No. 13-7451

IN THE
Supreme Court of the United States

JOHN L. YATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR CAUSE OF ACTION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Misapplication of Sarbanes-Oxley's "Anti-Shredding Provision," 18 U.S.C. § 1519, Presents Significant Risk Of Executive Branch Overreach 2

II. This Case Is An Ideal Vehicle For This Court To Address This Critical Issue Without Further Delay 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES: **Page**

Abuelhawa v. United States,
556 U.S. 816 (2009) 9, 10

Dowling v. United States,
473 U.S. 207 (1985) 9, 10

Simpson v. United States,
435 U.S. 6 (1978) 9

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013) 8

United States v. United Continental Tuna Corp.,
425 U.S. 164 (1976) 8

Williams v. United States,
458 U.S. 279 (1982) 2

STATUTES:

Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 2

§ 802 2

15 U.S.C. § 78ff(a) 3

16 U.S.C. § 374 5

16 U.S.C. § 1857(1)(A) 7

16 U.S.C. § 1857(1)(E) 7

16 U.S.C. § 1857(1)(G) 7

16 U.S.C. § 1858 7

16 U.S.C. § 1859(a) 7

16 U.S.C. § 1859(b) 7

18 U.S.C. § 711 5

18 U.S.C. § 1519 ..... *passim*

18 U.S.C. § 2232(a) 4, 8, 9

REGULATION:

50 C.F.R. 622.7(d)(2)(ii) 7

LEGISLATIVE HISTORY:

S. Rep. No. 107-146 (2002) 3, 4, 6, 10

S. Rep. No. 107-205 (2002) 2

OTHER AUTHORITIES:

John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes,* The Heritage Foundation, Legal Memorandum No. 26 (2008), *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes 5

Barnini Chakraborty, 'Excessive': Marine biologist ends 7-year legal battle with feds over feeding whales, FOXNEWS.COM (Jan. 17, 2014), http://www.foxnews.com/politics/2014/01/17/over-criminalized-scientist-settles-7-year-legal-nightmare-with-feds-over/ (accessed Feb. 4, 2014).....4

Gary Fields & John Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared,* WALL ST. J., July 23, 2011, *available at* http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654.....5

Southeast Region Magnuson–Stevens Act Penalty Schedule, available at http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf.....1, 7

Steven K. Smith & Mark Motivans, Bureau of Justice Statistics, *Compendium of Criminal Justice Statistics, 2004*, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf 6

INTEREST OF THE *AMICUS CURIAE*[1]

The *amicus curiae*, Cause of Action, is a nonprofit, nonpartisan organization that uses investigative, legal, and communications tools to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity. As part of this mission, Cause of Action works to expose and prevent the Executive Branch's misuse of discretionary power.

As part of its mission, Cause of Action devotes significant attention to highlighting the problems of overcriminalization and government overreach. The decision below, if allowed to stand, implicates both of those concerns, and accordingly this case is of great interest to *amicus*.

SUMMARY OF ARGUMENT

Petitioner John L. Yates allegedly threw overboard approximately six dozen red grouper that were too short by an inch or less, thereby making them unavailable for inspection by the National Marine Fisheries Service ("Fisheries Service"). Normally, this conduct would result in a civil fine or permit sanctions.[2] The United States Court of Appeals for the Eleventh Circuit, however, held that

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties nor their counsel, nor anyone except *amicus* and its counsel, financially contributed to preparing this brief.

[2] Southeast Region Magnuson–Stevens Act Penalty Schedule, *available at* http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf (noting that "Violations Regarding Failing to Make Fish or Documents Available for Inspection" warrants a fine beginning at $500 or permit sanctions).

this conduct violates Sarbanes-Oxley's "anti-shredding" provision, 18 U.S.C. § 1519, which carries a sentence of up to 20 years in prison.

This is quintessential overcriminalization. The reasoning underlying the Eleventh Circuit's opinion will continue to "make a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams v. United States*, 458 U.S. 279, 286 (1982). This Court should grant certiorari and properly limit the scope of Section 1519 to halt the government's unlawful overreach.

ARGUMENT

I. Misapplication of Sarbanes-Oxley's "Anti-Shredding Provision," 18 U.S.C. § 1519, Presents Significant Risk Of Executive Branch Overreach

In the wake of several major corporate and accounting scandals, Congress passed the Sarbanes-Oxley Act of 2002 "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. No. 107–204, 116 Stat. 745, 745.[3] As part of Sarbanes-Oxley, Congress enacted two new provisions under the heading "Criminal Penalties for *Altering Documents*." *Id.* § 802, 116 Stat. 800 (emphasis added). This case concerns the first of those provisions, 18 U.S.C. § 1519 ("Section 1519"), entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." Described in the Senate Report as an "anti-shredding

[3] Sarbanes-Oxley was also intended to "address the systemic and structural weaknesses affecting our capital markets." S. Rep. No. 107-205 (2002).

provision,"[4] Section 1519 criminalizes knowingly destroying or concealing a "record, document or tangible object" with the intent to "impede, obstruct, or influence" a government investigation.[5] Violators face up to 20 years in prison – the same sentence for knowingly violating serious securities laws. *Compare* 18 U.S.C. § 1519 (providing that a person who violates this provision "shall be . . . imprisoned not more than 20 years"), *with* 15 U.S.C. § 78ff(a) (providing that anyone who knowingly violates the Securities Exchange Act shall be "imprisoned not more than 20 years").

