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

REPLY BRIEF OF PETITIONER

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ARGUMENT

THE ORDINARY OR NATURAL MEANING OF "TANGIBLE OBJECT," IN THE CONTEXT OF 18 U.S.C. § 1519, IS A THING USED TO PRESERVE INFORMATION, SUCH AS A COMPUTER, SERVER, OR SIMILAR STORAGE DEVICE.

Context is the key to the meaning of the undefined statutory phrase "tangible object" as it is used in 18 U.S.C. § 1519, commonly known as the anti-shredding provision of the Sarbanes-Oxley Act of 2002. Section 1519 was enacted in response to the Enron document-shredding scandal, which included destroying paper records, computer drives, and email systems. In Section 1519, "tangible object" is listed with "record" and "document," immediately following the verb phrases "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." In this context, "tangible object" naturally means a thing used to preserve information, such as a computer, server, or similar storage device. *See* Pet. Br. 10-22.

In urging the Court to reject this contextual meaning, the government claims that the dictionary definitions of the words "tangible" and "object" reflect the plain meaning of the phrase "tangible object." *See* Resp. Br. 10, 15. The government, however, implicitly recognizes that the phrase "tangible object" has different meanings in different contexts. For example, the government repeatedly proposes construing "tangible object" as "all physical evidence," despite the absence of "evidence" in the dictionary definitions of "tangible" and "object." *See* Resp. Br. 11, 14, 17.

Moreover, the government's proposed constructions are not based on the actual context in which "tangible object" is used. Rather, the government seeks to import the term "evidence" into the meaning of "tangible object" here based on different language that appears in different provisions in different contexts. *See* Resp. Br. 16-29. The specific context in which "tangible object" appears, however, makes Section 1519 unique among those provisions. The different language demonstrates that for purposes of Section 1519, "tangible object" has a different meaning than the terms in those provisions.

Regarding the statutory context in which Section 1519 is placed, the government asserts that construing "'tangible object' to encompass all physical evidence" comports with the general structure and purpose of Section 1519 and Chapter 73 of Title 18 of the United States Code, entitled "Obstruction of Justice." Resp. Br. 17. That assertion, however, does not comport with the specific purpose of Section 1519, or with its specific placement in Chapter 73 and in the Sarbanes-Oxley Act. The actual structure, placement, and purpose of Section 1519 support reading "tangible object" as a thing used to preserve information, such as a computer, server, or similar storage device. This reading fits within the framework of both Chapter 73 and the Sarbanes-Oxley Act.

The government also attempts to bolster its construction of "tangible object" by citing to isolated portions of the legislative history of Section 1519. *See* Resp. Br. 29-35. When viewed in context, however, the legislative history as a whole, including the

origins of Section 1519 in the wake of the Enron document-shredding scandal, reinforces reading "tangible object" in Section 1519 as meaning a thing used to preserve information, akin to a computer, server, or similar storage device.

The overarching flaw in the government's position is that it misconstrues the fundamental principle of statutory construction that the meaning of a statutory phrase "must be drawn from the context *in which it is used*." *Deal v. United States*, 508 U.S. 129, 132 (1993) (emphasis added); *see also* Pet. Br. 15. This Court's principles of statutory construction support the contextual meaning of "tangible object" as a thing that is used to preserve information, such as a computer, server, or similar storage device. A fish is not such a thing. Mr. Yates therefore asks the Court to reverse the decision of the court below.

A. The ordinary or natural meaning of "tangible object" necessarily depends on its context.

The government asserts that the phrase "tangible object" "ordinarily means the same thing" as the dictionary definitions of "tangible" and "object"–that is, "any discrete item or thing that is capable of being touched or otherwise perceived by the senses." Resp. Br. 36; *see also* Resp. Br. 15-16. Yet despite this assertion, the government proposes several constructions of "tangible object" that are not found in the dictionary.[1] More importantly, none of the

[1] The government's brief repeatedly asserts that "tangible object" means all types of "physical evidence." *See, e.g.*, Resp. Br. 10-11, 13-14, 17, 19, 30, 32-33. It also characterizes "tangible object" as: all "physical items," Resp. Br. 14-16, 28; "a physical

government's proposed constructions reflect the context of Section 1519.

