As the Court explicitly noted, "'persuading' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from [a] Government [proceeding] is not inherently malign."⁹⁴ In other words, the word

87. Oral Argument at 0:50, *Arthur Andersen*, 544 U.S. 696 (No. 04-368), available at http://oyez.org/cases/2000-2009/2004/2004_04_368 [hereinafter Oral Argument, *Arthur Andersen LLP v. United States*]. Justice Scalia expressed his confusion about the government's proposed interpretation of corrupt persuasion: "[I]t doesn't make any sense to make unlawful the asking of somebody to do something which is, itself, not unlawful, so that the person could do it, but if you asked them to do it, you're guilty, he's not guilty." *Id.* at 30:02.

88. *Id.* at 29:42.

89. *Id.* at 39:00.

90. *Arthur Andersen*, 544 U.S. at 698, 704–08.

91. *Id.* at 703 (quoting *Dowling v. United States*, 473 U.S. 207 (1985)).

92. *Id.* (citing *United States v. Aguilar*, 515 U.S. 593, 600 (1995); *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

93. *Id.* at 703.

94. *Id.* at 704. The Court offered examples of persuasion that are not inherently corrupt, including a mother who suggests to her son that he invoke his right against compelled self-incrimination, a wife who persuades her husband not to disclose marital confidences, and an attorney who persuades a client with intent to withhold documents from the government. *Id.* (citing U.S. CONST. amend. V; *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Trammel v. United States*, 445 U.S. 40 (1980)).

“corruptly” must actually serve to limit the type of persuasion covered under the statute and cannot be interpreted as requiring merely intent to impede an official proceeding—which is already required by other language in the statute.

The Court went on to note that § 1512(b) most naturally reads “knowingly . . . corruptly persuades” even though such an interpretation produces a somewhat awkward formulation.⁹⁵ Thus, the Court reasoned, any reliance on the interpretation of “corruptly” from §§ 1503 or 1505 is unhelpful in interpreting the word in § 1512 because §§ 1503 and 1505 do not contain the modifying word “knowingly.”⁹⁶ The Supreme Court concluded that the jury instructions were too broad because they did not actually serve to limit the type of persuasion that would fall under the ambit of the corruptly persuades clause.⁹⁷ Anyone who innocently persuades another to withhold information from an official proceeding necessarily impedes the government’s progress and, therefore, violates § 1512(b) according to the trial court’s erroneous jury instructions.⁹⁸

Although the Court’s unanimous opinion did not define the correct interpretation of the corruptly persuades clause in §1512(b), its analysis suggested a preference for the narrow interpretation of *United States v. Farrell*,⁹⁹ rather than the broad one adopted in *United States v. Thompson*¹⁰⁰ and *United States v. Shotts*.¹⁰¹ It was this analysis from *Arthur Andersen LLP v. United States*, along with the three other circuits’ prior interpretations of the statute, that provided the framework for the Ninth Circuit when it decided *United States v. Doss*.¹⁰²

IV. *UNITED STATES V. DOSS*, 630 F.3D 1181 (9TH CIR. 2011)

A. Facts and Procedural History

Doss and his wife, Ford, were indicted for multiple counts of sex trafficking children and transportation of minors into prostitution.¹⁰³ During Doss’s trial, the government did not call Doss’s wife as a witness but did call a minor coconspirator named C.F., who refused to testify.¹⁰⁴ A mistrial resulted after the jury was unable to reach a verdict, but a grand jury issued a superseding indictment against

95. *Id.* at 704–05.

96. *Id.* at 705 n.9.

97. *Id.* at 707.

98. *Id.*

99. 126 F.3d 484, 489–90 (3d Cir. 1997).

100. 76 F.3d 442, 452–53 (2d Cir. 1996).

101. 145 F.3d 1289, 1301 (11th Cir. 1998).

102. 630 F.3d 1181 (9th Cir. 2011).

103. *Id.* at 1184.

