No. 13-7451

IN THE
Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers, Inc. submits the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to FRAP 26.1. The following persons and entities have an interest in the outcome of this appeal in addition to those previously identified by the parties in their briefs:

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Seth J. Welner

The National Association of Criminal Defense Lawyers, Inc. is a not-for-profit corporation headquartered in Washington, DC. It has no parent corporation and no stock.

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of the Petitioner in *United States v. Yates*, on petition for writ of certiorari.[1]

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before this Court, the federal courts of appeals, and the highest courts of numerous states. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association often appears as *amicus curiae* in cases involving

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[1] Pursuant to Rule 29(c)(5), counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

over-criminalization, over-federalization, and prosecutorial abuse.

NACDL appears as a friend of the Court to provide a broader perspective of the vast implications arising from the over-criminalization, and over-federalization, of offenses more appropriately resolved as civil penalties at the state level. With its long history championing the interests of criminal defendants wrongly convicted, NACDL respectfully suggests that its views may assist the Court in this matter.

SUMMARY OF THE ARGUMENT

Before this Court is the case of a commercial fisherman and three missing grouper.[2] At the heart of the issue presented is an unconstitutional expansion of federal law, resulting in Petitioner's wrongful conviction. Petitioner's conviction is but one more example of the overcriminalization epidemic.

Overcriminalization, and the overfederalization of traditionally state offenses, places a growing burden on the administration of justice—often resulting in ludicrous federal convictions for offenses better resolved with civil penalties and that, traditionally, fall outside constitutionally anticipated federal purview. In recent years, NACDL, and others, as *amicus curiae*,

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[2] Pursuant to Rule 37, counsel for *amicus curiae* states that counsel of record was notified of NACDL's intent to file an *amicus* brief under this Rule. The Solicitor General and Petitioner's counsel have consented to this filing.

have brought the phenomena of overcriminalization and overfederalization to the attention of the federal courts. Ordinarily, overcriminalization has been used to describe laws that are drafted with vague or overbroad language—which prevents fair notice to the alleged offender—and laws lacking a specific *mens rea* requirement; that is, the lack of a guilty mind. The overcriminalization attack is commonly asserted against Congress; i.e., those who draft the laws are to blame. But overcriminalization and overfederalization can also be shown through the *executive* expansion of criminal provisions in specific laws and regulations not intended (by Congress) to be so applied. For instance, improper prosecutorial discretion can result in the expansion of federal criminal law beyond legislative predictions where so-called "process crimes" are brought against defendants rather than charges directly relating to the underlying offense. The result is an overcrminalized society by virtue of unauthorized executive expansion of the law. This is squarely demonstrated in the instant appeal.

Indeed, NACDL has long been concerned that "expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from [its] anchor." Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Found & NACDL, April 2010, at forward, VI. This sentiment was further presented to a by-partisan congressional judicial committee task force in 2013, specifically created to address the over-criminalization phenomenon. *See* Hearing Tr. Over-Criminalization Task Force of 2013, Serial No. 113-

44, at 21-22 (June 14, 2013). William Shepherd (counsel for NACDL herein) discussed the facts of this very case in response to a question from a Member of Congress, whose dismay was a prime example of how executive decisions leading to over-criminalization are an unwarranted expansion of Congress's intent. *Id.* Mr. Shepherd explained that though Mr. Yates was prosecuted under a criminal law drafted by Congress, "my guess would be that Congress had no idea that a post-Enron anti-document-shredding statute would be used to convict a man of destroying three red grouper." *Id.* at 22.

Thus, with overcriminalization and overfederalization as guideposts, NACDL urges this Court to accept jurisdiction and reverse the Petitioner's conviction for the legal insufficiencies suffered in the courts below. As a matter of law, the Petitioner could not have been adjudicated guilty under 18 U.S.C. § 1519 (2012) as the application of an anti-shredding statute to three rotten fish is an unconstitutional expansion of the law and a violation of statutory construction.

