No. 13-7451

IN THE SUPREME COURT OF THE UNITED STATES

JOHN L. YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MYTHILI RAMAN
Acting Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's efforts to thwart a government investigation by dumping undersized fish at sea violated the criminal prohibition on "knowingly * * * destroy[ing] * * * [or] conceal[ing] * * * any * * * tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States," 18 U.S.C. 1519.

2. Whether the district court acted within its discretion in excluding at petitioner's trial certain expert testimony that petitioner failed to disclose to the government before trial, as required by Federal Rule of Criminal Procedure 16(b)(1)(C).

IN THE SUPREME COURT OF THE UNITED STATES

No. 13-7451

JOHN L. YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 733 F.3d 1059. The order of the district court (Pet. App. B1-B2) is not published in the Federal Supplement but is available at 2011 WL 3444093.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2013. The petition for a writ of certiorari was filed on November 13, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of disposing of undersized fish for the purpose of preventing the United States Coast Guard and the National Marine Fisheries Service (Fisheries Service) of the National Oceanic and Atmospheric Administration (NOAA) from exercising their lawful authority to take such property into their custody, in violation of 18 U.S.C. 2232(a); and of destroying, concealing and covering up an undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit, in violation of 18 U.S.C. 1519. He was sentenced to 30 days of imprisonment, to be followed by three years of supervised release. Pet. App. A6. The court of appeals affirmed. Id. at A1-A12.

1. Petitioner was the captain of the Miss Katie, a vessel engaged in commercial fish harvesting in the Gulf of Mexico. On August 23, 2007, John Jones, a field officer with the Florida Fish and Wildlife Conservation Commission who was deputized by the Fisheries Service to enforce federal fisheries laws, was on offshore patrol when he encountered the Miss Katie in federal waters. Pet. App. A2; 8/3/11 Tr. 69-71. Noting that the occupants of the Miss Katie were engaged in a commercial fish

harvest, Officer Jones boarded the vessel to inspect for gear, fishery, and boating-safety compliance. Pet. App. A2; 8/3/11 Tr. 71.

While on board, Officer Jones noticed several red grouper that appeared to be less than 20 inches long, the minimum legal limit for harvesting red grouper. Pet. App. A2; 8/3/11 Tr. 72. To determine whether the fish were of legal size, he measured the fish with their mouths closed and tails pinched, a protocol authorized by the governing federal regulation and which Jones determined was the most accurate way to measure red grouper. Pet. App. A2-A3 & n.2; 8/3/11 Tr. 60-61, 76, 80. Officer Jones gave petitioner the benefit of the doubt on fish that measured close to 20 inches but separated the fish that clearly measured less than 20 inches. In all, he determined that 72 red grouper measured less than 20 inches; Officer Jones placed them in wooden crates, instructed petitioner not to disturb them, and informed petitioner that the Fisheries Service would seize them upon the vessel's return to port. Pet. App. A3; 8/3/11 Tr. 81, 97, 101.

Petitioner did not comply. Instead, he directed Thomas Lemons, a crew member, to throw the undersized fish overboard. 8/3/11 Tr. 223. Lemons did so and, at petitioner's direction, the crew then took other red grouper and placed them in the crates that had held the undersized fish. Id. at 224.

Petitioner instructed Lemons to tell officials that the fish in the crates were the same fish that Officer Jones had identified as undersized. Pet. App. A3-A4; 8/3/11 Tr. 225.

On August 26, 2007, Special Agent James Kejonen of NOAA traveled to Cortez, Florida, to meet the Miss Katie, which had returned to port, and to investigate Officer Jones' report of undersized fish. Upon inquiring whether the fish that Officer Jones had identified as undersized were still on board, petitioner responded that they were. 8/3/11 Tr. 182-184. Officer Jones was then summoned to reinspect the fish at the dock. Using the same technique he previously employed, Officer Jones determined that, although some of petitioner's undersized fish had previously measured as little as 18 or 19 inches, none of the grouper unloaded at the dock were that small. And although most of the fish Officer Jones had measured at sea were between 19 and 19-1/2 inches long, the majority of the fish at the dock measured close to 20 inches. Id. at 121-124. Because Officer Jones suspected that the fish he measured at the dock were not the same fish he had measured onboard the Miss Katie, other officers interviewed crew member Lemons. Lemons eventually acknowledged that the undersized fish had been destroyed at petitioner's direction. Pet. App. A4; 8/3/11 Tr. 228-229.