104. *Id.*

Doss that added three counts of witness tampering in violation of § 1512(b).¹⁰⁵ One of the additional counts alleged that Doss knowingly corruptly persuaded Ford, intending to cause her to withhold testimony from an official proceeding.¹⁰⁶ The factual basis for that charge was Doss's sending of several letters to Ford encouraging her not to testify against him based on their marital status.¹⁰⁷ One of those letters stated:

Believe me if I got to go back to trial which is most likely I will if I don't get a 5 year deal, they are going to try you again to come testify which they made clear against me and if and when that time comes, I would expect you to hold strong and say NO that you won't even get on the stand period.¹⁰⁸

The letters Doss wrote to Ford did not show any coercion or other wrongful conduct on his part.¹⁰⁹ The other relevant additional charge¹¹⁰ in the superseding indictment involved Doss's persuasion of C.F. with the intent to cause the minor coconspirator to commit perjury in an official proceeding.¹¹¹ The evidence pertaining to that charge consisted of statements Doss made toward C.F. while the two were being transported back from the courthouse.¹¹² Doss repeatedly urged C.F. to lie and give law enforcement officials someone else's name rather than his own.¹¹³

At Doss's second trial, both C.F. and Ford testified against him, and the jury found Doss guilty on the witness-tampering charges involving C.F. and Ford.¹¹⁴ Doss unsuccessfully moved for acquittal on all counts, both at the close of the government's case and at the end of the trial.¹¹⁵ He subsequently appealed to the Ninth Circuit, contending that the district court erred in denying his motion to dismiss the two witness-tampering counts and in denying his motion for acquittal of those two counts.¹¹⁶

B. Analysis and Opinion

Doss contended that his conduct in persuading both Ford and C.F. not to testify was not corrupt because both Ford and C.F. possessed an

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1190.

110. The third count added in the superseding indictment—which charged Doss with attempting to influence a fellow inmate's testimony—was not an issue on appeal because the jury did not find Doss guilty on this charge. *Id.* at 1185 n.2.

111. *Id.* at 1190–92.

112. *Id.* at 1185, 1190–92.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1185–86.

independent legal privilege not to testify.¹¹⁷ His argument depended on the coverage of the corruptly persuades clause under § 1512(b) and, more specifically, on the meaning of the word “corrupt.” The Ninth Circuit noted that “[a]ll courts considering the issue have found this phrase to be ambiguous.”¹¹⁸ In determining the correct interpretation of the ambiguous statutory language, the court considered prior case law and legislative history.

The Ninth Circuit began its analysis by noting the Second and Eleventh Circuits’ substantial reliance on the meaning some courts previously attributed to the word “corruptly” in § 1503.¹¹⁹ The court then considered the Third Circuit’s reasons for rejecting the broad interpretation: both the fact that it renders the word “corruptly” surplusage and that it relies on the use of “corruptly” in the structurally dissimilar § 1503.¹²⁰ The court also noted the Supreme Court’s apparent acquiescence with the Third Circuit’s recognition that it is not inherently malign to persuade someone with intent to cause them to withhold testimony and the Circuit’s conclusion that comparisons of “corruptly” between §§ 1503 and 1512 are unhelpful.¹²¹

Next, the Ninth Circuit considered the House Judiciary Committee report that lists both bribing someone to withhold information and encouraging someone to affirmatively lie, as examples of culpable conduct punishable under the corruptly persuades clause.¹²² This report offers no indication that Congress intended the statute to cover mere persuasion motivated by an improper purpose.¹²³ Therefore, the court concluded that the narrow interpretation of the corruptly persuades clause—suggested by the plain language of the statute, favored by the Supreme Court in *Arthur Andersen LLP v. United States*, and consistent with congressional intent—is the appropriate reading of § 1512(b).¹²⁴

Finally, the court considered whether Doss’s conduct fell within the coverage of the corruptly persuades clause.¹²⁵ Since Doss did not attempt to intimidate or threaten his wife in attempting to persuade her to withhold testimony, the court reversed his conviction as to that

117. *Id.* at 1189–90. As Doss’s wife, Ford had the marital privilege not to testify, and as a coconspirator, C.F. had the Fifth Amendment right not to testify. *Id.*

118. *Id.* at 1186 (citing *United States v. Baldrige*, 559 F.3d 1126, 1142 (10th Cir. 2009)).

