No. 13-7451

In The
Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

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QUESTION PRESENTED

A provision of the Sarbanes-Oxely Act, 18 U.S.C. § 1519, entitled "Destruction, alteration or falsification of records in Federal Investigations and bankruptcy," makes it a crime to "knowingly alter[], destroy[], mutilate[], conceal[], cover up, falisf[y], or make a false entry `in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter…"

The question presented is whether this provision makes it a crime to destroy a fish during the course of a National Marine Fisheries Service investigation, or whether the statute prohibits only destruction of records, documents and similar communicative materials?

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INTEREST OF AMICUS CURIAE[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files

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[1] Counsels of record have consented to the filing of this brief. The Petitioner has filed a blanket consent. And a letter evidencing Respondent's consent is filed herewith. In accordance with Rule 37.6, NFIB Legal Center states that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

amicus briefs in cases that will impact small businesses. We seek to file in this case out of concern that the United States has taken an overly aggressive interpretation of a criminal statute in a manner that broadens its scope to include conduct that Congress could not have intended when enacting the Sarbanes-Oxley Act. When read in context, *Amicus* maintains that the criminal prohibition at issue in this case should be understood as prohibiting the destruction of financial records, documents and similar files that might be incriminating in a federal investigation. Accordingly, we file here to ensure that small business owners will not be caught in a criminal net that Congress never cast. More fundamentally, we file in this case to raise small business concerns over any interpretive approach that might have the unintended consequence of radically amplifying the scope of an arcane criminal prohibition. As explained in this filing, it is already difficult enough for small business owners to understand the law without extrapolating obscure federal provisions to the limits of reason.

SUMMARY OF ARGUMENT

The NFIB Legal Center previously filed in *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), urging this Court to cabin the scope of whistle-blower protections in the Sarbanes-Oxely Act, so as to limit their reach to cover only employees of publically-traded corporations. In that case, our preferred interpretation was rejected because—in the context of the Act as a whole, and in consideration of its purposes—Justice Ginsberg, writing for the

majority, concluded that it made sense to resolve the statutory ambiguity in a manner that would apply whistle-blower protections both to the employees of publically traded companies and those contractors working with such companies.[2] The Court emphasized that this interpretive approach made sense because Sarbanes-Oxely was designed to "safeguard investors in public companies and [to] restore trust in the financial markets following the collapse of Enron Corporation…" *Id.* at 1161.

Of course, there was at least room to argue as to whether Congress could have seriously *contemplated* that Sarbanes-Oxely might govern independent businesses in that case because—as with the Enron scandal—*Lawson* dealt with fraudulent business conduct that would potentially affect investors. *Lawson*, 134 S. Ct. at 1161. By contrast, the present case asks whether Sarbanes-Oxely's criminal provisions should be construed as applying to a commercial fisherman who destroyed wildlife—*three little fish*. This is patently absurd. One might reasonably expect National Marine Fisheries Service, or Fish and Wildlife Service, regulations to address such conduct. But one would not reasonably expect an obscure criminal provision,

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[2] In *Lawson*, the dissent expressed deep concern that the Court had expanded the reach of Sarbanes-Oxley beyond what context would allow. *Lawson*, 134 S. Ct. at 1178 (J. Sotomayor dissenting) ("Congress was of course free to create this kind of sweeping regime that subjects a multitude of individuals and private businesses to litigation over fraud reports that have no connection to, or impact on, the interests of public company shareholders. But because nothing in the text, context, or purpose of the Sarbanes–Oxley Act suggests that Congress actually wanted to do so, I respectfully dissent.").

from an Act intended to address corporate governance and financial affairs, to govern handling procedures for a red grouper caught in the Gulf of Mexico.

Section 1519 of Sarbanes-Oxely, entitled "Destruction, alteration or falsification of records in Federal Investigations and bankruptcy," makes it a crime to "knowingly alter[], destroy[], mutilate[], conceal[], cover up, falisf[y], or make a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter…" Setting aside the possibility that this criminal prohibition may be limited by its contextual construction, the United States contends that the term "tangible object" should be given the most expansive definition possible. On reading Section 1519, one might reasonably think the prohibition applied only to financial records, documents and other such *files* that might be incriminating if uncovered in an investigation. Yet in the view espoused by the United States, the prohibition applies to any physical object—fish, widgets, bubble-gum, *anything*—regardless of how attenuated it may be from the sort of concerns that Congress had in mind when enacting Sarbanes-Oxely.