2. Petitioner was charged with the offenses described above (and a third offense, of which he was acquitted at trial).

a. At trial, petitioner disputed whether the red grouper that he ordered thrown overboard were actually undersized because Officer Jones measured them with their mouths closed and not opened. He argued that it was possible that, if measured with their mouths open, they would have measured the legal size. Pet. App. A4-A5.

Before trial, both petitioner and the government had proffered experts who would testify about the proper method to measure red grouper. The district court conducted a Daubert hearing on the day before trial to evaluate the admissibility of both experts' testimony. The district court concluded that petitioner's expert, William Ward, a research director of the Gulf Fishermen's Association, could testify as a fish-measuring expert. Pet. App. A5; 8/2/11 Tr. 153. The court qualified the government's expert, Dr. Richard Cody, a research administrator with the Fish and Wildlife Research Institute, to testify about the amount a red grouper may shrink when placed on ice, but the court declined to rule on whether Dr. Cody could testify about the proper method of measuring a red grouper. Pet. App. A5; 8/2/11 Tr. 155, 164.

The government elected not to call Dr. Cody as an expert witness in its case-in-chief. After the government rested,

petitioner announced for the first time that he would call Dr. Cody as his own witness to testify about the length of a grouper with an open mouth versus a closed mouth. Pet. App. A5. The government objected, and the district court ruled that petitioner was precluded from calling Dr. Cody in his case-in-chief because petitioner had failed to notify the government of his intention to call Dr. Cody as an expert witness. 8/4/11 Tr. 51-54. Following that ruling, petitioner called Ward as his first witness. Ward testified as an expert that fish can shrink on ice and that grouper measure longer with their mouths open than with their mouths closed. Pet. App. A6. On cross-examination, the government elicited from Ward an admission that a seafood business that he operated had paid a $12,000 fine for dealing in gulf reef fish without a current permit. Ibid.; 8/4/11 Tr. 105-109.

b. At the conclusion of the government's case-in-chief, petitioner moved (as relevant here) for a judgment of acquittal on the count charging him with a violation of 18 U.S.C. 1519. That statute provides in relevant part that it is a criminal offense to "knowingly * * * destroy[], mutilate[], conceal[], [or] cover[] up * * * any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any

matter within the jurisdiction of any department or agency of the United States."

Petitioner argued that his destruction or concealment of fish could not violate Section 1519 because, in his view, the statute is merely a "documents offense," directed solely to the destruction of records and documents. 8/4/11 Tr. 38-40. The district court denied the motion. Id. at 46; see Pet. App. B1-B2. The district court observed that the Eleventh Circuit had held that, although Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or Act), Pub. L. No. 107-204, § 802(a), 116 Stat. 800, which responded to concerns about corporate fraud and executive malfeasance, the statute's broad language was not confined to such offenses and that "Congress is free to pass laws with language covering areas well beyond the particular crisis du jour that initially prompted legislative action." Pet. App. B1-B2 (quoting United States v. Hunt, 526 F.3d 739, 744 (11th Cir. 2008)). The district court concluded that a reasonable jury could find that a person who throws a fish overboard in the circumstances of this case violates Section 1519. Id. at B2.

3. The court of appeals affirmed. Pet. App. A1-A12. As relevant here, the court rejected petitioner's argument that the term "tangible object," as used in Section 1519, embraces only tangible objects that relate to recordkeeping and does not

include fish. Id. at A9-A10. The court explained that undefined words (such as "tangible object" in Section 1519) are given their natural meaning and that "the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." Id. at A10 (quoting United States v. Carrell, 252 F.3d 1193, 1198 (11th Cir. 2001)). Applying those principles, the court concluded that a fish is a "tangible object." Ibid.