Moreover, the government does not dispute that the ordinary meaning of "tangible object" may include a particular category of things in one context (e.g., Apple products in connection with what Apple sells), and a different category of things in another context (e.g., automobile products in connection with what General Motors sells). *See* Pet. Br. 13-14; Resp. Br. 36 n.16. Indeed, the government concedes that "Petitioner may be right (Br. 14) that a person who says 'Apple sells tangible objects' is probably referring to electronic devices." Resp. Br. 36 n.16.

The government attempts to explain away its concession by asserting that it "is only because those are the tangible objects for which Apple is best known—not because there is some specialized understanding of that term that applies *only* to such devices." Resp. Br. 36 n.16. That assertion, however, proves the point that in everyday, ordinary usage, the phrase "tangible object" is ordinarily understood to refer to a *particular* category of things, depending on the particular context in which the phrase is used.[2]

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item with evidentiary significance," Resp. Br. 14; and "any physical object," Resp. Br. 25.

[2] *See Federal Aviation Administration v. Cooper*, 132 S. Ct. 1441, 1450 (2012); *Caraco Pharmaceutical Labs, Ltd. v. Nordisk A/S*, 132 S. Ct. 1670, 1681 (2012); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

B. In the specific context of its surrounding terms, "tangible object" means a thing used to preserve information, like a computer, server, or similar storage device.

In the specific context of Section 1519, "tangible object" is enumerated in a list of three nouns–"record, document, or tangible object"–and is preceded by a list of verb phrases–"alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." 18 U.S.C. § 1519. These surrounding nouns and verbs support Mr. Yates's argument that "tangible object," as used in Section 1519, is naturally understood as referring to physical things akin to a record or document–that is, things that preserve information, like a computer, server, or similar storage device, which can be altered, destroyed, mutilated, concealed, covered up, falsified, or in which a false entry can be made. *See* Pet. Br. 17-19.

Rather than reading "tangible object" in the context in which it is used, the government dismisses the relevance of the surrounding words in Section 1519 based on its insistence that dictionary definitions establish the ordinary meaning of "tangible object." *See* Resp. Br. 37-38. But as noted above, the government's argument is inherently contradictory, given that the government proposes a construction of the phrase that is not found in the dictionary. *See supra* page 3 and note 1.

This Court's precedent also refutes the government's claim that because the meaning of the phrase "contains little ambiguity," the surrounding words are irrelevant. Resp. Br. 38 (internal quotation

marks omitted). The specific context in which a phrase is used must be considered when determining whether the phrase is plain or ambiguous. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). The government's claim that the meaning of "tangible object" is unambiguous ignores its surrounding context in Section 1519 and therefore must be rejected.[3]

The government's reluctance to consider the surrounding terms and apply the contextual canons is understandable given that those terms and canons negate its claim that "tangible object" means "evidence." Significantly, the government does not dispute that in Section 1519, "tangible object" is "a general term at the end of a list of more specific references," i.e., "record" and "document." Resp. Br. 40 n.18. Nor does the government deny that the "*ejusdem generis* canon counsels that, where general words follow an enumeration of specific terms, the general words may be read to embrace only other items similar to those expressly enumerated." Resp. Br. 37. Further, the government concedes that "petitioner is correct (Br. 18) that records and documents are both means of 'preserving information.'" Resp. Br. 39. It follows from the

[3] The modifier "any," *see* Resp. 15-16, adds nothing to the analysis because the meaning of "tangible object" must first be established. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012).

contextual canons that "tangible object" shares this common meaning regarding preserving information.

The government attempts to rebut this logical conclusion based on a *presumption* that–"[t]he destruction of an information-storage device *presumably* entails the destruction of the records or documents it contains" thereby rendering the phrase "tangible object" superfluous. Resp. Br. 38 (emphasis added). That presumption, however, is unfounded. For example, a person could destroy a blank hard drive, mistakenly believing it contains incriminating information. That person would fall within the scope of Section 1519, even though no record or document was destroyed.

The government also attempts to avoid the specific common attribute that records and documents share–preserving information–by positing another common attribute of records and documents–providing information. Resp. Br. 39. But that attribute is generally applicable to anything because everything provides some kind of information. Had Congress intended to target anything and everything, there would be no reason to list records and documents.