Amicus submits that this is a nebulous attempt to extrapolate the reach of Section 1519 beyond what Congress envisioned. Government should not be permitted to convert an ostensible financial regulation into a far-reaching prosecutorial tool, applicable in *any* federal investigation—certainly not run-of-the mill administrative

inspections. If prosecutors are permitted to take such a liberal approach to statutory construction, the citizens are right to fear that *nothing is plain*. Indeed such an approach turns the rule of lenity on its head.

For small business owners swimming in a sea of regulation, there is already a growing sense that it is impossible for reasonably prudent individuals to be sure of what the law demands—and to remain fully compliant with the estimated 300,000 regulations on the federal books. This is an especially serious concern when federal prosecutors begin ignoring context to construe a *criminal statute* more broadly than reasonable individuals would anticipate. For these reasons, the NFIB Legal Center submits that overcriminalization is a serious problem in America.

In this case the broad interpretation espoused by the United States would be especially problematic in that it would expose businesses to potential criminal prosecutions for failing to retain products, inventory or *any physical item* that might potentially be relevant in an administrative inspection of any sort. This would be most burdensome for small businesses, as they may be required to incur major expenses in warehousing such items indefinitely. And in those frequent cases where it is unclear as to whether the business has complied with federal regulations, this would force businesses to warehouse all sorts of items merely as a prophylactic measure—to avoid *risk* of prosecution under Sarbanes-Oxley. This would result in socially unconstructive ends, as it would require businesses

to expend limited resources preserving evidence of (often unwitting) regulatory violations—resources that would be better served investing in compliance programs and in growing business operations.

Such results should not be inferred lightly. *Amicus* beleive that Congress did not intend to impose such heavy-handed burdens on small business—or to hang a perpetual Damoclean Sword over an individual's head whenever there has been a potential mistake. To be sure, an Act intended to address financial fraud should not be contorted to give an open-ended prosecutorial tool for government to enforce—with an iron fist—the entire universe of administrative regulations governing economic conduct in America.

ARGUMENT

I. Overcriminalization is a Growing Problem in America

This case vividly illustrates the serious overcriminalization problem that permeates the American legal system today.[3] Here the United States has employed a technical provision in a financial disclosure statute to prosecute Petitioner, John Yates ("Yates"), for destroying evidence that he may have violated federal fishing regulations at sea. The United States advances the broadest possible

[3] *See* Greta Fails, *The Boundary between Zealous Advocacy and Obstruction of Justice after Sarbanes-Oxley*, 68 N.Y.U. Ann. Surv. Am. L. 397, 430 (2012)("[T]he implications of courts' broad interpretations of section 1519 and prosecutors' willingness to push the reach of the Sarbanes-Oxley obstruction of justice provisions . . . are worrisome.").

interpretation of Section 1519 of Sarbanes-Oxely in a manner that would convert the provision from a measure designed to prevent individuals from obstructing discovery of financial fraud into an open-ended prosecutorial tool that could be employed in the context of any conceivable federal investigation. This liberal approach to statutory construction contributes to the growing problem of overcriminalization in America.

In broad terms, "overciminalization" can be defined as the "use of the criminal law to punish conduct that traditionally would not be deemed blameworthy." Paul Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. & Pub. Pol. 716, 719 (2013).[4] The problem is plainly illustrated by the ever-growing growing breadth and scope of the federal criminal system. But if Section 1519 of Sarbanes-Oxely is interpreted as criminalizing the destruction of any conceivable tangible object that might be relevant in *any future inspection*, the universe of potential criminal conduct will expand exponentially.

A. The Ever-Expanding Universe of Criminal Liability

It is difficult to quantify the complete universe of criminal law. Whereas at common law it was relatively easy to know and avoid criminal conduct, in the 21st Century it is impossible to put a number on an exhaustive list of potential criminal acts. But

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[4] *Available* online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302913 (last visited 6/27/14).

all estimates recognize that the universe of criminal law is ever-expanding.

In 1998, the American Bar Association (ABA) reported that there were in excess of 3,300 separate federal criminal offenses. *See* American Bar Association, *The Federalization of Criminal Law*, Appendix C, 99 (1998) ("ABA Report").[5] A more recent estimate put that number at 4,450. Harvey A. Silverglate, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, 202 (Encounter Books, 2009). More than 40 percent of these laws have been enacted in the past 30 years, as part of the growth of the regulatory state. ABA Report, *supra*, at 7; Larkin, 36 Harv. J. L. & Pub. Pol. at 729 n.58. These laws are scattered throughout 50 titles of the United States Code, encompassing roughly 27,000 pages. *See* Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 46, 57 (1998).