The court of appeals also rejected petitioner's argument that the trial judge abused his discretion by refusing to permit Dr. Cody to testify as a defense expert because petitioner failed to provide proper notice of his intent to present such testimony, as Federal Rule of Criminal Procedure 16(b)(1)(C) requires. The court found that sanctions for violations of discovery rules lie within the discretion of the trial court and that, to warrant reversal of the exercise of such discretion, the defendant must show prejudice to his substantial rights. The court of appeals held that it was unnecessary to decide whether the district court properly exercised its discretion in precluding Dr. Cody from testifying as a defense expert. Instead, the court of appeals found that Ward presented the same testimony that petitioner hoped to elicit from Dr. Cody and that petitioner's claimed inability to rehabilitate Ward's

credibility did not prejudice petitioner's substantial rights. Pet. App. A10-A12.

ARGUMENT

Petitioner primarily contends (Pet. 8-28) that the fish he ordered dumped at sea to thwart a government investigation are not "tangible object[s]" within the meaning of 18 U.S.C. 1519, which criminalizes intentional obstructive conduct involving "any record, document, or tangible object." The court of appeals correctly concluded that fish are "tangible object[s]," and petitioner does not contend that its decision conflicts with the decision of any other court of appeals. Petitioner also seeks this Court's review (Pet. 28-33) of the district court's exclusion of Dr. Cody's testimony -- a sanction that the district court imposed for petitioner's failure to comply with the Federal Rules of Criminal Procedure, and which the court of appeals concluded did not affect petitioner's substantial rights. That doubly factbound contention lacks merit and does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner primarily contends that the fish he ordered dumped at sea are not "tangible object[s]" as that term is used in Section 1519. That is incorrect.

a. Petitioner was convicted under a provision that makes it a criminal offense to

> knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States * * * .

18 U.S.C. 1519. Petitioner does not dispute in this Court that he directed the destruction or concealment of the fish in question, that he did so in connection with a federal agency investigation, and that he acted with obstructive intent. He argues only that a fish is not a "tangible object." Petitioner is incorrect because a fish is indeed a "tangible object" within that term's ordinary and natural meaning. And to the extent the term's association with "record" and "document" informs the meaning of "tangible object," the established usage of those (or similar) terms together reveals that "tangible object" is given a broad construction that includes the fish at issue here.

i. As the court of appeals explained, where the meaning of a term is not further defined by the statute, the term should be given its "ordinary or natural meaning." Pet. App. A10 (citing Smith v. United States, 508 U.S. 223, 228 (1993) (relying on a dictionary definition to determine the ordinary meaning of the term "use")). Indeed, this Court recently applied that precept to interpret a neighboring provision of the very law that added Section 1519. See Lawson v. FMR LLC, No. 12-3 (Mar. 4, 2014) slip op. 9 (interpreting 18 U.S.C. 1514A(a)) ("In determining the meaning of a statutory provision, 'we look

first to its language, giving the words used their ordinary meaning.'") (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)); see also Sandifer v. United States Steel Corp., 134 S. Ct. 870, 876 (2014) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'") (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)); Burrage v. United States, 134 S. Ct. 881, 887 (2014) ("The Controlled Substances Act does not define the phrase 'results from,' so we give it its ordinary meaning.").

Here, the ordinary meaning of the adjective "tangible" is "[h]aving or possessing physical form." Pet. App. A10 (citing Black's Law Dictionary 1592 (9th ed. 2009)); see Webster's Third New International Dictionary 2337 (1993) (defining "tangible" as "able to be perceived as materially existent esp. by the sense of touch"). An "object" is, in the relevant sense, "a discrete visible or tangible thing." Id. at 1555. Moreover, because the adjective "any" precedes and modifies the series of nouns that includes "tangible object," the phrase "any * * * tangible object," taken as a whole, "suggests a broad meaning." Ali v. Federal Bureau of Prisons, 552 U.S. 214, 218-219 (2008); see United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting

Webster's Third New International Dictionary 97 (1976)). The phrase "any * * * tangible object" thus naturally and unambiguously includes a fish.

