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 FOR EIGHTEEN CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the anti-shredding provision of Sarbanes-Oxley, 18 U.S.C. § 1519, which criminally prohibits the knowing concealment, alteration, or destruction of “any record, document, or tangible object” with the intent to impede a federal investigation, applies to a fisherman who throws undersized grouper into the ocean to avoid sanction under civil fishing regulations.

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Begay v. *United States*,
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Bond v. *United States*,
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Bouie v. *City of Columbia*,
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Boyle v. *United States*,
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Bridge v. *Phoenix Bond & Indem. Co.*,
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Burns v. *United States*,
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Chambers v. *United States*,
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Circuit City Stores, Inc. v. *Adams*,
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Cleveland v. *United States*,
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Connally v. *Gen. Constr. Co.*,
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Descamps v. *United States*,
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Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*,
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H.J. Inc. v. *Nw. Bell Tel. Co.*,
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Harrison v. *Vose*,
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Hughey v. *United States*,
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James v. *United States*,
550 U.S. 192 (2007) 16

Jarecki v. *G.D. Searle & Co.*,
367 U.S. 303 (1961) 27

Johnson v. *United States*,
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Lanzetta v. *New Jersey*,
306 U.S. 451 (1939) 19

Lawson v. *FMR LLC*,
134 S. Ct. 1158 (2014) 31

Logan v. *United States*,
552 U.S. 23 (2007) 16

Loughrin v. *United States*,
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McBoyle v. *United States*,
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McNeil v. *United States*,
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Nat'l Org. for Women, Inc. v. *Scheidler*,
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Neder v. *United States*,
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Ratzlaf v. *United States*,
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Reves v. *Ernst & Young*,
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Salinas v. *United States*,
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Sekhar v. *United States*,
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Shepard v. *United States*,
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Skilling v. *United States*,
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Staples v. *United States*,
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Sykes v. *United States*,
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Taylor v. *United States*,
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United States v. *Bass*,
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United States v. *Birbal*,
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United States v. *Boston & Maine R.R.*,
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United States v. *Coleman*,
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United States v. *Dotterweich*,
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United States v. *Frank*,
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United States v. *Harriss*,
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United States v. *Kernell*,
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United States v. *Moyer*,
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United States v. *Robertson*,
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United States v. *Rodriquez*,
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United States v. *Standard Oil Co.*,
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United States v. *Turkette*,
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United States v. *Waterman*,
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United States v. *Wiltberger*,
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United States v. *Wortman*,
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United States v. *Yielding*,
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Wash. State Dep't of Social & Health Servs. v. *Guardianship Estate of Keffeler*,
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Whitfield v. *United States*,
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16 U.S.C. § 1858... 1

16 U.S.C. §§ 3371 *et seq.*.. 13

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18 U.S.C. § 175.. 6

18 U.S.C. § 228... 11

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18 U.S.C. § 711a 17
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18 U.S.C. § 1344 21
18 U.S.C. § 1512 32
18 U.S.C. § 1519 .... 1–2, 5, 8, 22–26, 29–34
18 U.S.C. § 1962 16
18 U.S.C. § 2119 11
18 U.S.C. § 2232 .... 4, 24–25, 34
18 U.S.C. § 2381 9
21 U.S.C. § 844 24
Pub. L. No. 107-204, 116 Stat. 745 (2002) 25, 34

OTHER AUTHORITIES

36 C.F.R. § 261.16 14

A.B.A. CRIM. JUST. SEC., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) 11

ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (Mar. 31, 2013) 10

Beale, Sara Sun, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005) 12

Beale, Sara Sun, *Too Many, Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995) 12

BLACK'S LAW DICTIONARY (10th ed. 2014)................. 29

BLACK'S LAW DICTIONARY (9th ed. 2009)..................... 5

1 W. BLACKSTONE, COMMENTARIES (1765) 3, 6, 18

Brown, Darryl K., *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007) 12, 15

Dieterle, C. Jarrett, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279 (2014) 13

Dillon, Zach, *Forward: Symposium on Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525 (2013) 10

Friendly, Henry J., *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, BENCHMARKS (1967)............ 20

Gainer, Ronald, *Federal Criminal Code Reform: Past & Future*, 2 BUFF. CRIM. L. REV. 45 (1998).. 11

Gainer, Ronald, *Remarks on The Introduction of Criminal Law Reform Initiatives*, 7 J.L. ECON. & POL'Y 587 (2011)..................................... 12

Girl saves woodpecker, but her mom fined $535, CBS NEWS, Aug. 4, 2011, available at http://www.cbsnews.com /news/girl-saves-woodpecker-but-her-mom-fined-535/.................. 14

Jeffries, Jr., John C., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) 20

Kozinski, Alex & Tseytlin, Misha, *You're (Probably) a Federal Criminal*, in IN THE NAME OF JUSTICE (Timothy Lynch ed., 2009) 10

Larkin, Jr., Paul, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715 (2013) 13

Meese, III, Edwin & Larkin, Jr., Paul, *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012) ... 16–17

O'Sullivan, Julie, *The Federal Criminal "Code" is a National Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006) 9, 12–13

Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 7 (2009) 13

Reining in Overcriminalization: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 21 (2010) 14

S. Rep. No. 107-146 (2002) 26, 30–31, 34

2A Singer, N., SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION (1991) 27

Smith, Stephen, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012) 14, 17

Smith, Stephen, *Proportionality and Federalization*, 91 VA. L. REV. 879 (2005) 18

Stuntz, William, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) 11, 14–15

THE FEDERALIST NO. 62 (James Madison) 9

Walsh, Brian & Joslyn, Tiffany, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010) 11

Weisberg, Robert, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425 (2012) 10

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

John Yates is accused of throwing about six dozen undersized fish into the Atlantic Ocean, thereby making them unavailable for inspection by the National Marine Service. Under the Magnuson–Stevens Fishery Conservation and Management Act, this conduct would ordinarily be met with a maximum fine of $30,000 and a suspended fishing license. 16 U.S.C. §§ 1857(1)(A), 1858(a), (g).