Worse, the statutory code sections often incorporate by reference the provisions and sanctions of administrative regulations promulgated by various agencies under congressional authorization. Estimates of how many such regulations exist are even less settled, but the ABA has placed the number around 10,000. ABA Report, *supra*, at 10. Further, if regulations "enforceable in criminal prosecutions are included, the number of potentially relevant federal laws could exceed

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[5] *Available* online at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf (last visited 6/27/14).

300,000." Larkin, 36 Harv. J. L. & Pub. Pol. at 729 n.55 (citing Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L. J. 2407, 2441-42 (1995)).

Most of these 300,000 "potentially relevant" laws are "properly characterized as *malum prohibitum*—wrong because prohibited [as opposed to those prohibitions justified by the force of moral compulsion and near universal social consensus]." Julie R. O'Sullivan, *The Federal Criminal Code Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. Crim. L. & Criminology 643, 657 (2005-2006). And the bulk of those *malum prohibitum* offenses stem from "the twentieth century pursuit of 'regulatory crimes,'" such as those governing commerce, finance, the environment, and public health. Larkin, 36 Harv. J. L. & Pub. Pol. at 728. The dangers of the "shift[ ] from the *malum in se* to the *malum prohibitum* framework" are manifold:

> 'it necessarily shifts its ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books'. . . . . [As laws become] too confusing and impractical, they also become useless and unjust.[6]

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[6] Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud*," 2009-2010 Cato Sup. Ct. Rev. 201, 220 (2010) (internal citations omitted).

B. The Injustice of Overcriminalization

In an age where there are so many criminal prohibitions it is often impossible for reasonable individuals to know the law. Though the law generally presumes otherwise, the reality is that individuals are often oblivious of the criminal implications of their conduct. Indeed, while some of criminal prohibitions may be well publicized and generally known, many others remain obscure pitfalls for unwitting (often perfectly reasonable) individuals. For all of these reasons, NFIB Legal Center submits that overcriminalization is "*the most pressing problem* with the criminal law [system] today." Stephen Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, at 538. (2013) (quoting Douglas Husak, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2007)).

Moreover, many crimes are "poorly defined in ways that exacerbate their already considerable breadth and punitiveness, maximize prosecutorial power, and undermine the goal of providing fair warning of the acts that can lead to criminal liability." *Id*. at 565. Even more alarming, some statutory crimes limit, or entirely do away with, the *mens rea* requirement. *Id*. at 568-74. Others impose disproportionately severe penalties for ostensibly insignificant crimes. *Id*. at 574-76. All of this contributes to the problem of overcriminalization.

II. The Government Seeks to Convert an Ostensible Financial Regulation into a Far-Reaching Prosecutorial Tool

The Sarbanes-Oxley Act was ostensibly designed to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws…" Pub. L. No. 107–204, 116 Stat. 745 (2002). The Act on the whole was a response to the Enron debacle. *Lawson*, 134 S. Ct. at 1162. To be sure, Section 1519 was included as a direct response to conduct of the "Big Five" accounting firm Arthur Andersen, which was charged with obstruction of justice after shredding Enron documents in anticipation of a possible investigation by the U.S. Securities and Exchange Commission. Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, *18 U.S.C. S 1519*, 89 Cornell L. Rev. 1519, 1521, 48 (2004) (explaining that Section 1519 was designed to address the facts of *Arthur Andersen*, *LLP v. United States*, 544 U.S. 696, 707-08 (2005), and describing Section 1519 as an "anti-shredding provision"). For this reason Section 1519 might likewise be referred to as the "Arthur Anderson Provision."

Entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," Section 1519 states:

> 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.

But the United States seeks to apply this criminal provision far beyond the realm of financial regulation and corporate governance. In this case, the United States would apply the Arthur Anderson Provision to authorize prosecution of a man who destroyed three red groupers during the course of a National Marine Fisheries Service investigation. To justify this prosecution, the Justice Department applies the broadest conceptual construction imaginable.

Indeed, the United States seeks to apply an unbounded construction of "tangible objects." Such an approach would greatly multiply the provision's leverage. This is especially true to the extent the United States seeks a dual expansion of the "in contemplation of" clause—an approach that seemingly neuters the *mens rea* requirement.

As other commentators have noted, the Government has already greatly attenuated the "in contemplation of" standard. This has "generate[d] an entirely new area of obstruction of justice law—that of anticipatory obstruction." Kyle R. Taylor, *The Obstruction Justice Nexus Requirement After Arthur Andersen and Sarbanes-Oxley*, 93 Cornell L. Rev.