ii. The reference to "tangible object" within the statutory context reinforces this conclusion. That term is used in parallel with "record" and "document" in the phrase "any record, document, or tangible object." Because the statute is concerned with acts intended to obstruct the "investigation or proper administration of any matter within [federal] jurisdiction," the broad triad of "any record, document, or tangible object" is naturally understood to refer to the wide variety of evidence generally regarded as germane to such "matter[s]." The triad is thus conceptually related to -- and textually parallels -- other provisions of law addressing the collection and preservation of evidence for official proceedings. For example, the discovery and inspection provisions of the Federal Rules of Criminal Procedure address "books, papers, documents, data, photographs, tangible objects, buildings or places." Fed. R. Crim. P. 16(a)(1)(E) (emphasis added). Likewise, the discovery provisions of the Federal Rules of Civil Procedure address disclosure of "[d]ocuments and [t]angible [t]hings" (Fed. R. Civ. P. 30(f)(2) (emphasis added)) or "documents or electronically stored information * * * or * * * tangible things" (Fed. R. Civ. P. 34(a)(1)(A)-(B)

(emphasis added)). If relevant to a court proceeding, a fish would plainly be discoverable as a "tangible object" or "tangible thing" under those provisions; correspondingly, its destruction or concealment is an offense under Section 1519 when undertaken to obstruct an official governmental matter.

b. Petitioner acknowledges (Pet. 25 & n.17) both that "any * * * tangible object" has been given its broad natural meaning in other cases and that the court of appeals' decision does not conflict with the decision of any other court of appeals. The government has found no decision endorsing petitioner's unnaturally narrow reading of the phrase "any * * * tangible object" as limited to "informational items" or "record-keeping modalities" (Pet. 17-18). There is therefore no division of authority for this Court to resolve.

Indeed, Section 1519 has been consistently applied to a variety of tangible objects (other than records and documents) that defendants destroyed, altered, or concealed with obstructive intent. See United States v. Perez, 603 F.3d 44, 45 (D.C. Cir. 2010) (washing cocaine powder down the sink); United States v. Vosburgh, 602 F.3d 512, 519, 521 (3d Cir. 2010) (destruction of computer hard drive and thumb drives to thwart execution of search warrant for child pornography), cert. denied, 131 S. Ct. 1783 (2011); United States v. Wortman, 488 F.3d 752, 752-753 (7th Cir. 2007) (destruction of compact disc

containing child pornography); United States v. Giuseppe Bottiglieri Shipping Co., No. 12–cr-57, 2012 WL 1899844, at *2 (S.D. Ala., May 24, 2012) (removing a pipe used to bypass vessel's pollution prevention system); United States v. Atlantic States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 540 (D.N.J. 2009) (altering the condition of a cement mixer to conceal from investigators that a safety device had been bypassed); United States v. Russell, 639 F. Supp. 2d 226, 230 (D. Conn. 2007) (destroying laptop computer containing child pornography).

c. Petitioner nonetheless contends that the decision below is incorrect, arguing that other canons of statutory construction suggest that a fish is not a "tangible object" for purposes of Section 1519.

i. Petitioner contends that the canon of noscitur a sociis requires that "tangible object" be given a common meaning with the immediately preceding words, "record" and "document," thus limiting it to tangible objects that are "somehow similar or related to documents and record-keeping modalities." Pet. 14. That is incorrect. As an initial matter, that canon of construction operates only to resolve ambiguity, see United States v. Stevens, 559 U.S. 460, 474-475 (2010), but "the phrase * * * at issue here contains little ambiguity * * * [given] the ordinary meaning of the[] words," ibid. See Schindler Elevator Corp. v. United States, 131 S. Ct. 1885, 1893

(2011) ("In interpreting a statute, [o]ur inquiry must cease if the statutory language is unambiguous.") (internal quotation marks and citation omitted); Ali, 552 U.S. at 227 ("[W]e are unpersuaded by petitioner's attempt to create ambiguity where the statute's text and structure suggest none.").