119. *Id.* at 1187 (citing *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998)); *United States v. Thompson*, 76 F.3d 442, 452–53 (2d Cir. 1996)).

120. *Id.* (citing *United States v. Farrell*, 126 F.3d 484, 489–90 (3d Cir. 1997)).

121. *Id.* at 1188–90 (citing *Arthur Andersen LLP v. United States* 544 U.S. 696, 703–04, 706 (2005)).

122. *Id.* at 1189 (citing H.R. REP. NO. 100-169, at 12 & n.25 (1987)).

123. *Id.* at 1189–90.

124. *Id.* at 1187–90.

125. *Id.* at 1189–92.

count.¹²⁶ The court affirmed Doss's conviction on the second count, however, because the evidence showed that he attempted to persuade C.F. to commit perjury by blaming someone other than himself.¹²⁷ Such conduct "clearly runs afoul" of § 1512(b).¹²⁸

V. ANALYSIS

The Ninth Circuit made the correct decision by adopting the narrow interpretation. This is the only interpretation consistent with the statutory construction and clearly favored by the Supreme Court's dicta in *Arthur Andersen LLP v. United States*.¹²⁹ Furthermore, the contention that the narrow interpretation conflicts with congressional intent holds no weight. The relatively small amount of relevant legislative history is notably vague on the issue and arguably supports the narrow interpretation. Therefore, the broad interpretation—which is not supported by the statutory construction, Supreme Court precedent, or congressional intent—should give way to the better interpretation.

A. Statutory Construction Requires Adoption of the Narrow Interpretation

The starting point for statutory construction is to look to the language of the statute itself.¹³⁰ A brief analysis of the plain language of § 1512(b) using common rules of statutory interpretation reveals that the statute does not at all lend itself to the broad interpretation.

1. *The Broad Interpretation Renders the Word "Corruptly" Meaningless*

The broad interpretation contradicts the plain language of the statute and reduces the word "corruptly" to mere surplusage. This is because the statute explicitly requires not only that the persuasion be committed knowingly and corruptly, but also that it be performed "with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding [or to] cause or induce any person to . . . withhold testimony . . . from an official proceeding."¹³¹ Under the broad interpretation, the word "corruptly" is defined as motivated by an improper purpose—such as self-interest in impeding an investiga-

126. *Id.* at 1190.

127. *Id.* at 1191–92.

128. *Id.* at 1192; *see also* 134 CONG. REC. 32701 (1988) (citing as an example of "corrupt persuasion" an attempt to induce a witness to commit perjury).

129. *See supra* notes 87–101 and accompanying text.

130. *See, e.g.,* McNeill v. United States, 131 S. Ct. 2218, 2221 (2011); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002); Robinson v. Shell Oil Co., 519 U.S. 337, 340–41 (1997).

131. 18 U.S.C. 1512(b) (2006).

tion.¹³² If this view is correct, then the statute contains two very redundant requirements: (1) that the persuasion be done for the purpose of impeding an official proceeding and (2) with intent to impede an official proceeding. No conceivable conduct would satisfy one of these requirements and not the other.¹³³ Thus, such a definition renders “corruptly” meaningless because the statute would prohibit the exact same conduct even without the presence of this modifying word. Because the broad interpretation renders the modifier “corruptly” surplusage, it is plainly inconsistent with the statutory construction.

As the Supreme Court has consistently held, statutes must be interpreted, when possible, to give meaning to each word contained therein.¹³⁴ This rule has clear applicability here because Congress could have simply kept the word “corruptly” out of the statute if its intent was to prohibit all persuasion with intent to impede an official proceeding. Congress chose instead to include the modifying word, and thus, courts must give meaning to the word where it is possible to do so.¹³⁵ The narrow interpretation properly recognizes that Congress included this word in the plain language of the statute. Thus, the conduct prohibited by § 1512(b) must necessarily be more culpable than that which would otherwise violate the statute if the word “corruptly” were not included.¹³⁶ The word must serve some limiting function or it would not be in the statute. The broad interpretation, however, overlooks the statute’s plain language and reads the word “corruptly” right out of § 1512(b).