The government concedes that its construction of "tangible object" would render "record" and "document" superfluous. Resp. Br. 40 n.18. Words in a statute should not be so readily discarded, especially where, as here, there is a viable alternative interpretation that maintains meaning for every word of the statute. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137,145 (1995).

Expanding the scope of the contextual inquiry to the surrounding verbs–in particular, "makes a false entry in"–further supports construing "tangible object" in Section 1519 as a thing used to preserve information, such as a computer, server, or similar storage device. Congress's use of that verb phrase makes sense if "tangible object" is read as a device for storing information, akin to records and documents. But the verb phrase cannot be reconciled with the government's construction of "tangible object" as any type of physical evidence, including a fish. *See* Pet. Br. 17.

Rather than attempting to reconcile its construction of "tangible object" with the verb phrases in Section 1519, the government points to 18 U.S.C. § 1505 as its single example of a statute in which a verb phrase does not apply to a noun. *See* Resp. Br. 42. The government argues that because all of Section 1505's verb phrases–"conceals, covers up, destroys, mutilates, alters"–do not apply to "oral testimony," Section 1519's verb phrase "makes a false entry in" need not apply to "tangible object." *See* Resp. Br. 42-43 (internal quotation marks omitted).

Unlike Section 1519, however, the awkward syntax of Section 1505 was not part of the original statute. Rather, the oral testimony language was added in an amendment years after Section 1505 was originally drafted. *See* Resp. Br. 42-43 (citing Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1384, 1389). It makes sense, then, that some of Section 1505's verbs might not apply to the later-added oral testimony language.

The verb phrases in Section 1519, however, were drafted simultaneously with the nouns. It makes little sense to conclude that Congress simultaneously wrote specific nouns and verbs into Section 1519, but did not intend for those nouns and verbs to apply together.

Furthermore, Section 1519 is the sole provision in Chapter 73 that includes the verb phrases "covers up, falsifies, or makes a false entry in." *See* 18 U.S.C. § 1501, *et seq*. In fact, the verb phrase "makes a false entry in" is only found in record-keeping statutes.[4] Congress's decision to include that verb phrase in Section 1519–and its decision to exclude it in other parts of Chapter 73 and the Sarbanes-Oxley Act–reflects a deliberate choice to liken Section 1519's scope to the record-keeping context. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

The government nonetheless argues that the proper grammatical reading of Section 1519 "leads to the untenable conclusion that most *documents* are also outside of Section 1519's scope," because "[o]ne does not make 'entr[ies]' in many types of documents that are relevant even in white-collar fraud cases–for example, letters, emails, and contracts." Resp. Br. 43. That assertion is meritless. Entries can be made in letters, emails, and contracts.[5]

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[4] *See, e.g.*, 15 U.S.C. § 78jjj; 18 U.S.C. § 152; 18 U.S.C. § 1712; 29 U.S.C. § 439; 49 U.S.C. § 522; 49 U.S.C. § 11903; 49 U.S.C. § 16102; 49 U.S.C. § 21311.

[5] Likewise, if a person installs a program on a computer so that the computer produces false data, it would be perfectly natural to speak of that person as having falsified a computer or hard drive. *See* Resp. Br. 43 n.19.

Moreover, other record-keeping statutes use the verb phrase "makes a false entry in" with reference to documents. *See, e.g.*, 15 U.S.C. § 78jjj ("makes a false entry in, or otherwise falsifies any document affecting or relating to the property or affairs of a debtor"); 18 U.S.C. § 152 ("makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor").

The government cannot point to a single substantive criminal statute–federal or state–that uses the phrase "tangible object" in a similar context as Section 1519, i.e., where the phrase "tangible object" is preceded by the nouns "record" and "document," and is governed by the verb phrases "covers up, falsifies, or makes a false entry in." The government thus attempts to draw a parallel between Section 1519's language–"record, document, or tangible object"–and "other provisions using virtually identical" or "materially indistinguishable" language. Resp. Br. 19, 25.[6] But when that language is viewed in context, it is clear that the government's repeated references to "virtually identical" language are just nuanced ways of saying "different" language.