Moreover, petitioner's application of noscitur a sociis begs the question whether Congress intended "record" and "document" to limit the reach of "tangible object." As explained above, the customary legal usage of those (or similar) words in tandem suggests an intent to cover a broad category of relevant evidence, not a limited subset of documentary materials. Relatedly, petitioner's argument relies too heavily on "the immediately surrounding words, to the exclusion of the rest of the statute." Schindler, 131 S. Ct. at 1892. Section 1519 is concerned with acts undertaken "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519 (emphases added). Such language reveals a breadth of purpose that goes beyond a simple prohibition on document destruction. Cf. Ali, 552 U.S. at 226 (noting that, although customs and excise are mentioned twice in the statute at issue, "nothing in the overall statutory context suggests that customs and excise officers were the exclusive focus of the provision"). And,

contrary to petitioner's suggestion (Pet. 15-16), most of the unlawful acts in Section 1519 -- "alter[ing], destroy[ing], * * * conceal[ing], cover[ing] up" -- are as applicable to the full range of tangible objects as they are to records and documents.

ii. Petitioner's reliance (Pet. 14) on the caption of Section 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy") is also misplaced. "[T]he title of a statute and the heading of a section cannot limit the plain meaning of the text." Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-529 (1947). As this Court recently observed, headings are often "short-hand reference[s]" that do not substitute for or limit the text's detailed provisions. Lawson, slip op. 16 (citation omitted). Here, although the heading of Section 1519 refers only to "records," the statute's text makes clear that it reaches "any * * * document, or tangible object" as well.

iii. Petitioner also invokes (Pet. 16-17) the ejusdem generis canon of construction. That principle counsels that, where general words follow an enumeration of specific terms, the general words are read to embrace only other items similar to those expressly enumerated. See Garcia v. United States, 469 U.S. 70, 74 (1984). Petitioner would apply that canon by treating the term "tangible object" as a "catchall-like term"

that must be informed by the narrower terms "record" and "document." Pet. 16-17. That reasoning is unsound. Like the noscitur a sociis canon, "[t]he rule of ejusdem generis is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." United States v. Turkette, 452 U.S. 576, 581 (1981) (citing Harrison v. PPG Indus., Inc., 446 U.S. 578, 588 (1980)); see Garcia, 469 U.S. at 74-75. Because there is no ambiguity in the meaning of "any * * * tangible object," resort to the ejusdem generis canon is inappropriate.

Moreover, the ejusdem generis canon is useful only to limit the meaning of a general term in light of distinctively specific terms that precede it. But here, no one of the operative terms -- "record, document, or tangible object" -- is any more or less specific than the others. All embrace a wide and somewhat overlapping variety of items. Accordingly, the term "tangible object" is not the "catchall-like term" petitioner claims it to be. Under the circumstances here, the more relevant rule of construction is "[t]he rule against superfluities" -- that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 46.06, at 181-186 (rev. 6th ed. 2000)); see

Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."). As one court construing Section 1519 has observed, if the term "tangible object" were limited to things akin to records and documents, it would "effectively render[] the term 'tangible object' superfluous and meaningless," Russell, 639 F. Supp. 2d at 238, a result that Congress would not have intended.

iv. Petitioner also invokes in passing (Pet. 17) the canon of expressio unius est exclusio alterius. That canon counsels that the enumeration of specific items in a statute implicitly excludes items not falling within the enumerated class. See, e.g., Marx v. General Revenue Corp., 133 S. Ct. 1166, 1181 (2013). Petitioner suggests that the fact that Section 1519 does not mention "evidence, property, [or] contraband" (Pet. 17 (emphasis omitted)) signals that it is not intended to reach the fish he that ordered dumped. Petitioner's argument lacks force because the term "any * * * tangible object" naturally includes fish; Congress had no need to specifically enumerate subcategories of tangible objects to make clear the breadth of its enactment.

v. Petitioner invokes various decisions of this Court construing unrelated statutory language (Pet. 12-13), but none justifies a departure from the plain meaning of Section 1519.