401, at 426 (2008). The reach of this new criminal prohibition threatens to be "vast." Fails, 68 N.Y.U. Ann. Surv. Am. L. at 411.

A. The Far-Reaching Implications of an Unbounded Interpretation in Future Anticipatory Obstruction Cases

1. The "In Contemplation" Language is Troublesomely Vague

Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005), provides a "roadmap for subsequent judicial interpretation of Section 1519's 'in contemplation of' language." Robert Buchholz, *When Your Best Friend Is Your Worst Enemy: How 18 U.S.C. § 1519 Transforms Internal Investigations Into State Action and Unexpected Waiver of Attorney-Client Privilege*, 46 N. Eng. L. Rev. 811, at 830 (2012).[7] In *Arthur Andersen*, this Court reversed a conviction of an in-house attorney charged with "corruptly persuad[ed]" "another person" on legal issues pertaining to an Enron earnings release. *See* O'Sullivan, 96 J. Crim. L. & Criminology at 679, 694-697 (for summary of jury finding). The *Arthur Andersen* Court held that the jury instructions failed to "convey the requisite consciousness of wrongdoing[,]" and that the prosecution was required to point to a 'nexus' between the obstructive act and the proceedings—a link that must be

[7] *Available* online at http://www.nesl.edu/userfiles/file/lawreview/Vol46/4/Buchholz%20-%20Final.pdf (last visited 6/27/14).

established to ensure a defendant has acted with the "'requisite intent to obstruct.'" *Arthur Anderson*, 545 U.S. at 707-708 (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)).[8]

In contrast to traditional obstruction of justice statutes, it is obvious that Section 1519 dilutes the nexus requirement, yet the *mens rea* requirement is not clearly specified. *See U.S. v. McRae*, 702 F.3d 806, at 837 (5th Cir. 2012) (Section 1519 suffers from "awkward wording"). Whereas previous obstruction statutes had required a clear showing that the defendant was "conscious of their wrongdoing,"[9] the Arthur Anderson Provision encompasses acts committed with knowledge as little as "in relation to or contemplation of a future proceeding," Fails, 68 N.Y.U. Ann. Surv. Am. L. at 405. This weakens the scienter and "nexus" requirements. *Id.* at 413 (Section 1519 is a "radical departure" from "the pre-Sarbanes-Oxley obstruction of justice scheme"). But, the precise degree of "prescience"[10] and culpability required is far from resolved. Robert Buchholz, *When Your Best Friend Is Your Worst Enemy: How 18 U.S.C. S 1519 Transforms Internal Investigations*

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[8] *See* Erin Murphy, *Manufacturing Crime: Process*, *Pretext*, *and Criminal Justice*, 97 Geo. L.J. 1435, 1475 n. 221 (2009), *supra*, at ("[T]he Supreme Court in *United States v. Aguilar* held that § 1503 required a nexus between the obstructive activity and the administration of justice. The Court applied the same rule again in the *Arthur Andersen* case, even though it was prosecuted under § 1512, which has less favorable language.") (internal citations omitted).

[9] *See Arthur Andersen*, 545 U.S. at 706.

[10] *See* Silverglate, supra, at 142 ("How prescient does a lawyer need to be?").

into State Action and Unexpected Waiver of Attorney-Client Privilege, 46 New Eng. L. Rev. 811, 824-25 (2012) (noting "there is no consensus regarding how § 1519's "in contemplation" language should be interpreted."); Fails, 68 N.Y.U. Ann. Surv. Am. L. at 410-11 (observing that "[s]ome courts have firmly read an Arthur Andersen 'corruptly' requirement into the 'knowingly' language of section 1519, requiring knowledge of conscious wrongdoing as opposed to the mere honest intent to impede a proceeding[,] [while] [m]any courts … have neglected to fully flesh out the requirement, simply stating that section 1519 requires intent to obstruct."); *see also* Silverglate, *supra*, at 163 (surmising that "anything that the lawyer does that makes the prosecutor's job harder is seen as a crime").