The Government viewed things differently. It charged Yates with violating the anti-shredding provision of Sarbanes-Oxley, 18 U.S.C. § 1519—a federal felony punishable by up to 20 years in prison. Passed in the wake of one of the largest financial scandals in American history, Sarbanes-Oxley forbids the knowing concealment, alteration, or destruction of "any record, document, or tangible object," with the intent to impede a federal investigation. By the Government's lights, the fish are "tangible object[s]," and Yates's "concealment" of those fish to frustrate an investigation under the Magnuson–Stevens Act violated the anti-shredding provision.

The problem is, no one in the public would reasonably expect Sarbanes-Oxley to apply to a fisherman throwing red grouper into the Gulf of Mexico. In context, the phrase "any record, document, or tangible object" no more applies to fish than the phrase "an

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any entity other than *amici curiae* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties' consents to the filing of this brief are on file with the Clerk.

automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle" applies to airplanes. Compare 18 U.S.C. § 1519 with *McBoyle* v. *United States*, 283 U.S. 25, 26–27 (1931). Indeed, if the term "tangible object" encompasses fish, then the statute here captures essentially every physical item within the jurisdictional reach of the United States. That is an unsupportable reading of the statute's text. And the history and purpose of Sarbanes-Oxley only bolster this common-sense conclusion.

The unseemly prosecution in this case, however, is but a symptom of the underlying problem. It is the latest chapter in a long history of the Government's misuse of vaguely drawn statutes to criminalize behavior far beyond what any ordinary person would understand to be prohibited. In the academic world, this problem is known as "overcriminalization." And the term describes two chief evils: *first*, the quantitative expansion of federal law to include countless, and often redundant, criminal provisions; and *second*, the qualitative breadth with which Congress has drafted many of these statutes.

Overcriminalization is not just a theory. Nor are cases like this all that unusual. With some 4,500 criminal statutes scattered throughout the U.S. Code and countless regulatory offenses embedded in federal agencies' rules, large portions of the American public are subject to criminal sanction for conduct ranging from the plainly reprehensible to the plainly inane. To be sure, only some face federal prosecution. But those unlucky few are subject to a maze-like "code" riddled with vague provisions, and are pitted

against an adversary with comparatively limitless resources.

The solution to this problem lies not in a case-by-case review of problematic statutes. Rather, the solution is to revitalize a fundamental maxim of criminal law: "Penal statutes must be construed strictly." 1 W. BLACKSTONE, COMMENTARIES *88 (1765). This ancient rule is reflected in a host of this Court's guideposts for deciding criminal cases—including the rule of lenity and the presumption against expanding a federal criminal statute into the domain of state police power. Yet the principle is more than just a set of disparate rules. As we explain, it is a comprehensive approach to reviewing criminal statutes. It protects against broad, severe application of criminal statutes, unless Congress clearly intended such a result.

Viewed through this lens, it is plain that Congress did not intend to sanction the expansive application of the anti-shredding provision that the Government advocates here. In fact, as shown by the text of the statute and its legislative history, Congress intended an application limited to those who would feed incriminating documents into a shredder or destroy an object (say, a disk) on which *information* was stored.

Amici are eighteen professors of criminal law from across the political and ideological spectrum. Their views on many topics vary widely. *Amici* are united, however, in the view that the growing problem of overcriminalization requires a principled response from the judiciary. In candor, this Court's jurisprudence governing the construction of penal statutes has not been a model of clarity. The lower courts—and the public—would benefit greatly if the Court took this opportunity to revitalize the foundational

precept that novel attempts to expand criminal statutes beyond their clear sweep will be judged against a default presumption of narrow construction.

A more detailed statement describing the *amici* is set forth in the appendix to this brief.

STATEMENT

In August 2007, a field officer of the National Marine Fisheries Service boarded the *Miss Katie*, a commercial fishing vessel operating in the Gulf of Mexico. He asked the ship's captain, Petitioner John Yates, to produce for inspection some 3,000 fish caught by the ship's crew during their multi-day voyage. During the nearly four-hour ordeal, the officer found 72 red grouper that measured less than 20 inches—the minimum length required by federal fishing regulations. He placed the fish into a wooden crate and informed Yates that the Fisheries Service would seize them upon *Miss Katie*'s return to port.

After the officer disembarked, Yates allegedly ordered the crew to dispose of the grouper in the crate and to replace them with larger fish. Upon returning to port, federal agents met with Yates to re-measure the fish. Only 69 of the 72 fish measured less than 20 inches. Suspecting that Yates had disobeyed orders to hold the original fish, the federal agents interviewed the crew. After being threatened with arrest, one crew member accused Yates of ordering the crew to dump the original fish.

Nearly three years later, the Government brought a three-count indictment against Yates, claiming that he: (1) knowingly disposed of undersized fish in order to prevent lawful seizure, in violation of 18 U.S.C. § 2232 ("obstruction"); (2) knowingly destroyed a

"tangible object" with the intent to impede a federal investigation, in violation of 18 U.S.C. § 1519 ("the anti-shredding provision"); and (3) made a false statement to federal authorities, in violation of 18 U.S.C. § 1001. After a four-day trial, Yates was acquitted of making a false statement but convicted of violating the obstruction and anti-shredding provisions. The District Court sentenced him to 30 days in prison, followed by 36 months of supervised release.

Yates appealed, arguing that his conviction under the anti-shredding provision must be reversed because a fish is not a "tangible object" in light of the preceding words in the statute ("records" and "documents") and the purpose of Sarbanes-Oxley. The Government, by contrast, insisted that a "tangible object" refers to *any* physical object—thus bringing fish within the ambit of the anti-shredding provision. The Eleventh Circuit agreed, concluding that "'tangible object,' as § 1519 uses that term, unambiguously applies to fish. See BLACK'S LAW DICTIONARY 1592 (9th ed. 2009) (defining 'tangible' as '[h]aving or possessing physical form')[.]" Without considering the context—or the absurdity that follows from such an expansive definition—the court below disposed of Yates's argument in a single, curt paragraph.

SUMMARY OF ARGUMENT

I. The modern federal criminal code is vast and unwieldy: some 4,500 laws criminalize conduct ranging from stockpiling biological weapons (18 U.S.C. § 175) to falsely representing oneself as a 4-H Club representative (*id.* § 916). Moreover, a host of these laws are redundant. Indeed, some federal crimes—notably fraud and false statements—are independently prohibited by over two hundred different statutes. Combined with over 300,000 federal criminal regulations, the canon benefits only the Government, which has a near-endless menu of charging options in a typical prosecution.