In Dolan v. United States Postal Service, 546 U.S. 481 (2006), this Court considered whether 28 U.S.C. 2680(b) -- which bars tort claims against the government "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" -- prohibited recovery of damages for injuries suffered by a homeowner who fell on mail left on her porch. The Court held that, as employed in the statute, the phrase "negligent transmission of * * * postal matter" did not extend to such injuries. The Court first recognized that the phrase in question was ambiguous, in that it "could embrace" the negligent act at issue. Dolan, 546 U.S. at 486. Resorting to noscitur a sociis, the Court found that the terms "loss" and "miscarriage" immediately preceding the words "negligent transmission" confined "transmission" to a failure to deliver mail in a timely manner and to the correct address (and, therefore, the injury at issue did not result from "transmission"). Id. at 486-487. Even this conclusion, the Court acknowledged, "would be less secure were it not for a precedent [that had] decisive weight" (id. at 487) -- a prior decision construing "negligent transmission" not to cover all negligence in the course of mail delivery.

Here, by contrast, neither "context [nor] precedent require[s] a narrower reading" (Dolan, 546 U.S. at 486) of the term "any * * * tangible object" in Section 1519. A broad

construction of the term both is consistent with its "bare dictionary definition" (as petitioner concedes, Pet. 13) and accords with the broad sweep of the statute considered as a whole. And, further distinguishing Dolan, no prior judicial construction of the statute here counsels a narrower reading of "any * * * tangible object."

For somewhat different reasons, Zuni Public School District No. 89 v. Department of Education, 550 U.S. 81 (2007), does not assist petitioner. See Pet. 13. There, this Court observed that the meaning or ambiguity of certain words or phrases may only become evident when placed in context. Interpreting a provision using the word "percentile" in a highly technical statutory formula applied by an administrative agency, the Court noted that even "[t]he dictionary acknowledges that, when interpreting technical statistical language, the purpose of the exercise matters." 550 U.S. at 99. Consequently, the range of permissible regulatory applications of the provision using the term "percentile" was illuminated by the statutory context in which the term was used. Id. at 98-99.

Here, by contrast, Section 1519 is not technical, nor is it committed to agency interpretation, nor is the term "any * * * tangible object" context-dependent. And to the extent the term "any * * * tangible object" is informed by its usage in Section 1519, that context fully supports the

government's view. Tangible objects (whether "record-keeping modalities" (Pet. 18) or otherwise) are often relevant to "the investigation or proper administration of a[] matter within [federal] jurisdiction." Such objects can readily be "alter[ed], destroy[ed], mutilate[d], conceal[ed], cover[ed] up, [or] falsifie[d]." And those actions can (as here) be undertaken with obstructive intent.

d. Petitioner further contends (Pet. 18-22) that the legislative genesis of Section 1519 demands that its application be confined to the destruction or alteration of documents and similar items relevant to the investigation of white-collar crime. Petitioner's interpretive methods are unsound.

i. Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 800. The announced purpose of that wide-ranging Act is "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." Pmbl., 116 Stat. 745. Title VIII of the Act bears the short title "Corporate and Criminal Fraud Accountability Act of 2002." Sarbanes-Oxley § 801, 116 Stat. 800. Section 802 of the Act (which added 18 U.S.C. 1519, among other criminal provisions) is captioned "Criminal Penalties for Altering Documents." Id. § 802, 116 Stat. 800.

Petitioner argues (Pet. 20, 22) that those descriptions evince a concern about protecting investors from corporate and white-collar crime, and therefore Section 1519 should not apply outside the context of the destruction or alteration of documents and records in furtherance of such activities. "The short answer [to that contention] is that Congress did not write the statute that way." Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Naftalin, 441 U.S. 768, 773 (1979)). As the Court explained in Russello, "legislative purpose is expressed by the ordinary meaning of the words used." Id. at 21 (quoting Richards v. United States, 369 U.S. 1, 9 (1962)). That is because the actual wording of the statute upon which both houses of Congress agreed is "the most reliable evidence" of legislative intent. Turkette, 452 U.S. at 593. Here, the text manifests a broad intent to prohibit the intentional and obstructive spoliation of evidence relevant to "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519 (emphases added). "[T]he broad language of [Section] 1519 * * * bears no hint of any limiting principle cabining [the statute] to corporate fraud cases, and Congress is free to pass laws with language covering areas well beyond the particular crisis du jour that initially

prompted legislative action." United States v. Hunt, 526 F.3d 739, 744 (11th Cir. 2008).

ii. Petitioner's reliance (Pet. 20-21) on the legislative history of Title VIII of Sarbanes-Oxley is likewise inappropriate. As this Court has repeatedly explained, "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" Turkette, 452 U.S. at 580 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).; see also Gonzalez, 520 U.S. at 6 ("Given the straightforward statutory command, there is no reason to resort to legislative history.").