Proponents of the broad interpretation argue that such an interpretation does not actually lead to statutory redundancy because there are certain limited situations where someone can persuade another to withhold testimony without violating § 1512(b).¹³⁷ Two commonly offered hypotheticals to illustrate situations like this are: (1) a mother who urges her son (in the child’s interest) to claim his Fifth Amendment right to remain silent¹³⁸ and (2) a husband who persuades his wife to refrain from testifying where taking the stand

132. *United States v. Doss*, 630 F.3d 1181, 1186 (2011).

133. The argument that there are actually types of conduct that would only satisfy one of these requirements is considered below. *See infra* notes 137–43 and accompanying text.

134. *See Walters v. Metro. Educ. Enters. Inc.*, 519 U.S. 202, 209 (1997) (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

135. *Id.*

136. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–07 (2005); *United States v. Doss*, 630 F.3d 1181, 1189 (9th Cir. 2011); *United States v. Farrell*, 126 F.3d 484, 487–88 (3d Cir. 1997).

137. *Farrell*, 126 F.3d at 492–93 (Campbell, J., dissenting); Oral Argument at 15:05, *Doss*, 630 F.3d 1181 (No. 07-50334), available at <http://www.ca9.uscourts.gov/datastore/media/2009/03/09/07-50334.wma> [hereinafter Oral Argument, *United States v. Doss*]; Debeer, *supra* note 13, at 607–09.

138. *Farrell*, 126 F.3d at 493 (Campbell, J., dissenting).

would be detrimental to her health.¹³⁹ However, there are two critical flaws with this argument. First, situations with these facts will rarely, if ever arise.¹⁴⁰ It is unlikely Congress had such limited situations in mind when it added the corruptly persuades clause to § 1512(b).¹⁴¹ Second, the argument incorrectly assumes that the conduct in these two situations does not fall under the ambit of the broad interpretation of corrupt persuasion. Certainly, both the mother and the husband are acting out of their own self-interest in the well-being of their family members and are doing so by persuading those family members to withhold testimony from an official proceeding.¹⁴² A straightforward application of the broad interpretation would result in both the mother and husband's conviction of witness tampering through corrupt persuasion under § 1512(b).¹⁴³ This argument thus fails to show how persuasion could possibly be done with the intent to impede an official proceeding but without a self-interested purpose to impede an official proceeding. It likewise fails to discredit the idea that the broad interpretation renders "corruptly" meaningless. Contrarily, it provides additional evidence of the incongruities that result from the broad interpretation and further supports adoption of the narrow interpretation.

2. *Canons of Construction Suggest the Narrow Interpretation*

Moreover, the narrow interpretation of the corruptly persuades clause is further confirmed by the nature of the other forms of witness tampering listed in the statute—intimidation, threats, and misleading conduct.¹⁴⁴ Two useful statutory interpretation canons—*noscitur a sociis* and *ejusdem generis*—suggest that the meaning of the corruptly persuades clause is guided by the context of the statute in which it is found.¹⁴⁵ The commonsense canon, *noscitur a sociis*, advises that a

139. Oral Argument, *United States v. Doss*, *supra* note 137; *Debeer*, *supra* note 13, at 607–09.

140. *Debeer*, *supra* note 13, at 608 n.171.

141. Oral Argument, *United States v. Doss*, *supra* note 137, at 21:00.

142. While their intentions are not wholly selfish, the very fact that they are persuading these people in the first place demonstrates that the mother and husband are motivated by a significant level of self-interest in persuading their family members not to testify—and thereby persuading those family members to impede an official proceeding.