Redundancy, however, is but one troubling consequence of the ever-growing criminal code. Vagueness is another. As evidenced by the number of times this Court has needed to interpret, and re-interpret, certain federal crimes, much of Title 18 and its regulatory counterparts fail to provide the public with fair warning of what conduct is prohibited. This is true on both a macro level—the canon is too vast to comprehend—and a micro level—many individual provisions are poorly drawn.

II. A critical part of the solution to these problems is for the courts to adopt a consistent interpretive approach based on the venerable maxim that "[p]enal statutes must be construed strictly." 1 W. BLACKSTONE, COMMENTARIES *88 (1765). Doing so would serve twin constitutional values: It would promote fair notice of the scope of the law, and it would properly delimit the respective roles of the legislative, executive, and judicial branches—a vital "checks and balances" function in our system of separated powers.

As to the former, judicial precepts including the void-for-vagueness doctrine, the rule of lenity, and the due-process-based prohibition on applying previously undisclosed, novel constructions of criminal statutes all operate to ensure that, "so far as possible the line [between legal and illegal] should be clear." *United States* v. *Lanier*, 520 U.S. 259, 265 (1997). As to the latter, this Court applies numerous narrowing presumptions to criminal statutes in order to keep them cabined within the bounds of clear congressional intent. This vindicates the "principle of legality," which recognizes that the legislature, not the judiciary, possesses the power of punishment.

III. John Yates's conviction cannot withstand scrutiny under a proper construction of Sarbanes-Oxley's anti-shredding provision. In context, *no* valid interpretation of "tangible object" includes fish. Rather, by placing "tangible object" after "records" and "documents" in an Act passed in response to a large-scale accounting scandal, Congress plainly intended to limit the anti-shredding provision to its common-sense application—to the destruction of media containing information.

A. Adopting the Government's position that "tangible object" should be interpreted according to its broad dictionary definition would render "records" and "documents" mere surplusage—in violation of this Court's deep-seated reluctance to read words out of a statute. It would also lead to at least two absurd results. *First*, the anti-shredding provision would become coextensive with the general obstruction statute. *Second*, the anti-shredding provision would become unnecessary. If Congress wanted to increase the penalty for obstruction, it knew how to do so. It

did not. It simply "closed a loophole" in the prohibition against spoliating corporate financial records.

B. Moreover, the interpretive canon of *ejusdem generis* precludes the Government's expansive reading of "tangible object." This catch-all phrase must be limited to objects similar in nature to the listed examples—*i.e.*, "records" and "documents."

Precedent supports this conclusion. In 1931, for example, the Court, per Justice Holmes, rejected the Government's attempt to qualify an airplane as a "motor vehicle" where the statute's listed examples all moved on land. And in 2008, the Court rejected the Government's attempt to qualify drunk driving as a "violent felony" where the statute's listed examples were all "purposeful, violent, and aggressive" rather than negligent or reckless. The same logic compels a narrow construction here: Where the statute's listed examples represent means of storing information, "tangible object" cannot include fish.

C. Further still, the history and purpose of Sarbanes-Oxley do not support the Government's position. The Act was aimed at accountants, auditors, and lawyers—not fishermen. Congress passed the Act to prevent and punish corporate fraud, and to protect the victims of such fraud.

The anti-shredding provision is no exception. Rather, as the legislative history demonstrates, § 1519 was aimed specifically at filling gaps in then-existing law regarding the destruction of evidence and the retention of financial records. It was not intended to criminalize destroying undersized red grouper.

D. In the end, there is no ambiguity as to whether the anti-shredding provision should be applied to

Yates. But if any ambiguity remained after the preceding considerations were weighed, the rule of lenity would compel resolving that ambiguity in Yates's favor. As both a tiebreaker and a rule of constitutional avoidance, the rule of lenity protects would-be criminal defendants from being subject to undue punishment under vague prohibitions—and thus furthers the constitutional value of fair notice.

The decision below should be reversed.

ARGUMENT

I. The federal criminal code has grown vastly to include many redundant and vague criminal provisions that permit prosecution of a wide range of conduct.

Today's federal criminal code would be profoundly troubling to the Founders. As James Madison wrote in FEDERALIST NO. 62, "[i]t will be of little avail to the people * * * if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood[.]" Yet these words provide an apt description of today's U.S. criminal code. As one commentator puts it, the federal criminal "code" is a "haphazard grabbag of statutes accumulated over 200 years"—it is "incomprehensible, random and incoherent, duplicative, ambiguous, incomplete, and organizationally nonsensical." Julie O'Sullivan, *The Federal Criminal "Code" is a National Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) (internal quotation marks and footnotes omitted).

Neither prosecutors nor their targets can plumb the depths of this criminal law. Federal law addresses conduct ranging from unquestionably serious

crimes (*e.g.*, 18 U.S.C. § 2381 (treason)), to trivial ones (*e.g.*, *id.* § 711 (unauthorized reproduction of "Smokey Bear")). As one well-known jurist has observed, "most Americans are criminals and don't even know it." Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43, 44–45 (Timothy Lynch ed., 2009).

To be sure, U.S. Attorneys cannot (and would not) enforce every one of these provisions every time it was violated. For those who do get prosecuted, however, the circumstances are grim. The vastness of the federal code and the breadth of myriad statutes provide the imaginative prosecutor with near-endless permutations of crimes to charge. Exercising prosecutorial discretion has evolved "from an exercise of wisdom to a selection of weaponry." Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1445 (2012).

In light of the powerful advantages that prosecutors enjoy in the federal arena, this grand arsenal of chargeable offenses essentially guarantees conviction. In 2013, for example, the Government's overall success rate was 91.6%, and that rate jumps to 99.6% when one excludes cases that were dismissed outright. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl. D-4 (Mar. 31, 2013).

These problems pervade the federal criminal code and have been subject to condemnation by groups across the political spectrum—from the American Civil Liberties Union to the Heritage Foundation. See Zach Dillon, *Forward: Symposium on Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2013). As we demonstrate below, the Court should

begin to address these issues by reading the criminal provision at issue here strictly.

