No. 13-7451

IN THE

Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF CAUSE OF ACTION, SOUTHEASTERN LEGAL FOUNDATION AND TEXAS PUBLIC POLICY FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Cause of Action, Inc. ("Cause of Action") is a nonprofit, nonpartisan organization that uses investigative, legal, and communications tools to educate the public about how government accountability and transparency protect taxpayer interests and economic opportunity. As part of this mission, Cause of Action highlights the linked problems of overcriminalization and government overreach—*i.e.*, the proliferation of statutes and regulations that impose harsh penalties for unremarkable conduct, and the propensity of prosecutors to push (and even exceed) any limits that those laws contain. Cause of Action's interest in this case is longstanding. It filed a brief in support of the petition for writ of certiorari in this Court on February 5, 2014.

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, private property rights, free enterprise, and government accountability in the courts of law and public opinion. SLF drafts legislative models, educates the public on important policy issues, and litigates regularly before this Court. SLF's direct interest in this case stems from its profound commitment to protecting America from

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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 *amici* and their counsel, financially contributed to preparing this brief.

overreach by the Executive Branch. The separation of powers enshrined in the Constitution is a vital component of the Nation's laws and a critical safeguard of political liberty. Most recently, SLF litigated *Southeastern Legal Foundation* v. *EPA,* consolidated with *Utility Air Regulatory Group* v. EPA, No. 12-1146, 2014 WL 2807314 (June 23, 2014), a constitutional separation of powers case, before this Court. Like the EPA consolidated case, this case concerns an aggrandizement of Executive authority contrary to separation of powers and thus implicates one of SLF's core concerns.

The Texas Public Policy Foundation is a non-profit, non-partisan research institute founded in 1989. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise throughout Texas and the U.S. by educating policymakers and the national public policy debate with academically sound research and outreach. The Foundation's Center for Effective Justice and its Right on Crime initiative are leading national efforts to combat overcriminalization, or the effort to regulate non-blameworthy business activity through criminal law. The Foundation is mission-bound to help the Court understand the threat of overcriminalization—and thus the threat to liberty and free enterprise—that is present in this case.

Petitioner's prosecution and conviction represent the very type of unbounded criminal liability and executive overreach that *amici* exist to prevent.

SUMMARY OF ARGUMENT

Petitioner John L. Yates, captain of the commercial fishing boat *Miss Katie*, ordered a crew member to throw overboard six dozen undersized red grouper, after being instructed to take the fish back to port for inspection by the National Marine Fisheries Service ("NMFS"). While this prevented the NMFS from measuring the fish, the fish themselves were evidence of, at most, a civil infraction, not a crime. Such conduct typically results in a civil fine or a temporary fishing license suspension under the Magnuson-Stevens Act.[2] And, in fact, Captain Yates was cited for a civil infraction and penalized accordingly.

The Government, however, did not stop there. Three years after the civil citation, the Government charged and convicted Captain Yates of multiple crimes, including felony violation of the Sarbanes-Oxley Act's "anti-shredding" provision, 18 U.S.C. § 1519 ("Section 1519").[3] Sarbanes-Oxley was passed by Congress "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws" (Pub. L. No.

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[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 (last visited July 3, 2014) (noting that "Violations Regarding Failing to Make Fish or Documents Available for Inspection" warrants a fine beginning at $500 or permit sanctions).

[3] Yates was also charged and convicted under 18 U.S.C. § 2232(a), entitled "Destruction or Removal of Property to Prevent Seizure," and charged with making false statements under 18 U.S.C. § 1001(a)(2), under which he was acquitted.

107–204, 116 Stat. 745, 745) and "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson* v. *FMR LLC*, 134 S.Ct. 1158, 1161 (2014).