[6] *But see* Pet. Br. 22; U.S. Sentencing Guidelines Manual § 2J1.2 cmt. n.1 (2003) (providing an illustrative list of "records, documents, or tangible objects" as things "that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices"); *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012).

1. The government's reliance on discovery provisions is misplaced.

The government argues that a broad construction of "tangible object" for purposes of Section 1519 would be consistent with the broad construction given the phrases "tangible object" and "tangible thing" in various provisions relating to discovery. Resp. Br. 16-17. Again, the government's argument lacks the critical component of context. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006) (distinguishing between the use of the same word in the venue context and the subject-matter-jurisdiction context).

In the context of the discovery rules, "tangible object" is enumerated in a broad list of other physical items. *See* Resp. Br. 16 nn.3, 4.[7] "When an enumerated list of items spans everything from books and buildings to papers and places, it is clear that the statute encompasses any potential evidence that might be relevant to the government's case against a defendant or relevant to a defense." Cato Amicus Br. 13. Clearly, the list of items that includes "tangible object" in Section 1519 is not as expansive as the lists in the discovery provisions. On the contrary, in Section 1519, "tangible object" is listed only with "record" and "document."

[7] All of the statutes and rules referenced in footnotes three and four of the government's brief are discovery provisions.

2. The Model Penal Code and the Brown Commission Report are inapposite.

Notwithstanding the very clear historical backdrop of the Sarbanes-Oxley Act, the government makes the astonishing claim that Section 1519's origins stem from "a decades-long effort to expressly prohibit the destruction of physical evidence with obstructive intent." Resp. Br. 19. The government, however, can point to nothing to support this claim. Indeed, the legislative history of the Sarbanes-Oxley Act of 2002 is devoid of any reference to the numerous failed reform proposals from the 1970s and 1980s that "would have criminalized" tampering with physical evidence, such as the Model Penal Code (MPC) § 241.7 or *Final Report of the National Commission on Reform of Federal Criminal Laws* (1971) (Brown Commission Report) Section 1323. Resp. Br. 23.

The lack of any connection between Section 1519 and the MPC and Brown Commission Report is highlighted by the different language and different penalties in those provisions. Unlike Section 1519, the MPC and the Brown Commission Report do not use the phrase "tangible object" or "makes a false entry in." And unlike the MPC and the Brown Commission Report, Section 1519 does not require a connection to an official proceeding.

Moreover, unlike the twenty-year felony prohibited in Section 1519, the offenses in the MPC and the Brown Commission Report are misdemeanors that were never enacted into law. *See Johnson v. United States*, 559 U.S. 133, 141 (2010)

("It is significant, moreover, that the meaning of 'physical force' the Government would seek to import into this definition of 'violent felony' is a meaning derived from a common-law misdemeanor.").

In short, the government's rather lengthy discussion of those provisions is inapposite as to the meaning of "tangible object" here.[8]

3. Section 1512(b) and Section 1519 target different conduct.

Context is also absent from the government's efforts to bind the phrase "any record, document, or tangible object" in Section 1519 to the "virtually identical references to 'record, document, or other object'" in Section 1512(b). *See* Resp. Br. 28. As Representative Oxley explains, although Congress used Section 1512(b)(2)(B) as the *starting point* in drafting the anti-shredding provision, Congress made "five key modifications" to the text of Section 1519. *See* Oxley Amicus Br. 11. Not only did Congress use the phrase "tangible object" in Section 1519 instead of Section 1512(b)'s phrase "other object," it also deviated from Section 1512(b) by expanding Section 1519's temporal scope; by substituting "any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11" for "official proceeding"; by adding the terms "covers up, falsifies, or makes a false entry in" to the list of verbs found in Section 1512(b)(2)(B); and by imposing liability on the person who actually shreds the documents. *Id.* 11-14 These strong textual *differences*

[8] The state provisions, *see* Resp. Br. 21 n.6, also use different language and are inapposite.

between Section 1519 and Section 1512(b)(2)(B) show that the two statutes criminalize different subject matter.

C. The broader statutory context in which "tangible object" is placed confirms the phrase's meaning as a thing used to preserve information, akin to a computer, server, or similar storage device.