A. The sheer quantity of federal crimes has created an overbroad and largely redundant "code."

According to recent estimates, U.S. law contains 4,450 criminal provisions. BRIAN WALSH & TIFFANY JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010). Roughly half of them are "found jumbled together in Title 18, euphemistically referred to as the 'Federal Criminal Code.'" Ronald Gainer, *Federal Criminal Code Reform: Past & Future*, 2 BUFF. CRIM. L. REV. 45, 53 (1998). The balance are scattered about the other 49 titles of the U.S. Code. *Ibid.* Many of these provisions came into force over the past half century, with "[m]ore than 40% of the federal criminal provisions enacted since the Civil War hav[ing] been enacted since 1970." A.B.A. CRIM. JUST. SEC., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998).

All too often, "[n]ew crimes are * * * enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14–15. Indeed, political pressure to take a stand in response to a national scandal frequently prods Congress to pass a flurry of open-ended criminal statutes. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001). Notable examples of so-called "*crime du jour*" lawmaking in Title 18 include carjacking (§ 2119), failure to pay child support (§ 228), and interference with the operations

of an "animal enterprise" (§ 43). See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755–56 (2005).

Seldom does Congress consider whether it must re-write or repeal an existing law to accommodate a new one. The reality is that the "political process of criminal law legislation is * * * a 'one-way ratchet' * * * . Criminal codes expand but don't contract." Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007). Consequently, "new statutes [are often] layered over the existing federal criminal statutes," to the end of widespread redundancy. Sara Sun Beale, *Too Many, Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 (1995).

Consider, for example, four basic federal crimes: fraud, forgery, false statements, and destruction of property. By one count, there are "232 statutes pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction." O'Sullivan, *supra*, at 654. These statutes "contain their own idiosyncratic verbiage and definitions, and bear some semblance of uniformity only with regard to the substantial nature of the penalties specified for their breach." Ronald Gainer, *Remarks on the Introduction of Criminal Law Reform Initiatives*, 7 J.L. ECON. & POL'Y 587, 588 (2011). To the extent that this "tower of legal babble" (*ibid.*) helps anyone, it helps the Government: "Some of the statutes will offer prosecutors important advantages over others—in terms of such matters as venue, proof, evidentiary

admissibility, or sentencing impact. * * * The effect * * * is to give prosecutors substantially greater bargaining power vis-a-vis the defense." O'Sullivan, *supra*, at 654.

Now add to this expansive body of criminal statutes a mountain of federal criminal regulations. According to one estimate, there are now more than 300,000 federal regulations that may trigger criminal sanctions. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Richard Thornburgh, former Attorney General of the United States). Indeed, even the Justice Department does not know how many federal crimes there are. See Paul Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 726 (2013).

Still worse, many of these regulatory offenses proscribe conduct that is *malum prohibitum*—*i.e.*, conduct that is wrong only because it is prohibited. Everyone knows that it is immoral to kill, rape, or steal. The same cannot be said, however, of importing non-veneered ebony wood from India, snowmobiling into a national forest in the midst of a blizzard, or saving a bird from the clutches of a hungry cat. Yet as Gibson Guitar Corp.,[2] IndyCar champion Bobby Unsar,[3] and

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[2] See C. Jarrett Dieterle, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279, 1284–86 (2014) (summarizing the prosecution of Gibson Guitar Corp. under the Lacey Act, 16 U.S.C. §§ 3371 *et seq.*).

11-year-old Skylar Capo[4] found out, the Government has no qualms about prosecuting such behavior. As these heavy-handed prosecutions show, the vast ocean of regulatory crimes—including many offenses that are "wrongful only because [they are] illegal"—threatens to "allow punishment where 'consciousness of wrongdoing be totally wanting.'" Stephen Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2012) (quoting *United States* v. *Dotterweich*, 320 U.S. 277, 284 (1943)).

In short, the ever-expanding breadth and redundancy of the federal statutory and regulatory criminal "code" threatens to create, in the words of the late Bill Stuntz, "a world in which the law on the books makes everyone a felon." Stuntz, *supra*, at 511.

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[3] *Reining in Overcriminalization: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 21–35 (2010) (statement of Robert "Bobby" Unser, detailing his prosecution under 16 U.S.C. § 551 and 36 C.F.R. § 261.16 for unintentionally entering a national forest with a snowmobile during a blizzard).

[4] *Girl saves woodpecker, but her mom fined $535*, CBS NEWS, Aug. 4, 2011, *available at* http://www.cbsnews.com/news/girl-saves-woodpecker-but-her-mom-fined-535/ (reporting the citation of an 11-year-old child under the Migratory Bird Act, 16 U.S.C. §§ 703 *et seq.*, for saving an endangered woodpecker from being eaten by the family cat). The charges were dropped after an international outcry over the incident.

B. Many federal criminal laws, and the code as a whole, are unclear.

Unfortunately, locating a germane statute is no guarantee that one can actually understand what is allowed and what is not. Rather, Congress often drafts open-ended statutes that fail to define key elements of the subject crime. "Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty." *Sykes* v. *United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting). And many federal agencies have followed suit.

As numerous scholars have pointed out, Congress faces a distorted incentive structure in the criminal arena: Many people, supported by well-established interest groups, crave open-ended crimes that permit—or encourage—novel and expansive application; yet very few advocate intelligible limits on the law to prevent its abuse. *E.g.*, Stuntz, *supra*, at 545–57; Brown, *supra*, at 232–33. "Rarely does an interest group of significant influence emerge to counter the influence" of prosecutors and other special-interest groups, which are particularly effective in seeking new and expansive criminal provisions. Brown, *supra*, at 233.