143. Clearly, this outcome is contrary to commonsense, but it is the necessary result if corrupt persuasion means merely persuasion with self-interest in impeding an official proceeding.

144. *See* 18 U.S.C. § 1512(b) (2006).

145. The use of these canons is not absolute, and they should not be treated as rules of law, but in the absence of persuasive contrary evidence, they provide useful inferences about the meaning of statutory language. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS CRS-4 (2008).

word’s meaning is influenced by the company it keeps.¹⁴⁶ The related canon, *ejusdem generis*, instructs that when general words follow a list of specific items, the general words are interpreted to include only objects similar to the specifically listed items.¹⁴⁷ The enumerated types of conduct prohibited by § 1512(b) other than corrupt persuasion are all examples of conduct that is otherwise inherently wrongful. Merely having self-interest in litigation by persuading someone not to testify based on legal privilege, on the other hand, is not inherently wrongful.¹⁴⁸ A straightforward application of these two canons of construction suggests that corrupt persuasion must also refer to otherwise inherently wrongful conduct, rather than mere persuasion with an improper purpose. Furthermore, the only examples offered in the legislative history of conduct that constitutes corrupt persuasion are also inherently wrongful actions.¹⁴⁹ These canons of construction clearly support the narrow interpretation of the corruptly persuades clause.

3. *The Rule of Lenity Requires Adoption of the Narrow Interpretation*

Another commonly used principle in statutory interpretation, known as the rule of lenity, requires adoption of the narrow interpretation. The rule of lenity is a longstanding Supreme Court rule that applies when interpreting ambiguities in criminal statutes.¹⁵⁰ It demands “resolution of ambiguities in criminal statutes [to be interpreted] in favor of the defendant.”¹⁵¹ This rule “serves to ensure both

146. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 294–95 (2008) (explaining that *noscitur a sociis* narrows the meaning of the words “promotes” and “presents” to contain a transactional connotation where those words are listed in a statute among a string of operative verbs including “advertises,” “distributes,” and “solicits”); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (applying the canon to conclude that the word “discovery” listed in a statute along with the words “exploration” and “prospecting” refers only to the discovery of mineral resources).

147. KIM, *supra* note 145, at CRS-10; *see also* Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 383–85 (2003) (relying on both *noscitur a sociis* and *ejusdem generis* as guidance of the restrictive meaning of “other legal process” used in a provision of the Social Security Act).

148. The Ninth Circuit pointed this out during oral argument in *United States v. Doss*. *See* Oral Argument, *United States v. Doss*, *supra* note 137, at 19:35.

149. *See infra* section V.C.

150. KIM, *supra* note 145, at CRS-28.

151. *Hughey v. United States*, 495 U.S. 411, 422 (1990). In a case where the Court considered the correct statutory interpretation of another provision that was enacted as a small part of the long and complex Anti-Drug Abuse Act—an act one congressman notably described as “more like a telephone book than a piece of legislation,” 134 CONG. REC. 33290 (1988) (remarks of Rep. Conte)—the Court adhered to the rule of lenity. *United States v. Granderson*, 511 U.S. 39, 54 (1994) (“In these circumstances—where text, structure, and history fail to establish that the Government’s position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”). The amendment that added the corruptly persuades clause to § 1512(b) is even smaller than the provision

that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.”¹⁵² The Court stressed the importance of lenity in *Arthur Andersen LLP v. United States* “out of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’”¹⁵³ Justice Breyer reiterated this concern during oral argument in *Arthur Andersen LLP v. United States*, stating, “I think it possible to approach ambiguous criminal statutes with the following idea: Congress did not intend to try to make of the statute a highly general weapon for the Justice Department to pick and choose; that’s a notification problem.”¹⁵⁴

Although the statutory construction strongly favors the narrow interpretation, there is some level of ambiguity as to the correct interpretation of the corruptly persuades clause.¹⁵⁵ Thus, the rule of lenity is clearly applicable in determining the correct interpretation of § 1512(b). The lenity principle in this case demands the adoption of the interpretation that favors defendants—the narrow interpretation. The Ninth Circuit’s holding is correct under the rule of lenity.¹⁵⁶