The Section 1519 charge carried a prison sentence of up to twenty years. Accordingly, for ordering a crew member to throw red grouper overboard, Captain Yates faced more prison time than if he had violated other federal laws covering violent and cruel criminal conduct, including inciting genocide, harboring terrorists, selling slaves, circumcision of a female child, or even raising an army against the United States. *Compare* 18 U.S.C. § 1519 *with* 18 U.S.C. § 1091(c) (five-year maximum for inciting genocide), § 2339 (ten-year maximum for harboring or concealing terrorists), § 1585 (seven-year maximum for selling slaves), § 116 (five year maximum for mutilating the genitals of a minor female), and § 2389 (five-year maximum for recruiting an army against the United States).

The Government's use of Section 1519 to hammer Captain Yates is quintessential Executive Branch overreach, and the Eleventh Circuit's decision should be reversed for at least the following reasons. First, there is no suggestion that Congress imagined, much less intended, that Section 1519 would apply to fish of any size. Congress expressly enacted Section 1519 to close legal loopholes contributing to corporate financial scandals—not to regulate fishermen. Therefore, the Eleventh Circuit erroneously construed the statutory term "tangible objects" to include red grouper.

Second, while Captain Yates's conduct is covered by many other statutes and regulations, Section 1519 was intended to cover document destruction offenses that were *not* adequately prohibited by existing law. The decision below erroneously rendered 18 U.S.C. § 2232(a), among other laws, superfluous.

Third, the Eleventh Circuit's construction results in a classic example of overcriminalization because it permits prosecutors to use Section 1519 to turn minor civil or criminal infractions into serious felonies, leading to absurd results. For example, individuals who destroy a misappropriated image of "Woodsy Owl," see 18 U.S.C. § 711a, or a videotape of a false weather report, see 18 U.S.C. § 2074, will face up to twenty years in prison if the decision below is affirmed.

Fourth, the notion that Captain Yates had fair notice that throwing red grouper overboard was a felony under Section 1519 is absurd. Due process is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

The Eleventh Circuit's decision, if allowed to stand, 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). We urge this Court to properly limit Section 1519's scope to halt the Government's improper over-reach. Captain Yates's conviction under Section 1519 should be reversed.

ARGUMENT

I. Captain Yates's Fish Are Not "Tangible Objects" Under Section 1519.

Section 1519 criminalizes the knowing destruction or concealment of a "record, document or tangible object" with the intent to "impede, obstruct, or influence" a government investigation.[4]

Congress was not unclear about Section 1519's purpose or ambit. It is entitled "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy."[5] It was placed under the heading "Criminal Penalties for *Altering Documents.*"[6] It was described in the Senate Report as an "anti-shredding provision."[7] It was passed as part of the Sarbanes Oxley Act, a statute designed to ward off the next massive financial scandal by, among other things, levying substantial penalties for destroying evidence of financial fraud.[8]

The Eleventh Circuit ignored this. Instead, based solely on the dictionary, it erroneously (and

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[4] In full, Section 1519 reads: "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."

[5] Pub. L. No. 107–204, § 802, 116 Stat. 800 (emphasis added).

[6] *Id.* (emphasis added).

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

[8] *Id.* at *1.

absurdly) concluded Captain Yates's fish were "tangible objects" under Section 1519. Of course a fish is a "tangible object." But whether a fish is a "tangible object" for purposes of *this particular statute* is a separate issue. See*, e.g., Guiseppi* v. *Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J.) ("literal meaning" construction that contradicts Congress's manifest statutory purpose should be avoided); see also *Griffin* v. *Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982) (interpretations of a statute producing "absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")[9]

II. Captain Yates's Conduct Is Sufficiently Covered By Existing Laws, and the Eleventh Circuit's Decision Renders 18 U.S.C. § 2232(a) Entirely Superfluous

Section 1519 was intended to close gaps "relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. No. 107-146 (2002). The Report concluded that those

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[9] As Judge Hand put it:

> [I]n every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.

Guiseppi, 144 F.2d at 624.

"ambiguities and technical limitations" had contributed to the Enron scandal. S. Rep. 107-146 at 12 (2002). Therefore, Section 1519 was intended to "close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." *Id.* at 14; see also *ibid.* (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").