Regrettably, Title 18 is littered with these kinds of statutes, many of which make routine appearances on this Court's docket. For example, the Armed Career Criminal Act (§ 924(e)) has appeared 12 times

since 1990,[5] and the Racketeer Influenced and Corrupt Organizations Act (§ 1962) has appeared 9 times since 1981.[6]

In far too many cases, the broad sweep of federal law means that no one is truly on notice as to what conduct constitutes a federal crime. See Edwin Meese III & Paul Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 738–41 (2012). "Traditionally, the concern has been whether *a particular statute* is sufficiently clear so that the average person can readily understand it and remain law-abiding. Nowadays, the difficulty is that *the entire criminal code* has become unknowable and subject to manipulation"—*i.e.*, the problem exists at both "the retail level," with "specific crime[s]" un-

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[5] *Descamps* v. *United States*, 133 S. Ct. 2276 (2013); *Sykes* v. *United States*, 131 S. Ct. 2267 (2011); *McNeil* v. *United States*, 131 S. Ct. 2218 (2011); *Johnson* v. *United States*, 559 U.S. 133 (2010); *Chambers* v. *United States*, 555 U.S. 122 (2009); *United States* v. *Rodriquez*, 553 U.S. 377 (2008); *Begay* v. *United States*, 553 U.S. 137 (2008); *Logan* v. *United States*, 552 U.S. 23 (2007); *James* v. *United States*, 550 U.S. 192 (2007); *Shepard* v. *United States*, 544 U.S. 13 (2005); *Caron* v. *United States*, 524 U.S. 308 (1998); *Taylor* v. *United States*, 495 U.S. 575 (1990).

[6] *Boyle* v. *United States*, 556 U.S. 938 (2009); *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158 (2001); *Salinas* v. *United States*, 522 U.S. 52 (1997); *United States* v. *Robertson*, 514 U.S. 669 (1995); *Nat'l Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994); *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993); *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229 (1989); *United States* v. *Turkette*, 452 U.S. 576 (1981).

der "vague law[s]," and "the wholesale level, with the entire body of federal criminal law, in all of its complexity." *Id*. at 763 (footnote omitted).

Indeed, the incoherence of the federal code "makes it difficult for even specialists in criminal law to find the law, much less ordinary citizens to determine their legal obligations." Smith, *Overcoming Overcriminalization*, *supra*, at 566. Compounding the problem, federal law now criminalizes a slew of trivial conduct "wholly unrelated to moral delinquency,"[7] such that people may no longer rely upon their internal compass to differentiate "right" from "wrong." Meese and Larkin, *supra*, at 740.

As a result, the unchecked growth of the federal canon "frustrates both the rule-of-law imperative that the criminal law should be accessible to the public so they can conform their behavior to it and potentially the notion that it is unfair to punish absent fair warning." Smith, *Overcoming Overcriminalization*, *supra*, at 566. As this Court has long held, "'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Bouie* v. *City of Columbia*, 378 U.S. 347, 351 (1964) (quoting *United States* v. *Harriss*, 347 U.S. 612, 617 (1954)). Yet the Government does just that when it calls citizens to answer for *mala prohibita* proscriptions buried deep in the U.S. Code or Code of Federal Regulations.

Poorly drawn statutes exacerbate these problems. A nebulous statute with harsh penalties incentivizes prosecutors to charge the offending conduct under a

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[7] "Give a Hoot, Don't Pollute!" See 18 U.S.C. § 711a (potentially criminalizing this footnote).

more general provision, either instead of or in addition to a provision more specifically tailored to the conduct that carries a lesser penalty. This results in disproportionate punishment that Congress arguably did not intend. Stephen Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 934–37 (2005). Moreover, when breadth crosses over to ambiguity—or worse, vagueness—due-process concerns arise. We discuss those issues more fully below.

II. This Court should address these problems of redundancy and vagueness by construing criminal statutes strictly—as required by fundamental, constitutionally driven interpretive principles.

Given the vast expanse of modern federal criminal law, a consistent approach to interpreting that body of law is more critical today than ever. An approach anchored in the principle that "[p]enal statutes must be construed strictly" (1 W. BLACKSTONE, COMMENTARIES *88 (1765)) would serve two fundamental values rooted in the text, structure, history, and purpose of the Constitution: The need to provide fair notice of the scope of the law, particularly where one's liberty is at stake; and the principle of separation of powers, which gives Congress primacy in defining federal crimes but provides a "checks and balances" role for the judiciary in interpreting those crimes. We discuss both in turn.

The fair-notice requirement springs from "the tenderness of the law for the rights of individuals." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). In keeping with "ordinary notions of fair play and the settled rules of law," "the terms of a penal statute creating a new offense must be sufficiently

explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "No one," this Court has held, "may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). Thus, due process compels that criminal statutes provide "'fair warning * * * 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.'" *Lanier*, 520 U.S. at 265 (quoting *McBoyle*, 283 U.S. at 27).

Fair notice manifests itself in three related judicial precepts. *First*, the void-for-vagueness doctrine prohibits enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally*, 269 U.S. at 391. *Second*, the rule of lenity holds that if, after exhausting all legitimate tools of interpretation a "reasonable doubt persists" (*Moskal* v. *United States*, 498 U.S. 103, 108 (1990)), "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (*Skilling* v. *United States*, 561 U.S. 358, 410 (2010)). The rule of lenity thus serves to avoid the wholesale abrogation of statues under the vagueness doctrine. *Third*, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266.

In addition to fair notice, this Court has long recognized "the plain principle that the power of pun-

ishment is vested in the legislative, not in the judicial department." *Wiltberger*, 18 U.S. at 95. Sometimes referred to as the "principle of legality" (John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985)), this rule—rooted in the separation of powers—holds that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," courts have "'the instinctive distaste[] against men languishing in prison unless [Congress] has clearly said they should.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, BENCHMARKS, 196, 209 (1967)).

Accordingly, this Court often applies a variety of narrowing presumptions to criminal statutes, designed to prevent prosecutors from expanding the scope of a criminal prohibition beyond clear congressional intent and the scope of their executive authority. For example, the Court presumes that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses" (*Neder* v. *United States*, 527 U.S. 1, 23 (1999)), and it resists novel prosecutorial theories that attempt to exploit ambiguous language to expand crimes beyond their accepted boundaries at common law. *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724–26 (2013) (refusing to extend the Hobbs Act's prohibition on extortion, which requires "the obtaining of property from another," to an attempt to extort approval of a financial investment).