In any event, Section 1519's legislative history is consistent with its plain language. Senator Leahy, who authored the obstruction provisions in Title VIII, explained in a "Section-by-Section Analysis" that Section 802 "would create a new 20-year felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, as a factual matter, within the jurisdiction of any federal agency." 148 Cong. Rec. 14,448 (2002) (emphasis added). Although Senator Leahy referred at times to Section 1519 as a "new general anti-

shredding provision," he further explained that "Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States." Id. at 14,448-14,449 (emphasis added). Far from qualifying the broad language of Section 1519, Senator Leahy's explanation reinforces its scope.

Even if petitioner is correct that Section 1519 was conceived principally in response to white-collar crime and document destruction, that would not confine its application to that one form of obstructive conduct to the exclusion of obstructive acts like petitioner's. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998).

e. There is no merit to petitioner's passing claim (Pet. 12, 23-24) that Section 1519 is so vague that it fails to afford defendants fair notice that it embraces the intentional destruction of fish to obstruct a federal agency's investigation. The Due Process Clause requires that a criminal

statute be sufficiently clear to give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Hunt, 526 F.3d at 743 (internal quotation marks and citations omitted); see, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). "The touchstone of the inquiry is the meaning of the statute in light of common understanding and practice" (Hunt, 526 F.3d at 743), a matter rooted in the language of the statute itself. Ibid. As explained, the ordinary and natural meaning of "any * * * tangible object" includes fish; the term may be broad, but it is not vague.

Moreover, as this Court explained in Village of Hoffman Estates, a scienter requirement in a criminal statute "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." 455 U.S. at 499. Here, whatever uncertainty there might be about whether destroying undersized fish is unlawful, there can be no question that petitioner's conduct -- undertaken in defiance of an enforcement official's direction to preserve the fish -- was unlawful because it was undertaken "knowingly" and with the specific "intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United

States." 18 U.S.C. 1519. The statute simply does not embrace innocent or inadvertent conduct.

Petitioner is mistaken to contend (Pet. 23-24 & n.14) that Bouie v. City of Columbia, 378 U.S. 347 (1964), requires a different result. In Bouie, a state criminal trespass law made punishable the entry on the premises of another after receiving fair notice to leave. This Court held that a judicial construction of the statute that expanded its scope to include the entirely different offense of remaining on the premises of another after receiving notice to leave violated due process because "[t]here was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises." 378 U.S. at 355. Here, by contrast, petitioner was convicted of conduct -- destruction of a tangible object with obstructive intent -- that falls squarely within Section 1519. His conviction does not rest on an unforeseeable expansion of the statute's plain language like the one in Bouie.

f. Petitioner's amici contend that petitioner's conviction reflects "quintessential overcriminalization" (Cause of Action Amicus Br. 2) and "the overfederalization of traditionally state offenses" (NACDL Amicus Br. 2). Those objections are both irrelevant and unfounded. Apart from ensuring that Congress "act[s] within any applicable constitutional constraints in defining criminal offenses," this

Court does not pass judgment on the wisdom of the scope of criminal law. Liparota v. United States, 471 U.S. 419, 424 n.6 (1985). Rather, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Id. at 424 (citing United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812)). In any event, petitioner's conduct was an entirely appropriate subject of federal criminal prosecution. He intentionally ordered the destruction of evidence relevant to a federal agency's investigation of a violation of federal law committed in federal waters, intending to thwart that federal investigation. Indeed, it would be surprising to discover that Congress did not intend to penalize such conduct under a statute making it a crime to "knowingly * * * destroy[] * * * any * * * tangible object with [obstructive] intent." 18 U.S.C. 1519.