Additionally, the lower courts committed reversible error when they effectively shifted the burden of proof from the government to the Petitioner on the issue of whether the fish were undersized. This burden-shifting conduct essentially had the jury operating under the notion that, under the process crimes brought, the fish *are presumed* undersized, unless the defendant proves otherwise. This is contrary to our criminal law and particularly offensive in this case because the district court prevented the testimony of a would-be defense

expert, originally retained as a government expert, who testified the day before trial as the government's witness in a *Daubert* hearing.

ARGUMENT

I. PETITIONER'S CONVICTION UNDER 18 U.S.C. §§ 1519 AND 2232 THROUGH HIS CONDUCT ABOARD THE *MISS KATIE*, EXEMPLIFIES OVERCRIMINALIZATION STEMMING FROM AN UNCONSTITUTIONAL EXECUTIVE EXPANSION OF THE LAW.

An overly broad construction of 18 U.S.C. §§ 1519 (2012) and 2232 (2012) injures the integrity of the criminal justice system. Sections 1519 and 2232 are part of a class of "process crimes" that focus on offenses "not against a particular person or property, but against the machinery of justice itself." Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1437 (2009). In particular § 1519 provides:

> 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.

(emphasis added). Section 2232 provides:

> Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.

Allowing the federal criminal law to prosecute an individual only for conduct *relating* to an underlying offense, without thereafter proving the elements of the underlying offense, and through shifting the burden of proof, runs afoul of the criminal justice system if limitations are not in place. The overexpansion of Sections 1519 and 2232, exemplifies that risk.

A. THE OVERCRIMINALIZATION AND OVERFEDERALIZATION PHENOMENA.

Today, it is seemingly impossible to list all of the federal criminal statutes and regulations

currently in existence. Walsh & Joslyn, at 2-4, 6.[3] Indeed, the government cannot even tell its citizens how many crimes are on the federal books. *Id.* Nor can the Congressional Research Service (CRS) so inform the Chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security, because as Congressman John Sensenbrenner stated at the June 14, 2013 Hearing referenced above, "CRS's initial response to our request [for a listing of all federal crimes] was that they lack the manpower and resources to accomplish this task. . . . I think this confirms the point that all of us have been making on this issue and demonstrates the breadth of overcriminalization."

Equally alarming is a 1998 American Bar Association Task Force estimation that at least another 10,000 regulations impose criminal sanctions and are so scattered as to render meaningful categorization impossible. *Id.* That study also found more than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970. *Id.* at 7. Extrapolated, this means that the amount of federal criminal provisions enacted in the twenty-six year period between 1970 and 1996 was almost equivalent to the amount of federal criminal provisions enacted in the

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[3] In the late 1980s, the Department of Justice suggested there were more than 3,000 federal criminal laws. *See* James A. Strazzella, *The Federalization of Criminal Law*, Criminal Justice Section, American Bar Association, 1998, at 94.

preceding 106 years. Alarmingly, this trend continues.[4]

In this case, the emergence of a new form of overcriminalization is exposed—wherein the executive branch overextends process crimes to prosecute individuals that cannot be found guilty under the statutes or regulations they were initially investigated under; i.e., over/undersized fishing. In these cases, burdens of proof are shifted through artful pleading and defendants are forced into untenable positions based on underlying conduct that the government claims is irrelevant to the process crime brought to convict. Thus, with Congress overcriminalizing through the enactment of laws, which are later exacerbated through agency regulations, and the executive branch arresting and prosecuting individuals for acts not contemplated in

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[4] Ten years after the ABA Task Force report, Professor John S. Baker, Jr., while acknowledging many of the same difficulties as the ABA Task Force in trying to accurately count the total number of federal criminal laws, concluded that by the end of 2007 the United States Code contained at least 4,450 federal criminal laws. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation, Legal Memo. No. 26, June 16, 2008, at 5. Of those 4,450 federal criminal laws, approximately 452 (10%) had been added between 2000 and 2007, an average rate of 56.5 new criminal laws per year—*i.e.*, more than one per week. *Id.* at 1-2. Professor Baker commented that this rate is roughly the same rate at which Congress created new crimes in the 1980s and 1990s. So for the past twenty-five years, a period over which the growth of federal criminal law has come under increasing scrutiny, Congress has been creating over 500 new crimes per decade. *Id.*

already overly-broad process crimes, the criminal justice system is overburdened.[5]