In a similar vein, this Court recently reaffirmed that federal courts are to avoid reading statutes in a manner that "'dramatically intrude[s] upon tradition-

al state criminal jurisdiction.'" *Bond* v. *United States*, 134 S. Ct. 2077, 2088, 2093 (2014) (quoting *Bass*, 404 U.S. at 350). Where federal laws threaten such an intrusion, this Court looks for a "clear statement assur[ing] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 350. Absent a "clear indication that Congress meant to reach purely local crimes," this Court provides a check on the unwarranted expansion of executive power—it reads the statute at issue narrowly. See *Bond*, 134 S. Ct. at 2090.

Both the fair-notice requirement and the principle of legality point back to the foundational concept "penal laws are to be construed strictly" (*Wiltberger*, 18 U.S. at 95), with "all reasonable doubts concerning [the statute's] meaning * * * operat[ing] in favor of the [defendant]." *Harrison* v. *Vose*, 50 U.S. (9 How.) 372, 378 (1850). The concept is not, of course, "a substitute for common sense, precedent, and legislative history." *United States* v. *Standard Oil Co.*, 384 U.S. 224, 225 (1966). If Congress has plainly forbidden a particular act—or consciously refused to write a criminal statute in a more lenient manner—no amount of charity toward the defendant can save her from conviction. See *Loughrin* v. *United States*, — S. Ct. — (2014) (slip op. at 5–6) (refusing to read a specific-intent *mens rea* requirement into the federal bank fraud statute (18 U.S.C. § 1344), where doing so would render part of the statute superfluous). But in cases where Congress has not spoken clearly, courts should engage the interpretive process with an eye towards the narrowest reasonable construction.

III. The Government's boundless interpretation of the anti-shredding provision flouts the strict construction required here.

With these principles in mind, we address the incongruity of the Government's interpretation of Sarbanes-Oxley's anti-shredding provision as applied to its prosecution of John Yates.

A. No interpretation of "tangible object" in the context of § 1519, much less the required strict interpretation, can reasonably include fish.

According to the Government, Yates violated the anti-shredding provision by destroying a "tangible object"—fish—with the intent to impede a federal investigation. The Government says this term must be given its dictionary definition: anything "having or possessing physical form." J.A. 132.

This capacious interpretation, however, is wholly divorced from the statutory context. "[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). When read in context, the Government's dictionary definition of "tangible object" runs headlong into a serious interpretative problem—the rule against superfluity.

This Court has repeatedly expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment" (*Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990)), and this "resistance" is "height-

ened when the words describe an element of a criminal offense" (*Ratzlaf* v. *United States*, 510 U.S. 135, 140–41 (1994)). Such is the case here. Consider the broader phrase in which the term "tangible object" is found: "any record, document, or tangible object." 18 U.S.C. § 1519. If indeed Congress intended "tangible object" to cover any object having physical form, the more specific words that precede it—"record" and "document"—would become mere surplusage.

The Government's error in this case echoes its error in *Begay* v. *United States*, 553 U.S. 137 (2008), where it argued that a drunk-driving conviction qualified as a "violent felony" under the Armed Career Criminal Act's catch-all provision—a crime punishable by more than one year in prison that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This Court would have none of that view. As it explained, "the provision's listed examples [that precede the catch-all provision]—burglary, arson, extortion, or crimes involving the use of explosives—illustrate the kinds of crimes that fall within the statute's scope," *i.e.*, crimes involving an element of violence. 553 U.S. at 142. "Their presence," the Court continued, "indicates that the statute covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" *Ibid.* (citing 18 U.S.C. § 924(e)(2)(B)(ii)). Rejecting the Government's "all encompassing" reading of this phrase, the Court stressed that, "[i]f Congress meant [such an expansive definition], it is hard to see why it would have needed to include the examples at all. Without them, clause (ii) would cover *all* crimes that present a 'serious potential risk of physical injury.'" *Ibid.*

The same logic governs here. If Congress intended § 1519 to prohibit destroying or concealing any object "having or possessing physical form" (J.A. 132), it could have simply barred the knowing destruction or concealment of any "tangible object"—without further qualification. But it did not. It provided examples of classes of articles it wished to target—*i.e.*, "record[s]" and "document[s]," followed by a catch-all phrase—"tangible object." That more general phrase can and must be read in harmony with the specific, illustrative examples that precede it. *Begay*, 553 U.S. at 142; *cf*. Part III.B, *infra* (discussing the principle of *ejusdem generis*). Defining "tangible object" as any object "having or possessing physical form" would obliterate any semblance of the limitation that "record" and "document" place on § 1519. Reading the statute strictly, as this Court must, such a definition is unacceptable.

Furthermore, the Government's reading of "tangible object" leads to two absurd results. *First*, reading § 1519 to encompass all objects "having or possessing physical form" would make the provision co-extensive with the general obstruction provision, which criminalizes the destruction of any "property" subject to seizure by the Government. 18 U.S.C. § 2232. This cannot be right. If it were, the anti-shredding provision could be used to prosecute suspects who flush drugs down the toilet to avoid arrest (*United States* v. *Birbal*, 113 F.3d 342 (2d Cir. 1997)),[8] transport prop-

[8] This scenario is particularly troubling given the weak reading that lower courts have given § 1519's specific-intent requirement. *E.g.*, *United States* v. *Moyer*, 674 F.3d 192, 208–10 (3d Cir. 2012); *United States* v. *Kernell*, 667 F.3d 746, 752–54 (6th Cir. 2012); *United States* v. *Yield-*

erty out of a State to avoid criminal restitution payments (*United States* v. *Frank*, 354 F.3d 910 (8th Cir. 2004)), or set fire to a methamphetamine lab to avoid detection (*United States* v. *Coleman*, 148 F.3d 897 (8th Cir. 1998)). Neither common sense nor the history and purpose of Sarbanes-Oxley (see Part III.C, *infra*) suggest that Congress intended to give the anti-shredding provision such far-reaching scope.

Second, accepting that Congress intended such a profound shift in the law makes a paradox out of § 1519. If Congress wanted to increase the punishment for the precise conduct already forbidden under § 2232 (the obstruction statute), it did not need to enact § 1519—it could have simply increased the maximum penalty for violating § 2232.

The Congress that drafted Sarbanes-Oxley knew how to do this, and in fact did so in both the mail and wire fraud statutes. Pub. L. No. 107-204, 116 Stat. 745, 805 (2002) (increasing the penalties for mail and wire fraud from 5 to 20 years); see *Whitfield* v. *United States*, 543 U.S. 209, 216–17 (2005) (rejecting an overt-act requirement for conspiracy to commit money laundering because Congress "knows how to impose such a requirement when it wishes to do so").