B. Comparison with Section 1503 Is Inappropriate

The courts adopting the broad interpretation rely solely on “similar” language in § 1503 to ascertain the meaning of corrupt persuasion.¹⁵⁷ This reliance is unfounded, however, due to the major structural difference between the statutes. The “similar” language relied on from § 1503 punishes “[w]hoever . . . corruptly . . . influences, obstructs, or impedes”¹⁵⁸ On the other hand, § 1512(b) is applicable to “[w]hoever *knowingly* . . . corruptly persuades another person, or attempts to do so”¹⁵⁹ The clear difference in the language of these two obstruction-of-justice statutes is the lack of the modifying

at issue in *United States v. Granderson*. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-169, sec. 7029(c), § 1512(b), 102 Stat. 4181, 4397–98 (1988) (codified as amended at 18 U.S.C. § 1512(b) (2006)).

152. *Crandon v. United States*, 494 U.S. 152, 158 (1990).

153. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (citation omitted) (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)).

154. Oral Argument, *Arthur Andersen LLP v. United States*, *supra* note 87, at 49:18.

155. *See supra* note 118 and accompanying text.

156. *United States v. Doss*, 630 F.3d 1181, 1189–90 (9th Cir. 2011). Although the Ninth Circuit did not explicitly rely on the rule of lenity in its opinion, the court did rely on previous interpretations of § 1512(b) adopted by both the Supreme Court and the Third Circuit, both of which applied the lenity principle. *See Arthur Andersen*, 544 U.S. at 703; *United States v. Farrell*, 126 F.3d 484, 489 (1997).

157. *See, e.g., United States v. Shotts*, 145 F.3d 1289, 1299–1301 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996).

158. 18 U.S.C. § 1503 (2006).

159. 18 U.S.C. § 1512(b) (2006) (emphasis added).

word “knowingly” in § 1503. This important difference means that the word “corruptly” necessarily serves two distinct purposes in each statute.

In § 1503, the word “corruptly” is widely understood to provide the requisite level of intent.¹⁶⁰ This is completely reasonable because if it did not, there would be no intent element to the general obstruction of justice offense defined in that statute.¹⁶¹ Under § 1512(b) however, the required level of intent is already expressed in the statute. The word “knowingly” provides the general intent, while the further sub-parts of § 1512(b) require certain specific levels of intent.¹⁶² Thus, “corruptly” must necessarily serve some additional purpose in § 1512(b) beyond that which it serves in § 1503.¹⁶³ Courts that have adopted the broad interpretation offer no explanation as to why the language of these two statutes should be compared despite this significant difference.¹⁶⁴ This is particularly interesting when considering the Eleventh Circuit’s conclusion that §§ 1503 and 1505 are too materially different to compare but that the same problem does not arise when comparing §§ 1503 and 1512(b).¹⁶⁵ The Eleventh Circuit did not explain this discrepancy.¹⁶⁶

Unlike the broad interpretation, the narrow interpretation accounts for the obvious structural difference between §§ 1512 and 1503. Courts adopting this interpretation are appropriately skeptical about using the exact same meaning of this word in each statute.¹⁶⁷ Not only is this more prudent approach most consistent with the statutory

160. *Farrell*, 126 F.3d at 490 (citing *e.g.*, *United States v. Barfield*, 999 F.2d 1520, 1524 (11th Cir. 1993); *United States v. Bashaw*, 982 F.2d 168, 170 (6th Cir. 1992); *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978)).

161. Interpreting the word “corruptly” not to provide the mens rea element of § 1503 would conflict with the general notion that criminal liability normally requires both a guilty mind and a guilty act (or failure to act where there is a duty to act). *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 250–51 (1952).

162. *United States v. Doss*, 630 F.3d 1181, 1188 (9th Cir. 2011); *Farrell*, 126 F.3d at 490.

163. *Farrell*, 126 F.3d at 489–90.