2. The "In Contemplation" Language has Been Applied to Prosecute for Destruction of Files Where Defendant Lacked Specific Knowledge of an Existing Investigation

United States v. Russell illustrates that federal prosecutors have—and likely will continue—to take an aggressive interpretation of Section 1519's *mens rea* requirement. 639 F. Supp. 2d 226 (D. Conn. 2007). In that case, defendant Russell, a respected attorney for a small local church, destroyed a laptop containing child pornography, which had been used by a choirmaster. *Russell*, 639 F. Supp. 2d at 230; *see also* Fails, 68 N.Y.U. Ann. Surv. Am. L. at 423 n.123,

429. Russell received the laptop from a church employee who discovered the illicit material.

Given that mere possession of a computer containing child pornography constitutes a crime, Russell faced a Hobson's choice: either risk potential prosecution for possessing the computer,[11] or hand the computer over to the government—a choice that he believed would violate the attorney-client privilege. Silverglate, *supra*, at 160.[12] Faced with that intractable dilemma, Russell destroyed the computer. He did so without knowledge that the authorities had already initiated an investigation into the matter. Fails, 68 N.Y.U. Ann. Surv. Am. L. at 423 n.123.

When it was discovered that Russell had destroyed the computer, he was indicted for anticipatory obstruction under the Arthur Andersen provision on the theory that the computer was destroyed in anticipation that an investigation might—at some point—take place. The prosecutor in that case argued that Section 1519 "does not require corrupt intent…" Silverglate, *supra*, at 164. If federal prosecutors continue to hold this line—

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[11] The government acknowledged that possession of the laptop was illegal. *See* Silverglate, *supra*, at 164; 18 U.S.C. § 2252 (2006).

[12] Another obstruction provision, 18 U.S.C. § 1512(c)(1), may create a similar quandary for defendants in drug cases. *See* Sarah O'Rourke Schrup, *Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. § 1512(C)(1)*, 102 J. Crim. L. & Criminology 25, at 56 (2013) ("For example, if the statute is extended to drug arrests, defendants will be required to continue possessing contraband in violation of federal law instead of lawfully destroying it, to act criminally rather than lawfully abandon a prior illegal pursuit").

prosecuting individuals for destroying "tangible objects" that might be relevant to future investigations—there will be major ramifications for the business community.[13] And as detailed *infra*, those ramifications will be much greater if the term "tangible object" is given an unbounded interpretation to include any physical evidence of a regulatory violation.

3. An Unbounded Interpretation of "Tangible Object," Will Impose Burdensome and Indefinite Retention Requirements on Businesses

Should this Court interpret "tangible object[s]" in Section 1519 to encompass the entire universe of physical objects that might be *potentially relevant in future investigations*, businesses will face a Hobson's choice anytime they become aware of a *potential* regulatory violation. The business must either: (a) retain all potentially relevant physical evidence, and risk an enforcement action if the evidence is ever discovered; or (b) discard the evidence in the course of usual business, therein risking potential prosecution under the Arthur Andersen provision. They face the ire of an enforcement action or criminal prosecution no matter how they should proceed.

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[13] *See United States v. Gray*, 642 F.3d 371, 378 (2d Cir. 2011) (explicitly rejecting the District Court's conclusion in *Russell* that there must be a "nexus between a defendant's conduct and an official [investigative] proceeding").

The first choice is severely burdensome because the business must find somewhere to safely store whatever items are in question *for an indefinite period* into the future. And even this risks potential criminal liability if a decision to store those items might be viewed as an attempt to conceal. Further, the decision to indefinitely retain such items is unpalatable because the business must operate under the specter that Damaclian's Sword might fall, at any moment, in the course of an administrative inspection. Yet the business must live with the threat of an ever impending civil enforcement action, or risk far worse criminal penalties for anticipatory obstruction.

The magnitude of the burden imposed on business should not be underestimated. Given that there are an estimated 300,000 federal regulations on the books, it is not uncommon for businesses to unwittingly violate a regulation, or to be unsure as to whether they have—or have not—been fully compliant with every rule. In such cases, businesses would be forced to play a guessing game as to whether they will risk prosecution if they should dispose of products, inventory or other non-communicative materials. Rather than playing Arthur Anderson Roulette, many businesses will feel compelled to incur costs and inefficiencies in maintaining such items into the indefinite future as a prophylactic matter. This would be the only way to avoid an *accusation* that the items were destroyed or removed in order to obstruct an anticipated future investigation. Thus, in an ever-expanding universe of federal regulation, the Government's unbounded interpretation would—without exaggeration—

greatly contribute to the problem of overcriminalization. Fails, 68 N.Y.U. Ann. Surv. Am. L. at 421 (concluding that nexus and scienter requirements should be implied to the Arthur Andersen provision).