B. EXECUTIVE EXPANSION OF 18 U.S.C. § 1519 TO INCLUDE RED GROUPER FURTHERS THE OVERCRIMINALIZATION EPIDEMIC.

If §1519 is read to encompass the destruction of fish, then the statute truly knows no bounds. It is up to the courts, as the gatekeepers, to ensure that congressional laws are not abused by the executive branch to criminalize conduct not contemplated under the applicable statute. Here, there are several fundamental concerns present in the government's approach to § 1519. First, § 1519 is a process crime. As discussed above, the government has been relying on this process crime, and similar process crimes, for retrieving convictions on individuals that would likely not be convicted under the underlying statute that was the cause of the investigation. Indeed, here,

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[5] Perhaps Justice Scalia has described the plight facing the Petitioner, and so many like him, most eloquently: "We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. 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. In the field of criminal law, at least, it is time to call a halt." *Sykes v. United State*s, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

the Petitioner was not charged with violating any statutory provision specific to fishing. Second, there is clear language in the Congressional Record that § 1519 is an "anti shredding provision" and that "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." 148 Cong. Rec. S7418-01, S7419 (2002). Third, this provision was passed after public pressure was placed on Congress to ensure that situations like Enron would not arise again in the future; it is no coincidence that the provision came into being less than a full year after Enron was exposed. And last, the government ignores the threat that such an over-expansion of the statute can have on everyday citizens living their everyday lives.

Section 1519 is inapplicable to the Petitioner because it provides criminal sanctions for persons that knowingly destroy or alter any "record, document, or tangible object" with the intent to impede a federal investigation—red grouper is not a document, record, or tangible object as envisioned in § 1519. *See* 18 U.S.C. § 1519 (2012). *Ejusdem generis*, one of the more powerful canons of statutory constructions recognized by this Court, provides where "general words follow specific words in a statutory enumeration, the general words are 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, 114-115 (2001). Where "several items in a list share an attribute," *ejusdem generis* "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511

U.S. 368, 371 (1994). Moreover, under the maxim of *noscitur a sociis*, "a word is known by the company it keeps." *Edison v. Douberly*, 604 F.3d 1307, 1309 (11th Cir 2010) (internal quotation and citation omitted). Finally, the government would have this Court believe that a fish is like a record or a document, but it ignores Congress's own admission that § 1519 is an "anti-shredding" statute designed to prevent the conduct used in the Enron investigation and like cases. The aforesaid canons of construction, when paired with Congress's unambiguous intent to create a stronger anti-document-shredding provision, expose the government's assertion that fish are among the "tangible objects" contemplated under § 1519 as nothing more than an attempt to expand the statute's reach as an unconstitutional means to overcriminalize.

If § 1519 was drafted to include red grouper, then the overbreadth of the statute alone creates an unconstitutional overcriminalization, and vagueness, concern;[6] but if the statute was not drafted to

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[6] Academics and criminal defense lawyers have identified numerous concerns about Congress's rush to criminalize. Brian W. Walsh and Benjamin P. Keane, *Overcriminalization and the Constitution*, Heritage Foundation Legal Memo. No. 64, April 13, 2011, at 2-6; Walsh & Joslyn, at 3-5. Such concerns include the following: (1) vagueness/lack of fair notice wherein the concept of fair notice is rooted in the Constitution's due-process protections, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted);[6] and (2) the lack of a *mens rea* requirement which has been a part of Anglo-American law since long before the founding of this country, and "requiring