Reading "tangible object" in the context of its placement in the Sarbanes-Oxley Act and the "obstruction-of-justice" chapter of Title 18, Chapter 73, reinforces the conclusion that the phrase means a thing used to preserve information, like a computer, server, or similar storage device. *See* Pet. Br. 19-22. The government's claim that reading "tangible object" as "evidence" also "makes sense in light of the structure and overarching purpose of both Chapter 73 and Section 1519," Resp. Br. 17, fails to take into account the full context of the statutory scheme under the Sarbanes-Oxley Act and Chapter 73.

For example, the government claims that Chapter 73 and Section 1519 share the objective of "protect[ing] the integrity of government operations, promot[ing] fairness to all parties in official proceedings, and ensur[ing] that government determinations of factual matters are accurate and true." Resp. Br. 18. Tellingly, the government cites no authority for this claim. Nor could it. In addition to the fact that the plain text of Section 1519 makes no reference to an "official proceeding," this Court has already recognized that the purpose of the Sarbanes-Oxley Act is to "prevent and punish corporate and

criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." *Lawson v. FRM LLC*, 134 S. Ct. 1158, 1162 (2014) (quoting S. Rep. No. 107-146, 2 (2002)); *see also id.* at 1161 ("To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted the Sarbanes-Oxley Act of 2002, 116 Stat. 745.").

Moreover, the government's argument is based on the erroneous assumption that because Section 1519 is located in Chapter 73, entitled "obstruction-of-justice," Section 1519 must be read as prohibiting obstructive acts in all contexts. The structure of Chapter 73, however, refutes that assumption. Indeed, several provisions immediately preceding Section 1519 in Chapter 73 address obstructive acts in specific contexts, including federal audits, examinations of financial institutions, inquiries into health care-related offenses, and bankruptcy investigations. Oxley Amicus Br. 23-24. Furthermore, the statute immediately after Section 1519 was its "sister" provision in the Sarbanes-Oxley Act, and it targets obstruction involving the destruction of corporate audit records. *See* 18 U.S.C. § 1520. As Representative Oxley explains:

> These sister provisions are closely intertwined. Section 1520 requires that corporate audit records be retained for five years, while Section 1519 prohibits the destruction of business records in contemplation of a federal investigation or proceeding. Together, they establish a comprehensive regulatory regime for

> preservation of corporate records: those most likely to be relevant in cases of corporate fraud (i.e., audit records) are retained for a set period of time, which may be extended and broadened to include additional records when an investigation is contemplated.

Oxley Amicus Br. 9.

Reading Section 1519 and Section 1520 together clarifies that Congress intended the two statutes to target the destruction of records, documents, and the like, a point reinforced by the use of the word "document" in the relevant public law section of the Sarbanes-Oxley Act, and the use of the word "record" in the titles of both Section 1519 and Section 1520. *See* Oxley Amicus Br. 10.[9]

Rather than addressing Section 1520, the government's argument focuses on Section 1512(c), which is another "obstruction-of-justice" provision that was enacted as part of the Sarbanes-Oxley Act. But unlike Sections 1519 and 1520, which were placed in Title VII of the Act, under the section titled "Criminal penalties for altering documents," Section 1512(c) was placed in Title XI, under section 1102,

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[9] The government posits that the title of a statute cannot limit the plain meaning of its text. *See* Resp. Br. 40-41. But the meaning of "tangible object" is informed by its placement within the context of the anti-shredding provision and the Sarbanes-Oxley Act as a whole–a point that the government never acknowledges. The anti-shredding provision's title does not limit its plain text; it simply illuminates the plain meaning of "tangible object" in context.

entitled "Tampering with a record or *otherwise impeding an official proceeding*."

Nonetheless, the government asserts that because Sections 1512(c) and 1519 were enacted at the same time, and the phrase "other object" in Section 1512(c) encompasses "any kind of object," the phrase "tangible object" in Section 1519 should cover the same thing. Resp. Br. 48. Far from supporting the government's argument, however, the *in pari materia* doctrine is fatal to its argument, *see* Resp. Br. 29, because Section 1519 uses one phrase, "tangible object," and Section 1512(c) uses a different phrase, "other object," indicating the phrases have different meanings.