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ing, 657 F.3d 688, 711–14 (8th Cir. 2011). A defendant need not intend to impede a *federal* investigation; rather, he need only intend to impede *some* investigation (pending or merely contemplated) that eventually becomes a federal one. By this logic, a suspect who disposes of a small bag of marijuana to avoid arrest by local police could be referred to the U.S. Attorney's Office and face a 20-year felony conviction. See 21 U.S.C. § 844 (criminalizing misdemeanor possession of a controlled substance).

Yet Congress chose a different course here. Rather than increasing the penalty for violating the general obstruction provision, it passed the anti-shredding statute to "close loopholes" in the laws forbidding the spoliation of corporate financial records. S. Rep. No. 107-146, at 14 (2002). In effect, then, the Government would have this Court draw an inference from Congress's silence—something this Court has expressly refused to do "when it is contrary to all other textual and contextual evidence of congressional intent." *Burns* v. *United States*, 501 U.S. 129, 136 (1991).

At bottom, an interpretation of § 1519 that would sustain Yates's conviction cannot be squared with either the principle of strict construction or common sense. Yates's conduct, to be sure, is not innocent. But it is "impossible to believe" that Congress meant to express the same degree of moral outrage towards those who skirt fishing regulations—a mere civil infraction—as it did towards those who perpetrated one of the largest financial scandals in American history. *Cf. Abuelhawa* v. *United States*, 556 U.S. 816, 822–23 (2009) (finding it "impossible to believe" that Congress intended the felony drug-facilitation provision to cause "a twelve-fold quantum leap in punishment for simple drug possessors" who set up multiple buys that aggregate to a felony quantity).

B. Under the canon of *ejusdem generis*, the term "tangible object" must refer to something similar to a "record" or a "document"—which does not include fish.

Rejecting the Government's reading of "tangible object" in § 1519 is also compelled by the familiar canon of *ejusdem generis*. "'[W]here general words

follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114–15 (2001) (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)).

Ejusdem generis is "often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Wash. State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384–85 (2003) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). This is doubly true of penal statutes, where the law favors narrow construction: "The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition." *United States* v. *Boston & Maine R.R.*, 380 U.S. 157, 160 (1965). Rather than construing a statute to sweep up "*every* crime" that might conceivably fall within the literal meaning of a single, catch-all provision (*Begay*, 553 U.S. at 142), courts must interpret criminal provisions only as broadly as their text, read as a whole, warrants. See *Hughey* v. *United States*, 495 U.S. 411, 415–19 (1990) (limiting criminal restitution to amount of loss caused by the specific conduct that is the basis of conviction, despite judicial authority to consider "other [appropriate] factors" in setting the amount).

This Court's seminal opinion in *McBoyle* is particularly relevant. The defendant there was convicted of transporting a stolen airplane—which the Government deemed a "motor vehicle"—across state lines.

283 U.S. at 25. The statute defined "motor vehicle" as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails[.]" *Id.* at 26. Despite the statute's specific references to terrestrial forms of transportation, the Government claimed that use of the word "vehicle" in a catch-all provision expanded the statute to include airplanes.

In a decision authored by Justice Holmes, the Court disagreed. Although it acknowledged that, "etymologically it is possible to use the word to signify a conveyance working on land, water or air," use of the word "vehicle" in "everyday speech" calls up "the picture of a thing moving on land." *Ibid.* And the context of the term "motor vehicle" reinforced this "popular picture": "For after including automobile truck, automobile wagon and motor cycle, the words 'any other self-propelled vehicle not designed for running on rails' still indicate that a vehicle in the popular sense, that is a vehicle running on land is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies." *Ibid.* Thus, the Court concluded, "[i]t is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class." *Id.* at 27.

This Court's more recent decision in *Begay* is of a piece with *McBoyle*. The Court in *Begay* rejected the argument that drunk driving was a "violent felony" simply because it may, as a linguistic matter, be said to "present[] a serious potential risk of physical injury to another." 553 U.S. at 141 (quoting 18 U.S.C.

§ 924(e)(2)(B)(ii)). Rather, the Court distinguished drunk driving from the listed crimes—burglary, arson, extortion, and crimes involving the use of explosives—by observing that they "all typically involve purposeful, 'violent,' and 'aggressive' conduct." *Id.* at 144–45. Drunk driving, by contrast, "is a crime of negligence or recklessness, rather than violence or aggression." *Id.* at 146 (quotation omitted).

The same reasoning applies with even greater force here. The common trait linking a "record" and a "document" is that both physically store information. See BLACK'S LAW DICTIONARY 587 (10th ed. 2014) (defining "document" as "[s]omething tangible on which words, symbols, or marks are recorded"); *id.* at 1465 (defining "record" as a "documentary account of past events"). Much as the words "automobile truck, automobile wagon and motor cycle" conjured up images of land-based "vehicles" in *McBoyle*, the words "record" and "document" evoke "tangible objects" used to store data—*e.g.*, a cabinet containing files or an accountant's ledger. "Tangible object," then, refers only to physical objects that, like records and documents, are used *to store information*. It includes, for example, compact discs (*United States* v. *Wortman*, 488 F.3d 752 (7th Cir. 2007)), hard drives (*United States* v. *Waterman*, — F.3d — , 2014 WL 2724131 (3d Cir. 2014)), and any other physical object that preserves information for later use.

But not fish. The terms "record" and "document" do not encompass "red grouper." The Government tacitly admits this by attempting to sever "tangible object" from the items that precede it. Yet this is precisely what *ejusdem generis* prohibits.