164. *See United States v. Shotts*, 145 F.3d 1289, 1299–300 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996).

165. *See supra* notes 65–70 and accompanying text. Compare the language of § 1503 (“Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice . . .”), and § 1505 (“Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law . . .”), with that of § 1512(b) (“Whoever knowingly . . . corruptly persuades another person, or attempts to do so . . . with intent to [either] influence, delay, or prevent the testimony of any person in an official proceeding; [or] cause or induce any person to . . . withhold testimony . . . from an official proceeding . . .”). The language of §§ 1503 and 1505 appears to be very similar, while § 1512(b) is clearly distinguishable because of the modifying word “knowingly.”

166. *See Shotts*, 145 F.3d at 1299–300.

167. *See Doss*, 630 F.3d at 1188; *Farrell*, 126 F.3d at 490.

language, but it is also the only interpretation consistent with the Supreme Court's conclusion that any analogy between the meaning of the word "corruptly" in §§ 1503 and 1512 is unhelpful.¹⁶⁸ By explicitly refusing to compare the two structurally different statutes, the Supreme Court cast serious doubt on the Second and Eleventh Circuits' heavy reliance on this comparison in adopting the broad interpretation.

C. The Narrow Interpretation Does Not Conflict with Congressional Intent

Although legislative history is often a valuable resource in statutory interpretation, the legislative history behind the corruptly persuades clause in § 1512(b) does not provide much guidance on the clause's intended meaning. The only relevant pieces of legislative history are a small excerpt in a report authored by the House Judiciary Committee¹⁶⁹ and a page in the congressional records containing statements made in the Senate.¹⁷⁰ The House Judiciary Committee's report does not define corrupt persuasion, but instead, it offers both bribery and persuasion to commit perjury as examples of such conduct¹⁷¹—actions that are otherwise wrongful. The narrow interpretation is entirely consistent with this report in echoing the House Judiciary Committee's intention to require otherwise wrongful conduct for a violation of the corruptly persuades clause.¹⁷² Nothing in this report suggests congressional intent to broadly prohibit otherwise innocent conduct solely because it is done with self-interest in impeding an official proceeding.¹⁷³ The broad interpretation takes the coverage of the corruptly persuades clause considerably further than the House Judiciary Committee's expressed intention. Arguably, then, the narrow interpretation more reasonably adheres to the congressional intent expressed in this report.

Courts have also relied on a page in the congressional records concerning the 1988 amendment of § 1512 to determine congressional intent of the statute's coverage.¹⁷⁴ The records state that the amendment's intention was "to include in section 1512 the same protection of witnesses from noncoercive influence that was (and is) found

168. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 n.9 (2005) ("The parties have pointed us to two other obstruction provisions, 18 U.S.C. §§ 1503 & 1505, which contain the word 'corruptly.' But these provisions lack the modifier 'knowingly,' making any analogy inexact.").

169. H.R. REP. NO. 100-169 (1987).

170. 134 CONG. REC. 32701 (1988).

171. H.R. REP. NO. 100-169.

172. *See Doss*, 630 F.3d at 1189-90; *Farrell*, 126 F.3d at 489-90.

173. *See* H.R. REP. NO. 100-169.

174. *United States v. Shotts*, 145 F.3d 1289, 1300 (11th Cir. 1998); *Farrell*, 126 F.3d at 491-92 (Campbell, J., dissenting).