The legislative history of Section 1519 emphasizes that it was intended to cover document-destruction offenses that were *not* adequately prohibited by existing law. The Senate Report explains that Section 1519 was to "close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. No. 107-146 (2002). Those "ambiguities and technical limitations" in pre-Sarbanes-Oxley federal law, the Report concluded, had contributed to the Enron scandal.[6]

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[4] S. Rep. No. 107–146, at 14 (2002).

[5] The full text of Section 1519 is: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes 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 or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

[6] S. Rep. 107–146 at 14 (2002).

However, there was no such gap for property (including fish) that was subject to an authorized search and seizure by the government. "[B]efore, during, or after any search for or seizure of property," federal law already prohibited "tak[ing] any action," or "attempt[ing] to . . . take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control." 18 U.S.C. § 2232(a). Violating that provision carries a 5-year prison sentence. *Id.*

Nevertheless, the government has come to use Section 1519 as far more than a gap-filler to cover the destruction of corporate documents. Rather than employing Section 1519 as a shield to protect the citizenry from true acts of corporate and financial criminality, the government uses it as a sword ruthlessly to attack people for petty offenses.[7]

The government has relied on the notion that virtually anything can lead to the "investigation" of a "matter within the jurisdiction of [a] department or agency of the United States," within the meaning of

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[7] For example, Nancy Black, a marine biologist, was indicted under Section 1519. *See* Indictment at 4, United States v. Nancy Black, No. 5:12-cr-00002-EJD (N.D. Cal. 2012). The government's original charges could have resulted in up to 27 years in prison, a $700,000 fine and forfeiture of her research vessel. Eventually, Ms. Black pleaded guilty to a single misdemeanor charge of violating a Marine Mammal Protection Act regulation prohibiting "feeding" for which she received a $12,500 fine, 3 years of probation, and 300 hours of community service. *See* Barnini Chakraborty, *'Excessive': Marine biologist ends 7-year legal battle with feds over feeding whales*, FOXNEWS.COM (Jan. 17, 2014), http://www.foxnews.com/politics/2014/01/17/over-criminalized-scientist-settles-7-year-legal-nightmare-with-feds-over/ (accessed Feb. 4, 2014).

Section 1519. The expansion of federal administrative law has resulted in a multitude of agencies empowered to investigate alleged violations of countless federal regulations. John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008), *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes; Gary Fields & John Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared,* WALL ST. J., July 23, 2011, http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654. Under the Eleventh Circuit's reasoning, destroying evidence of a misdemeanor regulatory violation subjects a person to prosecution under Section 1519. Accordingly, a person who misappropriates the image of "Smokey Bear" or engages in unauthorized bathing within Hot Springs National Park could face up to 20 years in prison. *See* 18 U.S.C. § 711; 16 U.S.C. § 374.

Further, each year thousands of people are cited for traffic-related offenses on federal property. Steven K. Smith & Mark Motivans, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004*, at 17 tbl.1.1, http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf. As a result, disposing of evidence of countless low-grade regulatory offenses—including traffic offenses on the Woodrow Wilson Bridge or George Washington Parkway—may violate Section 1519. Nothing in the Eleventh Circuit's opinion cabins Section 1519 to prevent the government from prosecuting a person for destroying evidence of a federal *infraction*. Such an interpretation clearly contravenes Congress's intent Section 1519 be used "to ensure that individuals who

destroy evidence with the intent to impede a pending or future *criminal* investigation are punished." S. Rep. No. 107-146, at 27 (2002) (emphasis added).

Therefore, given the increasingly broad reach of the federal government, it is critical for this Court to properly confine the scope of Section 1519 in order to prevent unwarranted expansion.

II. This Case Is An Ideal Vehicle For This Court To Address This Critical Issue Without Further Delay

A jury convicted Mr. Yates, a commercial fisherman, of violating Section 1519 for throwing undersized fish overboard with the intent to hinder a *civil* investigation by the National Marine Fisheries Service into whether he violated federal regulations by catching grouper that were less than 20 inches long. Catching undersized red grouper is not a criminal offense.[8] And under the federal fisheries laws, impeding a search for undersized fish, or for evidence of other regulatory violations—even *forcibly resisting* such a search—is a federal misdemeanor punishable by at most six months' imprisonment, except in the most aggravated cases involving a dangerous weapon or risk of bodily injury. *See* 16

[8] *See* 16 U.S.C. § 1859(a). The restrictions on possessing undersized red grouper appear in 50 C.F.R. 622.7(d)(2)(ii), (n) (2007). Violating those regulations is unlawful, 16 U.S.C. § 1857(1)(A), (G), but not criminally punishable, *see id.* § 1859(a). Violations instead result only in civil penalties and sanctions against the defendant's fishing permit. 16 U.S.C. § 1858. Mr. Yates's alleged first-time violation of the undersized-fish rules would ordinarily warrant a fine of $500-50,000 and permit sanctions of 0-45 days. Southeast Region Magnuson–Stevens Act Penalty Schedule, *available at* http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf.