However, Captain Yates's conduct was already covered by multiple statutes and regulations. The Magnuson-Stevens Act requires fishermen to make fish available for inspection. Failing to do so generally warrants a civil fine beginning at $500 and/or a license suspension.[10] That Act also covers more serious fisheries infractions—such as impeding a search for undersized fish, or even forcibly resisting a search. These are federal misdemeanors punishable by at most six months' imprisonment, except in the most aggravated cases involving a dangerous weapon or risk of bodily injury. See 16 U.S.C. §§ 1857(1)(E), 1859(a), (b).

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[10] The NOAA Office of General Counsel for Enforcement and Litigation publishes each region's Magnuson-Stevens Act Penalty Schedule, which provides the penalty range for each type of prohibited conduct. *See* Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions NOAA Office of the General Counsel – Enforcement and Litigation, available at http://www.gc.noaa.gov/documents/0316611_penalty_policy.pdf (last visited July 2, 2014).

Section 2232(a), entitled "Destruction or Removal of Property to Prevent Seizure," also applies and, in fact, Captain Yates was charged and convicted under this statute as well.[11] Violating Section 2232(a) triggers a potential five-year maximum penalty—far less than Section 1519's twenty-year maximum penalty—for knowingly destroying, damaging, or disposing of property that the government has the authority to search or seize.

The Eleventh Circuit's erroneous construction of Section 1519 means that Section 1519 encompasses *all* conduct criminalized by § 2232(a), rendering it 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). See also *Pa. Dep't. of Public Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance to interpret a statutory provision so as to render superfluous other" statutory provisions) (citation omitted).

III. The Eleventh Circuit's Construction of Section 1519 Criminalizes Ordinary Conduct

Since virtually anything can trigger an "investigation" of a "matter within the jurisdiction of [a] department or agency of the United States,"

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[11] See*, e.g., United States* v. *Dehmer*, No. 2:99-CR-100-FtM-25D (M.D. Fla. 1999). In fact, during Captain Yates's sentencing hearing, the government relied on *Dehmer*, a pre-Sarbanes-Oxley case involving a commercial fisherman who was convicted under Section 2232(a) for willfully throwing undersized fish overboard to prevent seizure by the U.S. Coast Guard. Sentencing Hr'g Tr. 60:4-12, May 12, 2012.

disposal of most anything can fall within the scope of Section 1519. It does not have to be evidence of an alleged crime. For instance, destroying evidence of a minor regulatory violation or a civil infraction could, under the Eleventh Circuit's reasoning, violate Section 1519.

This would include a person who destroys a misappropriated image of "Smokey Bear,"[12] conceals evidence of a surfboard being used on a beach designated for swimming,[13] throws away a bag of chips from a workplace restroom prior to an OSHA inspection,[14] fails to declare an item on a customs form at the airport,[15] gets rid of a bat used in a teenager's game of "mailbox baseball,"[16] or discards an empty container of medicine purchased from a foreign pharmacy.[17]

Section 1519 cannot reasonably be read to cover the destruction of these tangible objects, given that doing so would convert relatively minor civil or

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[12] Misappropriating an image of Smokey Bear is prohibited under 18 U.S.C. § 711.

[13] 16 U.S.C. §§ 1, 1a–2(h), 1a–6 & 9a (2006); 36 C.F.R. § 3.17(b) (prohibiting the use of surfboards within a designated swimming area).

[14] Under 29 C.F.R. § 1910.141(g)(2), administered by the Occupational Safety and Health Administration, an employer faces civil penalties for allowing his employees to consume food in a restroom.

[15] 19 U.S.C. § 1497(a) (noting penalties for having articles neither "included in the declaration" nor "mentioned before the examination of baggage").

[16] 18 U.S.C. § 1705 (criminalizing the destruction of mail boxes).