As in *Begay*, expanding the objects subject to § 1519 effectively transforms the crime itself. The provision forbids the knowing alteration, destruction, falsification or concealment of documents, records, and the like. Particularly in light of the history of Sarbanes-Oxley, this language points the reader to a very specific *actus reas*: shredding documents. One may also envision related bad acts having the same effect, such as falsifying government reports, hiding financial information from auditors, or smashing hard drives containing damning e-mails. But one does not—under any plausible reading of the text—picture a fisherman throwing undersized fish into the sea.[9]

No one would dispute that catch-all provisions operate to expand a statute's literal scope. But where Congress precedes such catch-all provisions with specific, enumerated examples, those examples necessarily limit such expansion. *Circuit City Stores, Inc.*, 532 U.S. at 114–15. Faithful adherence to this well-recognized canon is all the more important when ignoring it would expand a criminal statute. The Government's definition of "tangible object" strips the words "record" and "document" of their proper limiting effect on the ambit of § 1519 and opens the provision up to encompass a wide range of conduct that no ordinary reader would understand to fall within it. That definition must be rejected.

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[9] In theory, if a fish were large enough, it might amount to a "record." But even entertaining that imaginative, out-of-context reading of the statute's language, the problem with the fish tale here is that Yates is charged with destroying fish that were *too small*.

C. The history and purpose of Sarbanes-Oxley further undermine the Government's definition of "tangible object."

The legislative history and purpose of Sarbanes-Oxley point in the same direction. This Court is familiar with the Act's background: Congress passed the statute in response to "a series of celebrated accounting debacles" (*Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010)), and in particular "the collapse of Enron Corporation" (*Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1161 (2014)). "In the Enron scandal that prompted the Sarbanes-Oxley Act, contractors and subcontractors" and Enron's own "accounting firm * * * participated in Enron's fraud and its coverup." *Id.* at 1162. As investors and regulators attempted to ascertain both the extent and cause of Enron's losses, the accounting firm's partners allegedly "launched * * * a wholesale destruction of documents," shredding "tons" of documents. S. Rep. No. 107-146, at 4.

In response, Congress enacted "numerous provisions aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies," with the express "aim[] to 'prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable.'" *Lawson*, 134 S. Ct. at 1162 (quoting S. Rep. No. 107-146, at 2). These enactments included several revisions to Title 18 designed to "provide prosecutors with the tools they need to prosecute those who commit securities fraud, and make sure that victims of securities fraud" can "recoup their losses." S. Rep. No. 107-146, at 2.

Section 1519, dubbed the "anti[-]shredding provision," was designed "to clarify and 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. The provision addresses "shortcomings in current law that the Enron matter has publicly exposed." *Id.* at 6. Congress lamented that "current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected." *Id.* at 7. "Indeed," Congress noted, "even in the [then-]current [Enron] case, prosecutors [were] forced to use the 'witness tampering' statute, 18 U.S.C. 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves."[10] *Ibid.*

The legislative history leaves no room for equivocation about Congress's intent: "[I]t only takes a few seconds to warm up the shredder, but it will take years for victims to put this complex case back together again. It is time that the law is changed to provide victims the time they need to prove their cases to recoup their losses." *Id.* at 9–10. Section 1519 does just that, criminalizing the destruction of corporate records with the intent of frustrating a federal investigation.

This intent is entirely harmonious with the narrow, common-sense reading of the statutory text, discussed above. Accordingly, Yates's conviction under § 1519 cannot stand.

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[10] This Court eventually reversed the conviction resulting from this "legal fiction." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 708 (2005).

D. The rule of lenity likewise compels a narrow construction of the anti-shredding provision.

As we have shown, the "text, structure, history and purpose" of Sarbanes-Oxley leave no doubt that, when Congress enacted the anti-shredding provision, it did not have fish in mind. See *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010). If, however, some "reasonable doubt persists about the statute's intended scope" (*Moskal*, 498 U.S. at 108), the rule of lenity compels a narrowing construction in Yates's favor.

The rule of lenity functions as a tiebreaker, construing an ambiguous statute in favor of the accused and in favor of individual liberty. If traditional interpretative tools leave the Court to "simply guess" where Congress intended to draw the line between innocence and guilt (*Barber*, 560 U.S. at 488 (internal quotation marks omitted)), the "'ambiguity concerning the ambit of [the] criminal statute[] should be resolved in favor of lenity'" (*Skilling*, 561 U.S. at 410 (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000))).

The rule of lenity also acts as a rule of avoidance of constitutional difficulties. If a statute is so unclear that courts must guess as to its proscriptive reach, *a fortiori* it fails to give "fair warning * * * in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle*, 283 U.S. at 27. Thus, resolving the doubt in favor of the accused obviates the need to decide whether the statute is unconstitutionally vague.

Although the interpretive canons discussed above definitively resolve this case, at the very least they

reflect ambiguity in Yates's favor. Read in a vacuum, the term "tangible object" might suggest that Congress intended to sweep up every object "having or possessing physical form," including undersized fish. But the words "any record, document, or tangible object"—that is, the actual words of the statute—do not. See *McBoyle*, 283 U.S. at 26–27.

Moreover, the Government's reading of the anti-shredding provision creates a structural oddity within the broader context of Title 18's obstruction provisions, by giving words of a more limited nature the exact same punitive scope as words of far more general meaning. Compare 18 U.S.C. § 1519 (prohibiting the destruction of any record, document, or tangible object"), with *id.* § 2232(a) (prohibiting the destruction of "property"). And insofar as the Congress that passed Sarbanes-Oxley knew how to modify extant criminal laws (see 116 Stat. 805 (amending the mail and wire fraud statutes)), it would be truly puzzling to say that the same Congress consciously designed the anti-shredding provision to be a *de facto* replacement for the general obstruction statute. In fact, as shown above, the legislative history does not manifest such an odd intent. It shows that Congress simply aimed to "close loopholes" in the existing law that the Enron scandal "publicly exposed." S. Rep. No. 107-146, at 6, 14.

Fish and corporate documents are vastly different in character. What is more, there was no loophole to "close" for the conduct of which Yates is accused: He was successfully prosecuted under § 2232's general obstruction provision. It is thus inconceivable that ordinary people would understand, based on the passage of Sarbanes-Oxley, that they face up to 20 years

behind bars for failing to retain evidence of a small-time regulatory infraction.

In the end, this Court need not reach the rule of lenity, as doing so would require it first to find the anti-shredding provision to be "grievous[ly] ambigu[ous] or uncertain[]." *Staples* v. *United States*, 511 U.S. 600, 619, n.17 (1994) (internal quotation marks omitted). But if the rule needs to be invoked, it too warrants reversing Yates's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2014

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