U.S.C. §§ 1857(1)(E), 1859(a), (b). Yet the government circumvented these limitations on punishment by proceeding under Section 1519, which allowed it to seek up to a 20-year sentence.

In affirming Mr. Yates's conviction, the Eleventh Circuit focused on whether a fish can be regarded as a "tangible object," without considering the various canons of statutory construction that limit Section 1519's reach and rationalize its interpretation. Section 1519 cannot reasonably be read to encompass every imaginable tangible object that could conceivably constitute evidence of a regulatory violation and thus absurdly transform a civil violation into a twenty-year felony. *See Moncrieffe v. Holder,* 133 S. Ct. 1678, 1691 (2013) ("[T]here is a more fundamental flaw in the Government's approach: It would render even an undisputed misdemeanor an aggravated felony. This is 'just what the English language tells us not to expect,' and that leaves us 'very wary of the Government's position.'") (citation omitted).

The Eleventh Circuit first erred by interpreting Section 1519 in a way that results in the implied repeal of other laws that carry lesser penalties. Under 18 U.S.C. § 2232(a), entitled "Destruction or Removal of Property to Prevent Seizure," a person faces up to 5 years in prison for knowingly destroying, damaging, or disposing of property that the government has the authority to search or seize. By concluding that Mr. Yates's disposal of fish with the purpose of preventing the government from conducting an authorized search fell within the ambit of Section 1519, the Eleventh Circuit implicitly held that Section 1519 encompasses *all* conduct

criminalized by § 2232(a). That makes Section 2232(a) either completely superfluous, in violation of the "cardinal principle of statutory construction that repeals by implication are not favored," *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976), or a prohibited double punishment for the same offense, in violation of this Court's "steadfast[] insiste[nce] that 'doubt will be resolved against turning a single transaction into multiple offenses.'" *Simpson v. United States*, 435 U.S. 6, 15 (1978).

Further, permitting the government to prosecute under Section 1519 (as broadly interpreted) rather than the more pertinent statutes with lesser penalties is contrary to this Court's decisions in *Dowling v. United States*, 473 U.S. 207 (1985) and *Abuelhawa v. United States*, 556 U.S. 816 (2009). *Dowling* instructed that when a defendant's misconduct "fits but awkwardly with the language Congress chose [for a statute]," courts should carefully discern the statute's objective intent and purpose. *Dowling*, 473 U.S. at 218. This includes "consider[ing] whether the history and purpose of [of the statute] evince a plain congressional intention to reach" the misconduct, and invoking the rule of lenity. *Id.*

Here, at most, Mr. Yates's conduct "fits awkwardly" with the language Congress used in Section 1519. Throwing undersized fish overboard to hinder an investigation by the Fisheries Service is better described as "failing to make fish . . . available for inspection" under the Magnuson-Stevens Act[9] or

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[9] *See* Southeast Region Magnuson–Stevens Act Penalty Schedule, *available at* http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf (noting penalties for

even "disposing" (word used in § 2232(a)), rather than the verbs "alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up, falsify[ing], or mak[ing] a false entry in" Congress chose for Section 1519.

Further, it is unlikely that Congress intended Section 1519 to cover the disposal of undersized fish, given that it would converts a misdemeanor into a felony. *See Abuelhawa*, 556 U.S. at 822–23 ("Given the [Controlled Substances Act's] distinction between simple possession and distribution, and the background history of these offenses, it is impossible to believe that Congress intended 'facilitating' to cause that twelve-fold quantum leap in punishment for simple drug possessors.").

Section 1519's legislative history also demonstrates that it does not encompass the disposal of fish. The purpose of the statute was to ensure that individuals who hinder criminal investigations into corporate malfeasance by destroying evidence receive a punishment that reflects the severity of the underlying crime. *See* S. Rep. No. 107-146 (2002) (noting that Section 1519 addresses the problem of "certain current provisions mak[ing] it a crime to persuade another person to destroy documents, but not [making it] a crime to actually destroy the same documents yourself").

Finally, applying the rule of lenity leads to the conclusion that Section 1519 does not reach Mr. Yates's conduct. Under this principle, the language in statute must "plainly and unmistakably" cover a defendant's conduct before a court will impose

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"Violations Regarding Failing to Make Fish or Documents Available for Inspection").

criminal sanction. *Dowling*, 473 U.S. at 228. Such is not the case here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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