[17] 21 U.S.C. § 331(t) (prohibiting the "purchase . . . of a drug" in a foreign pharmacy).

criminal offenses into twenty-year felonies—and there is absolutely no suggestion that Congress ever intended to transfer that power to agencies of the Executive Branch. *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); *Abuelhawa* v. *United States*, 556 U.S. 816, 822–23 (2009) ("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."). Such an interpretation also clearly contravenes Congress's intent that 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); *cf. United States* v. *Am. Trucking Ass'n*, 310 U.S. 534, 543 (1940) (explaining that when the "plain meaning" of words "has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act."); see also *Lionberger* v. *Rouse*, 76 U.S. 468, 475 (1869) ("It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice."). In sum, there are

"deeply serious consequences of adopting such a boundless reading" of Section 1519. See *Bond* v. *United States*, 134 S. Ct. 2077, 2090 (2014).

The Eleventh Circuit's construction of Section 1519 is so removed from common sense that it also leads to absurd results. For example, consider the government's position that commercial fishing boat operators are liable under the Magnuson-Stevens Act for possessing fish that were caught at a legal size but subsequently shrunk due to being kept on ice. Sentencing Hr'g Tr. 28:2-4 (noting that the vessel's operator is "held accountable" for any shrinkage that occurs after fish are placed on ice and must "make sure that his fish on board are always going to be above the size limit"). If operators are responsible for measuring fish after they were caught and iced,[18] then throwing overboard dead fish that had been *legally* caught but shrank during transport can violate Section 1519. Properly cabining Section 1519's scope to conduct pertaining to the destruction of corporate records and documents that was inadequately criminalized prior to Sarbanes-Oxley avoids such absurdity. Accord *Griffin,* 458 U.S. at 575.

The "context, structure, history, and purpose" of Section 1519 all support an interpretation limited to document destruction offenses that were not adequately prohibited by existing law, which resolves

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[18] *Id.* at 27:7-10 (Government: "So if that means the [operator] needs to measure the fish four days later, because he caught them at 1/16th of an inch over 20 inches and they've shrunk, then he needs to do that.").

the ambiguity created by the statute's broad text. See *Abramski* v. *United States*, 134 S. Ct. 2259, 2272 n.10 (2014) ("Although the text creates some ambiguity, the context, structure, history, and purpose [of the statute] resolve it."). Additionally, the rule of lenity applies. *Ibid.* (noting that lenity 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") (internal quotation marks omitted); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (instructing that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States* v. *Santos*, 553 U.S. 507, 514 (2008). This Court should hold that throwing undersized fish overboard does not fall within the ambit of Section 1519 because Congress failed to clearly indicate "the harsher alternative." *Cleveland* v. *United States*, 531 U.S. 12, 24-25 (2000) (rejecting the Government's broad interpretation of "property" in a criminal statute and noting that "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite") (internal quotation marks and citation omitted); see also *Begay* v. *United States*, 553 U.S. 137 (2008) (holding that the catch-all language at the end of a criminal statute be limited to crimes similar to those enumerated at the beginning of the provision).

IV. Section 1519 Is Being Used As A Sword Of Executive Overreach, Not As A Shield Against Financial Fraud.

Section 1519 has become a "significant new weapon in the arsenal of a federal prosecutor." Dana E. Hill, *Anticipatory Obstruction of Justice: Preemptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 CORNELL L. REV. 1519, 1529 (2004). Contrary to Congress's intent, the Government is not using Section 1519 to shield Americans from corporate and financial fraud and criminality. Instead, the Executive Branch is using the statute as a sword to attack citizens for minor offenses.

For example, Nancy Black, a marine biologist, was indicted under Section 1519 for providing a video recording of whale watching activity to the National Oceanic and Atmospheric Administration—which was investigating whether her colleagues violated federal law by whistling at whales—that had been edited to highlight the whistling. Indictment at 4, *United States* v. *Nancy Black*, No. 5:12-cr-00002-EJD (N.D. Cal. 2012). While her colleagues' whistling was at most a misdemeanor,[19] Ms. Black faced up to twenty years in prison.[20]