Moreover, by their very terms, the two provisions serve different functions and thus address different conduct. Section 1512(c)(1) targets the destruction of a "record, document, or other object," when a person acts "corruptly . . . with the intent to impair the object's integrity or availability for use in an official proceeding." Section 1519, on the other hand, targets the knowing destruction of a "record, document, or tangible object, with the intent to impede, obstruct, or influence the investigation or proper administration of" any federal matter.[10]

The government attempts to minimize the significance of the different language in the two provisions by asserting, "[b]ecause Section 1519 was drafted well before Section 1512(c)–and by different

[10] Likewise, the fact that the two provisions require different mental states indicates that the two provisions criminalize different conduct.

people–the legislative record refutes any assumption that the overlap reflects an intentional scheme in which each provision serves a unique and distinct function." Resp. Br. 49-50. The simple fact, however, is that both provisions were passed as part of the Sarbanes-Oxley Act, in separate sections, and with separate language. Nothing in the legislative history justifies overlooking these facts or reading the two sections, which use different language, as covering the exact same conduct. As Representative Oxley explains, reading Section 1519 and Section 1512(c) as covering the same conduct would render Section 1512(c) wholly superfluous. *See* Oxley Amicus Br. 20-21.

In the government's view, reading "tangible object" as a thing like a record or document that is used to preserve information, e.g., a computer, server, or similar storage device, creates an "arbitrary distinction between documentary evidence and most kinds of physical evidence." Resp. Br. 47. But there is nothing arbitrary about the fact that Congress created different statutes, with different standards, to target different acts of obstruction.

Consider the government's claim that it makes little sense as a policy matter that "Section 1519 prohibits a murderer from destroying a threatening letter to his victim (a 'document')–but not the murder weapon, his victim's body, or the getaway car." Resp. Br. 47. A murderer, however, could be charged with destroying such evidence under other criminal provisions. For example, 18 U.S.C. § 2232 imposes liability if property that the government has the lawful authority to seize is destroyed, and Section 1512(c) criminalizes obstructive conduct related to an

official proceeding. It makes sense, then, that those provisions broadly prohibit the destruction of evidence that would be relevant to an official proceeding or which the government would have the authority to seize.[11]

The heart of Section 1519, however, is the "*intent* to impede, obstruct, or influence," the "proper administration of any matter within" federal jurisdiction. Documentary information, by its very nature, is critical to the administration of any federal matter (i.e., in the form of regulatory filings and white-collar fraud investigations); whereas, "all physical evidence" is not. It makes little sense, then, to conclude that Congress intended in Section 1519 to prohibit the destruction of "all physical evidence" when it could accomplish the goal of ensuring the proper administration of federal matters by limiting Section 1519's reach to documentary information.

D. The legislative history comports with Mr. Yates's contextual reading of "tangible object" as meaning a thing used to preserve information, akin to a computer, server, or similar storage device.

The government recognizes that the "main impetus" for the Sarbanes-Oxley Act and its anti-shredding provision "was prompted by revelations

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[11] Additionally, the government's example ignores Section 1519's verbs. One does not speak in terms of altering, falsifying, or making a false entry in a murder weapon. On the other hand, the verbs in Section 2232–"damages, wastes, disposes of, transfers"–could apply to a murder weapon.

that Enron and its outside accounting firm–Arthur Andersen LLP–had deliberately destroyed large quantities of *documents* in an effort to conceal fraudulent accounting practices." Resp. Br. 4, 30 (emphasis added). "No one disputes that Enron's collapse sparked the Sarbanes-Oxley Act, or that Section 1519 was intended to prohibit corporate *document* shredding to hide evidence of financial wrongdoing." Resp. Br. 46 (emphasis added). Curiously, however, the government never acknowledges that Enron and Arthur Andersen's purge extended beyond paper records and documents to computer drives and the email system. *See United States v. Arthur Andersen LLP*, No. 02-121, 2002 WL 32153945, ¶¶ 5, 9-11 (S.D. Tex. Mar. 14, 2002).