B. An Unbounded Interpretation of "Tangible Object" Invites Pretextual Prosecutions

The Justice Department has an unfortunate history of employing Section 1519, and other obstruction statutes, to advance pretextual and other secondary goals. Like other process crimes, Section 1519 is "readily amenable" to pretextual prosecutions because it is "easy to prove and hard to defend," and "carr[ies] significant penalties." *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L. J. 1435, 1443-1445, 1472, 1475 (2009). Indeed, the Arthur Andersen Provision offers a "veneer of legitimacy…" for a criminal prosecution advanced for secondary goals. And when employing an unbounded interpretation of "tangible objects," the Justice Department has even greater leverage.

Pretextual enforcement may be said to occur where there is a "primary basis" for targeting an individual and a "secondary basis" for bringing the prosecution. *See* Murphy, 97 Geo. L. J. 1435 at 1442. In *Arthur Andersen*, for example, the Justice Department charged the accounting firm with obstruction, while the underlying purpose of the suit was to "eliminate [Andersen] as a credible source of testimonial support for the defense of Enron or any

of its indicted officers." Silverglate, *supra*, at 133.[14] Similarly, in *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011), the government indicted an in-house GlaxoSmithKline attorney under Section 1519 for allegedly obstructing a Food and Drug Administration investigation. The attorney was eventually acquitted after a dismissal and re-indictment.[15] But, commentators posit that the case was never really about obstruction of justice—in actuality the case was brought "as 'part of the governments long-promised crackdown on individual executives for their roles in pharmaceutical company cases' and because of the 'mounting complaints from consumer groups and Congress that companies are paying nine-figure fines as a cost of doing business while executives are almost never held accountable.'" Fails, 68 N.Y.U. Ann. Surv. Am. L. at 416.

The GlaxoSmithKline attorney in *Stevens* was eventually vindicated, as the trial court noted that he "should never have been prosecuted." *Id*. at 417.[16] But the case serves as an example of a troubling trend. And *Amicus* is concerned that—if the Court should expand the scope of Section 1519 to cover the entire universe of physical objects that may be relevant in a future investigation—prosecutors will

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[14] *See* Harry Litman, *Pretextual Prosecution*, 92 Geo. L. J. 1135, at 1152 (2004) (discussing "cooperation cases" where charges are brought "to induce the defendant to cooperate in the investigation or prosecution of another person").

[15] S*ee* Fails, *supra*, at 417 n.88-94.

[16] As in *Arthur Andersen*, Stevens's prosecution was "a ploy to encourage GlaxoSmithKline to settle with the FDA." *Id*. at 429.

have tremendous leeway to bring enforcement actions for ostensibly legitimate, but potentially inappropriate, reasons. This further contributes to the problem of overcriminalization.

C. The Mere Threat of Prosecution Under the Arthur Anderson Provision Can be Devastating for a Small Business

An obstruction indictment, by itself, has severe consequences. The *Russell* prosecution is said to have "bordered on terror,"[17] while *Arthur Andersen* was noteworthy for its "*in terrorem* effect." Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, at 330 (2007). Faced with severe criminal penalties for his alleged violation of Section 1519, *Russell* was induced to plea to a crime for which he served six months' home confinement—a potentially "career-wrecking" result for a man who acted without any express knowledge that the government was actively investigating the choirmaster. Silverglate, *supra*, at 160, 163.

An obstruction indictment is enough to call into question the future—and certainly the reputation—of any company. By the time Arthur Andersen achieved its victory before this Court in 2005, it had no future and 28,000 of its employees had no jobs. *Id*. at 133. As one commentator explained:

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[17] Silverglate, *supra*, at 162.

> [T]o Andersen, the court's ruling doesn't matter, the original trial at which it was convicted didn't matter and the verdict at any coming trial won't matter. Andersen was destroyed when it was indicted. No exoneration at trial and no ruling by the Supreme Court will cause it to rise, Lazarus-like, from the dead.[18]

Of course if an obstruction indictment is enough to sink one of the Big Five accounting firms, it is unquestionably enough destroy smaller firms. One must remember that small businesses generally lack tremendous capital assets. For this reason they are more vulnerable when faced with a legal challenge—whether a frivolous lawsuit or a pretextual indictment. But unlike a civil lawsuit, which can just as well destroy a business, a federal indictment tarnishes the business's reputation with stigma of criminality.