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[19] The Marine Mammal Protection Act ("MMPA") prohibits the unauthorized "take" by any person of any marine mammal in waters under the jurisdiction of the United States. 16 U.S.C. §1372(a)(2)(A). The term "take" includes to "harass" any marine mammal. *Id.* at §1362(13). "Harassment" means any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or to disturb a marine mammal by

The rapid expansion of federal administrative law has resulted in a multitude of Executive 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/SB10004240527487037495045761727141846016 54 (last visited July 3, 2014). In 2009, it was estimated that there were more than 300,000 regulations within the federal code that could possibly trigger criminal sanctions. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the*

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causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. *Id.* at §1362(18). A person who knowingly violates this provision of the MMPA faces a fine or imprisonment of not more than a year. *Id.* at 1375(b).

[20] 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/ (last visited July 2, 2014).

Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 7 (2009) (testimony of Richard Thornburgh, former Att'y Gen. of the United States).[21] Despite many of these offenses being vague, *malum prohibitum*, and arbitrarily enforced,[22] the government maintains that concealing evidence of these offenses is a twenty-year felony under Section 1519. Given the increasingly broad reach of the Executive Branch, it is critical for this Court to properly confine the scope of Section 1519 in order to prevent unwarranted expansion.

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[21] See also Brian W. Walsh & Tiffany M. Joslyn, THE HERITAGE FOUNDATION, *Without Intent: How Congress Is Eroding The Criminal Intent Requirement In Federal Law* 6 (2010) (noting that the number of offenses in the U.S. Code was at least 4,450 by 2008); John S. Baker, Jr. & Dale E. Bennett, *Measuring The Explosive Growth Of Federal Crime Legislation,* FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, 5, 7-10 (2004) (noting the difficulties in obtaining an accurate count of federal criminal laws due to dispersion throughout the federal code and multiple crimes embedded in single statutes).

[22] See, *e.g.,* Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 673 (2006) (noting that "the overbreadth, vagueness, and redundancy of the code give prosecutors power that they are not supposed to have in a decently-functioning system of justice"); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 881 (2005) ("[T]he expansion of the criminal code has seemed to be driven by politics rather than by a demonstrated need for expanded coverage."). Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 1, 5–14 ("Congressional activity making essentially local conduct a federal crime has accelerated greatly . . . contribut[ing] to a patchwork of federal crimes often lacking a principled basis.").

It is no comfort that the government rarely prosecutes the destruction of evidence pertaining to civil infractions and misdemeanors under Section 1519. A single misuse of Section 1519—as in Captain Yates's case—is unlawful. And rarely enforcing the alleged outer ambit of Section 1519 could lead to arbitrary and capricious enforcement. See Paul Larkin, *Public Choice Theory & Overcriminalization*, 36 HARV. J. L. & PUB. POLICY 715, 751-51(2013) ("One risk [of rarely enforced crimes] is that prosecutors will make charging decisions based on irrational factors, such as the value that a particular case holds for an ambitious lawyer or the number of points it will add to his batting average."); Alex Kozinski & Misha Tseytlin, You're (Probably) a Federal Criminal, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE AIMS OF CRIMINAL LAW, 44 (Timothy Lynch ed. 2009) ("[A] ubiquitous criminal law becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant.").

For example, during the years that Captain Yates has been subjected to criminal prosecution, there have been multiple cases of document destruction by federal officials. In 2011, during the course of an Inspector General investigation into NOAA's Office of Enforcement, then director Dale J. Jones, Jr. actually did shred documents, objects clearly within Section 1519's ambit, to conceal evidence.[23] But

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[23] See Richard Gaines, *Documents: NOAA chief was told of shredding*, GLOUCESTER TIMES, Feb. 18, 2011, http://www.gloucestertimes.com/local/x740790797/Documents-NOAA-chief-was-told-of-shredding (last visited July 3, 2014).