include said fish, as the government argued below, then the prosecutorial action demonstrated through the statutes unfounded expansion itself creates the same unconstitutional issue. Thus, no matter which party is right, § 1519 unconstitutionally overcriminalizes. Finally, because the post-*Enron* enactment of Section 1519 suggests that red grouper were not among the tangible items contemplated by that anti-white collar crime effort (like disks and CDs), its expansion to grouper in this case is indicative of prosecutorial creep and unauthorized executive expansion of the law. Overcriminalization cannot be combated effectively if the executive branch expands criminal laws that are already overly broad. The courts must continue to perform their role to protect individual liberties and refuse to apply § 1519 to unspecified areas—in this case, grouper.

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the government to prove that a defendant had a guilty mind at the time she committed a guilty act 'is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' " Walsh & Joslyn, at 3 (citation omitted). Despite the recognized importance of a *mens rea* requirement, the joint Heritage Foundation and NACDL study mentioned above concluded that over 50% of proposed criminal laws in the 109th Congress were silent as to the mental state of culpability required. Walsh & Joslyn, at 11-15.

C. NO REASONABLE JURY COULD HAVE CONVICTED THE PETITIONER UNDER § 2232 BECAUSE THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROOF.

The Due Process Clause of the Fifth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970). The reasonable doubt standard protects the "fundamental value determination of our society, given voice in Justice Harlan's concurrence in *Winship,* that it is far worse to convict an innocent man than to let a guilty man go free." *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (internal citation omitted). Therefore, to find that no reasonable doubt exists, the jury must rely on substantial evidence. *United States v. Taylor*, 144 F.3d 1423, 1426-27 (11th Cir. 1998) "If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilty and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982).Though reasonable inferences can be made from the evidence, a guilty verdict cannot be supported by mere speculation. *United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994).

Petitioner's conviction was in error because the government failed to prove beyond a reasonable

doubt that the red grouper were undersized. It is undisputed that the government had the burden to prove the elements of the charged offense. To be adjudicated guilty under § 2232, the government must prove beyond a reasonable doubt the essential element that the government had "lawful authority" to seize the property in question at the time of the alleged offense. *See* 18 U.S.C. § 2232 (2012). It follows that to prove the government had "lawful authority" to seize the property, the property at issue must have been contraband. Thus, the government had the burden to prove that the grouper were undersized in order to convict the Petitioner under § 2232. Rather than present such substantial evidence, however, the government relied in its case-in-chief on the fact that the 69 red grouper ultimately seized and destroyed by the government were different from the 72 red grouper aboard the *Miss Katie* three days prior. The government claimed this amounted to "destruction" under § 2232 without regard to presenting substantial evidence that the "original" fish were indeed undersized.[7] In addition, there is no apparent distinction between 69 and 72 red groupers, in terms of culpability, under federal law. Thus, the destruction of three of these fish would have no impact on the government's ability to prosecute.

The burden shifting imposed on the Petitioner violated his due process rights and forced him into

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[7] Indeed, the only evidence so presented was that of Officer Jones's initial findings. It is undisputed, however, that Officer Jones failed to perform the measurement in accordance with federal law.

an untenable position—one in which he was required to present evidence disproving a theory that the government treated as a presumption. As a collateral consequence, the Petitioner's fishing business has been destroyed and he is sanctioned, either permanently or for a specified term, from 842 different federal and state privileges and rights by virtue of his felon status. *See* American Bar Association, *National Institute of Justice: Collateral Consequences*, available at http://www.abacollateralconsequences.org/ CollateralConsequences /QueryConsequences (last visited Feb. 3, 2014). Not only does this shock the conscience, but it demonstrates the real threat that overcriminalization has on civil liberties and the common law understanding of criminal culpability—the presence of a guilty mind.

CONCLUSION

For the foregoing reasons, *amicus curiae*, NACDL, respectfully urges this Court to accept certiorari review of the aforesaid pending matter. This Court's voice is needed as a vehicle for controlling the ever-expanding criminal law.

Respectfully submitted,

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