in section 1503.”¹⁷⁵ Since, at the time of this report, some courts had interpreted the word “corruptly” in § 1503 as meaning motivated by an improper purpose, courts have viewed this document as determinative evidence that the narrow interpretation directly conflicts with congressional intent.¹⁷⁶ However, further examination reveals that it actually provides no more determinative evidence of the congressionally intended meaning of corrupt persuasion than the House Judiciary Committee’s report. The paragraphs preceding that oft-cited statement show that the main concern was the Second Circuit’s holding in *United States v. King*¹⁷⁷ and its recognition of the gap in witness protection under the VWPA.¹⁷⁸ In fact, the statement follows directly after acknowledgement of the Second Circuit’s invitation to “close the gap.”¹⁷⁹ The context of this quoted phrase thus leads to the reasonable inference that it refers to Congress’s intent to ensure that persuasion involving bribery or inducement to commit perjury—the two types of conduct committed by the defendant in *United States v. King*—is covered under the corruptly persuades clause in § 1512(b). In context, the phrase does not support the notion that Congress intended to give the word “corruptly” a meaning in § 1512(b) that some courts had given it under § 1503—motivated by an improper purpose. The congressional records contain no citation to any case adopting this interpretation of the word.¹⁸⁰ Moreover, if this really was Congress’s intention, then it likely would have clarified this by providing an example of persuasion motivated by an improper purpose as conduct that falls within the corruptly persuades clause.¹⁸¹ Congress would have at least provided a citation to a case that had interpreted such conduct as corrupt persuasion. However, statements to this effect are tellingly absent, which arguably indicates that Congress did not intend such a broad interpretation of the corruptly persuades clause. The narrow interpretation therefore does not conflict with the expressed legislative intent as to the meaning and proper coverage of the corruptly persuades clause.

175. 134 CONG. REC. 32701 (1988). This quoted language is commonly cited by proponents of the broad interpretation. See, e.g., *Shotts*, 145 F.3d at 1300; *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting).

176. *Shotts*, 145 F.3d at 1300; *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting).

177. 762 F.2d 232 (2d Cir. 1985).

178. See *supra* notes 19–25 and accompanying text.

179. 134 CONG. REC. 32701 (1988).

180. *Id.*

181. Instead, Congress only included bribery and inducement to commit perjury—both of which constitute otherwise wrongful conduct and are within the ambit of the narrow interpretation.

VI. CONCLUSION

With careful analysis, taking into consideration several different factors, the Ninth Circuit correctly concluded in *United States v. Doss* that the corruptly persuades clause does not prohibit mere persuasion that is motivated by an improper purpose. The statutory construction, Supreme Court precedent, and legislative history all reveal that the corruptly persuades clause under § 1512(b) requires persuasion through otherwise wrongful conduct. Persuasion motivated by an improper purpose does not, without more, constitute a violation of § 1512(b) under the correct interpretation of the statute. The two primary arguments for interpreting the language so broadly—based on “similar” language in a separate statute and indeterminate records of congressional intent—fail to persuade, especially after careful consideration of the Supreme Court’s guidance and upon further examination of the legislative history.

This holding is significant because it evens up the number of circuit courts on each side of this issue. More importantly, *United States v. Doss* is the first decision in this circuit split that resulted from a thorough analysis of the Supreme Court’s strong dictum in *Arthur Andersen LLP v. United States*. It may be true that the circuit split will only continue to grow in the absence of a Supreme Court holding explicitly resolving the split or a congressional amendment expressly defining the corruptly persuades clause.¹⁸² It is undeniably an imperative function of the federal criminal code to provide reasonable notice as to what type of conduct constitutes criminal behavior.¹⁸³ However, it is also possible that courts in the future will recognize the value of the Ninth Circuit’s approach in *United States v. Doss* and will also adopt the narrow interpretation. *Arthur Andersen LLP v. United States* does present very strong evidence of the Supreme Court’s view on the issue. It is hard to imagine a court would consider that opinion and still choose to adopt the broad interpretation. Of course, a congressional amendment could also potentially provide clarity for courts going forward on how to interpret the corruptly persuades clause, but as with the amendment enacted in 1988, there is always the possibility that the statutory language will still contain ambiguities. In the absence of further action by either the Supreme Court or Congress, courts considering this issue in the future should follow the Ninth Circuit’s lead and adopt the narrow interpretation.

182. See Petition for Writ of Certiorari, *supra* note 6, at 28–30; Debeer, *supra* note 13, at 613–15.

183. *Arthur Andersen LLP v. United States*, 544 U.S. 698, 703 (2005); see O’Sullivan, *supra* note 2.