Jones was not prosecuted—instead, he was given a different job. Similarly, Charles Edwards, former Department of Homeland Security Inspector General, allegedly destroyed documents to impede a federal investigation into his office.[24] Edwards, too, was reassigned to another federal job. There have been many other cases of document destruction by federal employees, but to date there has not been a single Section 1519 prosecution against any of them.[25] This is an obvious double standard: a federal employee who destroys *documents* to obstruct an

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[24] See STAFF OF S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS, SUBCOMM. ON FIN. AND CONTRACTING OVERSIGHT, 113th CONG., INVESTIGATION INTO ALLEGATIONS OF MISCONDUCT BY THE FORMER ACTING AND DEPUTY INSPECTOR GENERAL OF THE DEPARTMENT OF HOMELAND SECURITY (2014), available at http://www.ronjohnson.senate.gov/public/_cache/files/4f916bda-8373-4ac8-b2cd-4d0ba115e279/fco-report-investigation-into-allegations-of-misconduct-by-the-former-acting-and-deputy-inspector-general-of-the-department-of-homeland.pdf (last visited July 3, 2014); Zach Rausnitz, *Edwards resigns from DHS OIG amid allegations*, FIERCEHOMELANDSECURITY.COM, Dec. 17, 2013, http://www.fiercehomelandsecurity.com/story/edwards-resigns-dhs-oig-amid-allegations/2013-12-17 (last visited July 3, 2014).

[25] Recently, there have been multiple revelations of document destruction by Executive Branch agencies under congressional scrutiny. See Erica Martinson, *EPA joins IRS lost emails club*, POLITICO (Jun. 26, 2014, 4:39 PM), http://www.politico.com/story/2014/06/missing-government-emails-epa-108306.html; Rachael Blade, *Archivist: IRS did not follow law on lost emails*, POLITICO (Jun. 24, 2014, 4:31 PM), http://www.politico.com/story/2014/06/irs-lost-emails-archivist-108242.html And there have been no Section 1519 charges or prosecutions for any of these things.

investigation (conduct clearly covered by the statute) is reassigned, while a taxpayer who orders red grouper thrown overboard is imprisoned. This suggests that the statute is susceptible not only to misapplication, but selective enforcement. No system that treats government employees differently than average citizens engenders respect for the law. Moreover, differential treatment of taxpayers and government officials suggests that Section 1519 is so vague that prosecutors cannot apply it consistently.

Accordingly, this Court should reject any assurances from the government that it will use its discretion to carefully limit Section 1519's application to serious underlying crimes. Besides the fact that it is virtually impossible to closely monitor every federal prosecutor, this Court has repeatedly rejected similar promises. See*, e.g., United States* v. *Alvarez*, 132 S. Ct. 2357 (2012) (rejecting, without comment, the government's argument assuring that the Stolen Valor Act would only be used in "carefully chosen prosecutions." Brief for the United States at 55, Alvarez, 132 S. Ct. 2357 (No. 11-210)); *cf. United States* v. *Stevens*, 559 U.S. 460, 480 (2010) (refusing to "uphold an unconstitutional statute merely because the Government promised to use it responsibly").

The Government further contends that concerns regarding Section 1519 prescribing harsh penalties for obstructive conduct related to relatively minor matters are overblown because courts have discretion to consider the gravity of underlying offense during sentencing. See Br. in Opp. of Cert. at 27-28. If the Government continues to press Section

1519's congressionally-defined limits as it did with Captain Yates, whether or not courts use discretion in sentencing is of little importance, because a potential felony conviction has serious consequences beyond length of sentence. First, being able to seek up to a 20-year prison sentence for a minor violation unjustly favors the prosecution. Defendants accused of relatively minor civil or criminal infractions risk extremely harsh prison terms and have a high incentive to accept a less-than-favorable plea deal—or even to plead guilty when innocent. See Larkin, *supra*, at 754 (noting that overcriminalization can lead "an innocent person to plead guilty to avoid long-term imprisonment); Brian Walsh & Benjamin Keane, *Overcriminalization and the Constitution*, THE HERITAGE FOUNDATION, Legal Memo. No. 64, Apr. 11, 2011, at 5 ("In the federal system, where over 95 percent of defendants already plead guilty, overcriminalization thus gives prosecutors vast latitude to secure guilty verdicts.").