III. Congress Could Not Have Intended to Require Businesses to Incur Costs for Retention of Products, Inventory and Other Non-Communicative Items

The Sarbanes-Oxley Act costs the nation's businesses a measurable percentage of the United States gross domestic product every year. Much of that cost includes the expense of implementing and maintaining compliant document retention and

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[18] Joseph A. Grundfest, Over Before It Started, N.Y. Times, A23 (June 14, 2005), *available* at http://www.nytimes.com/2005/06/14/opinion/14grundfest.html?_r=0 (last viewed 6/30/14).

destruction programs. And should this Court endorse the Government's unbounded interpretation of the Arthur Andersen Provision—treating any and all physical matter as equivalent to documents or records—the result will significantly increase, perhaps grossly multiply, compliance costs.

A. Sarbanes-Oxley Compliance Costs are Already Staggering When Understood Only as Requiring Document Retention Programs

The Sarbanes-Oxley Act sought 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." Stanley S. Arkin & Charles Sullivan, *Document Destruction Under Sarbanes-Oxley*, New York Law Journal, 1 (Sept. 15, 2003) (quoting 148 Cong. Rec. S7419 (July 26, 2000) (statement of Sen Leahy).[19] The Arthur Andersen Provision has thus been understood as making it a crime to destroy records, documents and other such files in anticipation of a potential future federal investigation. But, for the very reasons discussed above, this has resulted in "increased uncertainty, legal jeopardy, and grossly increased cost for the business community."[20] *Id.*, at 1.

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[19] *Available* online at http://www.arkin-law.com/wp-content/uploads/Document-Destruction-under-Sarbanes-Oxley.pdf (last visited 6/30/14).

[20] "In the absence of a thoughtful document retention and destruction policy, most businesses of any size will soon be overrun with the detritus of their own information." Arkin, *supra*, at 7.

One study put the five-year overall cost of Sarbanes-Oxley at $1.4 trillion.[21] Ivy Xiying Zhang, Economic Consequences of the Sarbanes-Oxley Act of 2002, 44 J. Acct. & Econ. 74 (2007). Document retention costs were only part of the overall compliance costs—but likely represented a significant percentage of the total figure. These costs are disproportionately burdensome for small businesses because they usually lack in-house compliance officers. *See* Oleg Rezzy, *Sarbanes-Oxley: Progressive Punishment for Regressive Victimization*, 44 Hous. L. Rev. 95, 117 (2007).

B. An Unbounded Interpretation of "Tangible Object" Would Radically Increase Retention Costs for Business

In light of the aggressive posture the Justice Department has taken in prosecuting anticipatory obstruction cases under the Arthur Andersen Provision, *Amicus* is concerned that an unbounded interpretation of "tangible object" will require businesses to consider retaining any physical matter relevant to a current or contemplated federal investigation of any kind. Every manufacturer, wholesaler, retailer, rancher, and farmer—whose wares, output, livestock, or grain is subject to federal inspection must consider warehousing any and all non-compliant products, along with the means of

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[21] Milton Friedman said that the Sarbanes-Oxley Act was the greatest problem facing the United States economy. Josh Gersten, *Friedman, 93, Set to Unleash Power of Choice*, New York Sun (Mar. 22, 2006), *available* online at http://www.nysun.com/national/friedman-93-set-to-unleash-power-of-choice/29551/ (last visited 6/30/14).

producing those items, or face possible felony prosecution. This will result in tremendous new costs, which may not be easily absorbed by smaller firms.

The point is well illustrated in consideration of *United States v. Alexander Wolff*, 08-CR-00417 (Aug. 31, 2010)(St. Eve, J.)("*Wolff Indictment*").[22] In that case federal prosecutors indicted employees of a food conglomerate company for allegedly conspiring to anticipatorily obstruct investigations by the Department of Commerce into "transship[ments]," of Chinese honey through other countries to avoid payment of heavy "antidumping" duties.[23] *Id.*, at ¶ 33. Specifically the Department of Justice alleged that the defendants manipulated or falsified records in anticipation of a prosecution—an act that is unambiguously prohibited by the Arthur Andersen Provision. But, under the Government's unbounded interpretation of the term "tangible objects" in the present case, it would follow that the company might also have faced criminal liability for mishandling the honey—which was itself physical evidence of a potential regulatory violation.

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[22] *Available* at http://www.justice.gov/usao/iln/pr/chicago/2010/pr0901_01a.pdf (last visited 06/27/14).