Amici express a related concern (e.g., Cause of Action Amicus Br. 6-10) that Section 1519 prescribes potentially harsh penalties for obstructive conduct related to relatively minor matters. That concern is unfounded because Section 1519 establishes no minimum punishment. Although it has a relatively substantial statutory maximum punishment (20 years of imprisonment), that wide range within which a sentencing court may exercise its discretion accommodates the wide variation in

the gravity of the matters whose investigation a defendant's conduct might obstruct. Cf. Sentencing Guidelines §§ 2J1.2(c), 2X3.1(a) (linking the advisory Sentencing Guidelines range for certain obstructive conduct to the offense level that would apply to the matter whose investigation was obstructed). Petitioner's modest 30-day sentence aptly illustrates that district courts are sensitive to the context in which a Section 1519 defendant's obstruction occurs. There is no reason to treat petitioner's intentionally obstructive conduct as lawful.

g. Finally, petitioner's reliance (Pet. 22 n.12) on the rule of lenity is misplaced. As this Court has repeatedly emphasized, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013) (citation omitted). In this case, "there is no work for the rule of lenity to do." Ibid. The text of Section 1519 is unambiguous and leaves no doubt that petitioner's conduct was within its broad reach.

2. Petitioner also contends (Pet. 28-33) that the district court erred, and prejudiced petitioner's case, by not allowing petitioner to present Dr. Cody's expert testimony, notwithstanding petitioner's failure to provide timely notice of

his intent to do so as required by Federal Rule of Criminal Procedure 16(b)(1)(C). That factbound argument lacks merit.

The Rule provides in relevant part:

> The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if * * * the defendant requests disclosure under subdivision (a)(1)(G) and the government complies. * * * This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Fed. R. Crim. P. 16(b)(1)(C). Petitioner does not dispute that he failed to comply with that obligation with respect to Dr. Cody.

As this Court has explained, "[t]he principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right," Taylor v. Illinois, 484 U.S. 400, 410 (1988), and therefore it "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). Thus, a defendant's failure to follow "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence," Chambers, 410 U.S. at 302, may prompt the court to correspondingly curtail the defendant's right to present evidence. See Taylor, 484 U.S. at 412 ("The court's preclusion

sanction was an entirely proper method of assuring compliance with its order.") (citation omitted).

Here, petitioner challenges the district court's exclusion of Dr. Cody. But the court of appeals did not address that issue because it found no prejudice from the exclusion. There is no reason for this Court to address that issue in the first instance. "This Court . . . is one of final review, 'not of first view.'" FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009) (quoting Cutter v. Wilkinson, 544 U.S. 709, 719, n. 7 (2005)).

In any event, it was within the district court's discretion to exclude expert testimony as a sanction for petitioner's failure to provide the notice required by Rule 16(b)(1)(C). See United States v. Lundy, 676 F.3d 444, 451 (5th Cir. 2012); United States v. Hoffecker, 530 F.3d 137, 185-188 (3d Cir.), cert. denied, 555 U.S. 1049 (2008); United States v. Petrie, 302 F.3d 1280, 1288-1289 (11th Cir. 2002), cert. denied, 538 U.S. 971 (2003). First, although petitioner had subpoenaed Dr. Cody as a defense witness (8/4/11 Tr. 53-54), he neglected to proffer Dr. Cody as an expert witness until his case-in-chief, and petitioner never furnished the government with a written summary of Dr. Cody's anticipated testimony as required by Rule 16(b)(1)(C). See id. at 51. Moreover, at the stage of proceedings when the district court excluded Dr. Cody, the court

had not decided whether to allow Dr. Cody's fish-measuring testimony, but it had qualified petitioner's expert (Ward) to offer that testimony, see id. at 50-51. It was eminently sensible for the district court to allow petitioner to put on the testimony of his own expert, who had been properly disclosed and qualified as an expert on the relevant subject, rather than the (cumulative) testimony of Dr. Cody, who had been neither disclosed nor found qualified.

Finally, for the reasons given by the court of appeals (Pet. App. A12), there is no merit to petitioner's argument (Pet. 32-33) that he was prejudiced by the district court's refusal to permit him to offer Dr. Cody as an expert in addition to, and on the same subject as, Ward. Such a case-specific question of harmless error would not, in any event, warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MYTHILI RAMAN
Acting Assistant Attorney General

JOHN F. DE PUE
Attorney

MARCH 2014