Even when a person receives a relatively light prison sentence under Section 1519 for destroying evidence of a non-criminal offense, they still must deal with the harsh implications of being a convicted felon. Examples include ineligibility for public and private employment,[26] loss of the right to possess a

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[26] See*, e.g.*, Conn. Gen. Stat. § 21-40 ("No [pawnbroker] license shall be issued under this section by the licensing authority to any person who has been convicted of a felony."); *Id.* at § 29-145 ("No person who has been convicted of a felony shall be licensed to do business as a professional bondsman in this state."); NY CLS Bank § 599-e(b) ("[T]he superintendent shall not issue a mortgage loan origination license unless he or she makes, at a

firearm,[27] and voting restrictions.[28] These consequences further emphasize how the Government's construction is untenable and why this Court must properly confine the scope of Section 1519.

V. The Eleventh Circuit's Decision Ignores Captain Yates's Due Process Rights

The Eleventh Circuit's interpretation of Section 1519 converts otherwise clear statutory language into unconstitutionally vague language within the meaning of the Due Process Clause of the Fourteenth Amendment because the court applied Section 1519 in a way no person of ordinary intelligence could have foreseen. Criminal statutes must be

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minimum, the following findings: No felony conviction."); Deborah Simmons, *Former Felons Feel Boxed In By Crime Question*, The Washington Times, Aug. 15, 2010, http://www.washingtontimes.com/news/2010/aug/15/former-felons-feel-boxed-in-by-crime-question/?page=all (last visited July 3, 2014).

[27] 18 U.S.C. § 922(g)(1) (stating that it is unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess "any firearm or ammunition").

[28] *See, e.g.,* La. R.S. 18:102 ("No person shall be permitted to register or vote who is: Under an order of imprisonment, as defined in R.S. 18:2(8), for conviction of a felony."); Fla. Stat. § 97.041(b) ("The following persons, who might be otherwise qualified, are not entitled to register or vote: A person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law."); Jotaka L. Eaddy, *Our Nation has a Secret: Felony Disenfranchisement in America*, THE HUFFINGTON POST (Dec 10, 2013, 9:54 AM), http://www.huffingtonpost.com/jotaka-l-eaddy/america-has-a-secret_b_4415993.html.

sufficiently clear so individuals are put on notice of what conduct is prohibited. "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). "[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Statutes lacking sufficient notice violate "the first essential of due process of law." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "We have often emphasized the need for clarity in the definition of criminal statutes, to provide 'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Hubbard* v. *United States*, 514 U.S. 695, 701 n.4 (1995) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)).

A statute that is otherwise clear and definite on its face runs afoul of due process requirements if it is applied in an unexpected manner. As this Court held in *Bouie* v. *City of Columbia*, "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. 347, 352 (1964); see also *Rabe* v. *Washington*, 405 U.S. 313 (1972) (reversing a conviction under a state obscenity law because it

rested on an unforeseeable judicial construction of the statute).

The inquiry here, therefore, is whether a person of ordinary intelligence is put on notice that throwing undersized fish overboard is a criminal violation under Section 1519. No person of ordinary intelligence could read Section 1519 and be put on notice that he or she could face up to twenty years in prison for throwing undersized fish overboard.

Because the entirety of Section 1519 concerns records, the only reasonable way to interpret Section 1519's use of the phrase "tangible objects" is that it refers to tangible objects that perform a record-keeping function, such as flash drives, hard-drives, or computers. Any other interpretation turns Section 1519 into nonsense. One can make a "false entry in" a document or a hard drive; one cannot make a "false entry in" a fish.