[23] Honey import duties vary substantially. In 2001, the Department of Commerce determined that Chinese-origin honey was being sold into the United States at artificially low prices, and imposed "antidumping" duties that have exceeded 220 percent. *Wolff Indictment*, *supra*, at par. 29. In contrast, honey imported from Russia, India, and South Korea faces no antidumping duties. *Id.*

In the *Wolff Indictment*, the company was accused of filtering Chinese-origin honey in order to remove evidence "that the honey originated in China." *Id*. at ¶ 50. Under the theory advanced here, the government might just as well have alleged that the honey was a "tangible object" that the defendants "knowingly" "alter[ed]"" from an unfiltered or unadulterated state with the intent to impede a Department of Commerce investigation. But, if filtered or adulterated honey—like an undersized fish—is a "tangible object" for the purposes of Section 1519, then the company might just as well have faced prosecution for anticipatory obstruction in taking other actions that might otherwise make the noncompliant product unavailable to the government (*e.g.*, selling the product or disposing of it). This could have profound implications for all levels of commerce.

Wolff suggests that any company importing products or commodities from abroad must set aside those shipments for an indefinite period if there is any concern that there may have been a violation of federal regulation or treaty. The implication is that food processing companies must warehouse their entire production of any product if there is a chance of an FDA investigation. For that matter, a business might face criminal prosecution for obstructing a potential Federal Trade Commission investigation if the company should dispose of a product after realizing that it may have errantly labeled the product as "Made in America." Or a farmer might face prosecution for getting rid of fertilizer that he suspects is no longer compliant with current regulations.

It is hard to imagine any enterprise dealing with "tangible objects" that would be immune from such concerns. Even remedial measures might expose businesses to prosecution under Section 1519. For example, a contractor might be prosecuted for anticipatory obstruction if he or she should remove gravel that was originally placed on a portion of land that might potentially be viewed as a wetland—as this may be said to obstruct anticipated investigations from the Environmental Protection Agency or the Army Corps of Engineers.[24] Likewise, a construction company might face criminal prosecution if it should replace non-compliant safety equipment because aggressive prosecutors might view this as potentially impeding the Occupational Safety and Health Administration from discovering the violation.

Because strict criminal liability may apply to "contemplated" investigations, as in *Russell*, it is possible that many businesses will choose to "over-retain." Especially when dealing with large quantities of a noncompliant product, the costs of retention will be staggering. That would be all the more true if Section 1519 is understood as imposing criminal liability on anyone disposing of any physical

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[24] Like the attorney in *Russell*, an individual in this situation would be caught in a catch-22. If the contractor leaves the gravel in place, he or she risks ruinous civil penalties for violating the Clean Water Act (CWA)—penalties that *accrue daily* at $37,500. *See Sackett v. E.P.A.*, 132 S. Ct. 1367, 1370 (2012). But if the contractor removes the gravel there is a possibility prosecutors might allege that he or she has removed "tangible objects" with intent to obstruct a future investigation into the potential CWA violation.

evidence that might be relevant in any future inspection.

C. Congress Should Not be Presumed to Have Imposed Such Heavy-Handed Burdens on Business

This Court's recent decision in *Utility Air Regulatory Group v. Environmental Protection Agency* emphasized a salient point: context matters when deciphering the meaning of a statutory provision. In *Utility Air Regulatory Group* the Court held that—despite the fact that the law may assume a general definition, or an "act-wide" definition in the case of the Clean Air Act—it may be appropriate to infer a more narrow definition in the context of a specific provision. 12-1146, 2014 WL 2807314 (U.S. June 23, 2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (referring to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). This is all the more true where the more general definition would lead to absurd results, or where it would transform the provision so as to allow government to reach conduct that Congress did not seemingly intend. *Utility Air Regulatory Group*, 12-1146, 2014 WL 2807314. In the criminal context, this approach to statutory construction is consistent with rule of lenity, which holds that courts should construe criminal statutes narrowly on the assumption that Congress would speak more clearly if it intended to cast a broader net. *United States v. Santos*, 553 U.S. 507, 514

(2008); *see also United States v. Bass*, 404 U.S. 336, 347-349 (1971).

In this case it should not be assumed that Congress intended to impose burdensome retention requirements on business for the entire universe of physical things that might be viewed as relevant evidence in all future regulatory investigations. As this Court made clear in *Lawson*, Sarbanes-Oxley was enacted to address financial fraud. *Lawson*, 134 S. Ct. at 1161. It should not be converted into an open-ended prosecutorial tool to enforce the entire universe of federal regulation.

CONCLUSION

For the foregoing reasons, this Court should reverse the Eleventh Circuit and hold that Section 1519 of the Sarbanes-Oxley Act is limited by its contextual construction to require retention of only records, documents and similar files.

Respectfully submitted,

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