For all the reasons set forth above, Congress did not intend for Section 1519 to either prohibit or punish throwing fish overboard. But even if it had, the statute as written does not provide sufficient notice to ordinary citizens that such conduct is criminalized by Section 1519. Determining whether the constitutional "fair notice" requirement is met is somewhat different than the process of statutory construction to determine what a statute actually says. Compare *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) (fair notice requires that a statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."), with

United States v. *Missouri Pac. Ry.*, 278 U.S. 269, 278 (1929) (if the plain language of a statute is clear, unambiguous, and does not lead to absurd results, then no further interpretation is required), and *Lancashire Coal Co.* v. *Sec'y of Labor, Mine Safety & Health Admin.,* 968 F.2d 388, 391 (3d Cir. 1992) ("[W]hen the statutory language is clear a court need ordinarily look no further.").

The "fair notice" inquiry looks to what an ordinary person would understand the statute to mean. Here, the language of the statute does not clearly prohibit the conduct in question. Further, the discussion in Congress and in the media at the time Sarbanes-Oxley was passed concerned accounting fraud, Enron, and document shredding. Section 1519 was described in the Senate Report as an "anti-shredding provision,"[29] and Sarbanes-Oxley as aiming "to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions."[30]

In discussing Section 1519, Senator Patrick Leahy stated "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." Sen. Patrick Leahy, Statement, 148 Cong. Rec. S7418-19 (July 26, 2002).

Media coverage at the time of the passage of Sarbanes-Oxley did nothing to tip off Captain Yates

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[29] S. Rep. No. 107–146, at 14 (2002).
[30] *Id.*, at *1 (2002)

or anyone else that throwing undersized fish overboard could result in prosecution under that law. The *Wall Street Journal* wrote that "[p]remised on the notion that nothing concentrates the mind like the prospect of a hanging, Sarbanes-Oxley added penalties for corporate wrongdoing to a variety of regulatory initiatives already underway," and that the goal of the Act was "restoring investor confidence." Paul Maco, *You Can't Count on Laws To Restore Market Trust*, WALL ST. J., Aug. 6, 2002, http://online.wsj.com/news/articles/SB102857486314 6641600 (last visited July 3, 2014). *The New York Times* called Sarbanes-Oxley a "major *corporate* corruption law." Stephen Labaton, *Business: Will Reforms With Few Teeth Be Able to Bite?*, N.Y. TIMES, Sept. 22, 2002, http://www.nytimes.com/ 2002/09/22/business/business-will-reforms-with-few-teeth-be-able-to-bite.html (last visited July 3, 2014) (emphasis added). The *Chicago Tribune* wrote "[i]n July, after WorldCom's implosion in a massive accounting fraud and a parade of other business scandals, Congress enacted legislation to combat corporate corruption." Michael Orey, *WorldCom-Inspired Law Has Some Flaws*, CHI. TRIB., Oct. 9, 2002, http://articles.chicagotribune.com/2002-10-09/business/0210090046_1_sarbanes-oxley-act-retaliation-claim-new-law (last visited July 3, 2014). In this atmosphere, no citizen could be expected to read the statute and believe that Section 1519 applies to the conduct at issue here.

This Court's decision in *McBoyle*, 283 U.S. at 27, is instructive. In that case, the defendant appealed his conviction under the National Motor Vehicle Theft Act for interstate transport of a stolen

airplane. The Act covered only "motor vehicles," defined as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." The Court ruled for the defendant. As Justice Holmes wrote:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable 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. To make the warning fair, so far as possible, the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.

McBoyle, 283 U.S. at 26-27. Here, the rule of conduct laid down evokes in the common mind (and, as the statutory history makes clear, in the congressional "mind" as well) "only the picture" of document shredding and financial fraud and not throwing red grouper overboard. The statute should not be extended.

Statutory context, plain language, legislative history and contemporaneous statements make it clear that Congress did not conceive Section 1519

would implicate, prohibit or punish a commercial fisherman throwing undersized fish overboard, much less that Congress intend it to do so. Congress did not put individuals in Yates's position on fair notice that such conduct was, in the wake of Enron's financial fraud, a violation of Section 1519. Accordingly, Section 1519 is unconstitutionally vague as applied.

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's judgment upholding Petitioner Yates's conviction under Section 1519 should be reversed.

Respectfully submitted.

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