In light of Section 1519's origins as part of the Sarbanes-Oxley Act, which clearly targeted the destruction of corporate records, documents, computer drives, and email servers, an ordinary person would naturally understand the phrase "tangible object" in Section 1519–entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"–to mean a thing used to preserve information, like records and documents, including a computer, server, or similar storage device. The government attempts to avoid this important context by asserting that Section 1519's origins in the Sarbanes-Oxley Act do not trump its plain meaning. Resp. Br. 46. Yet again, this assertion fails because, as the government implicitly acknowledges, the meaning of "tangible object" depends on its context, which includes its historical origins.

However, in urging the Court to construe Section 1519 like Section 1512(b)–as broadly relating to physical evidence–the government mischaracterizes the historical origins of Section 1519. The government alleges, "All agree that the Judiciary Committee intended Section 1519 to address Section 1512(b)'s loophole and remedy the absence of a direct prohibition on destroying evidence." Resp. Br. 34 (citing Oxley Amicus Br. 11-14; Crim. Law Professors Amicus Br. 32; Cause of Action Amicus Br. 4, 7-8). This allegation is simply wrong. No one agrees that Congress intended Section 1519 to "remedy the absence of a *direct* prohibition on destroying *evidence*." Resp. Br. 34 (emphasis added).

The Senate Report is straightforward. The "loopholes" Congress targeted were *not* based on evidence in general. Congress specifically identified two major loopholes in then-existing obstruction-of-justice statutes related to records and documents. First, "Section 1512(b) 'ma[d]e it a crime to persuade another person to destroy *documents*, but not a crime for a person to destroy the same *documents* personally'"; and second, "Section 1503 had been 'narrowly interpreted by courts * * * to apply only to situations when the obstruction of justice may be closely tied to a judicial proceeding.'" Resp. Br. 30-31 (quoting S. Rep. No. 107-146, 6-7 (2002)) (emphasis added).

This plain text contradicts the government's claim that the only way Section 1519 could close those loopholes would be "if its reference to 'any record, document, or tangible object' covers all of the 'object[s]' also encompassed by Section 1512(b)(2). Otherwise the loophole survives with respect to

physical evidence that would not qualify as a 'record, document, or tangible object' under a narrower construction of that term." Resp. Br. 34.

The loopholes identified by the Judiciary Committee plainly relate to the destruction of records and documents in connection with an official proceeding. Moreover, the text of Section 1519 reveals that it addresses both of the loopholes. First, "Congress excised the requirement, found in Section 1512(b)(2)(B), that to violate the provision one must intimidate, threaten, or persuade another person to destroy the records." Oxley Amicus Br. 13. Second, Congress "substitut[ed] 'official proceeding' with 'any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11.'" Oxley Amicus Br. 12.

Furthermore, the government's discussion of the legislative history selectively cites to isolated parts of the history, taken out of context, while omitting the parts that cut against its argument. For example, the government cites to the portion of the Senate Report that states that "'Section 1519 is meant to apply broadly to *any acts to destroy or fabricate physical evidence*.'" Resp. Br. 32 (quoting S. Rep. No. 107-146, 12 (2002)). The government, however, neglects to mention that the very same paragraph of that Senate Report contains the following language:

> Destroying or falsifying *documents* to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute.

> ***
>
> The intent of the provision is simple; people should not be destroying, altering, or falsifying *documents* to obstruct any government function.
>
> ***
>
> [T]his section could also be used to prosecute a person who actually destroys the *records* himself in addition to one who persuades another to do so, ending yet another technical distinction which burdens successful prosecution of wrongdoers.

S. Rep. No. 107-146, 12 (emphasis added).

Likewise, for each of the isolated statements of Senators cited by the government, the legislative history is replete with statements by other Senators indicating their belief "that Section 1519 was specifically intended to reach persons who destroy documents themselves, and not only those who instruct others do so." *See* Oxley Amicus Br. 10, 16 (citing and expounding on statements of Senators).

The government complains that there is not a "single instance in which anyone ever stated that Section 1519 covered *only*" offenses involving the "destruction of documents." Resp. Br. 48. On the contrary, the legislative history quite clearly refers to Section 1519 as a "general anti shredding provision" and as "an obstruction statute specifically directed to

the destruction of documents." S. Rep. No. 107-146, 21, 27.

The government also claims that the Senate Report "did not suggest that Section 1519's reference to 'any record, document, or tangible object' encompassed only a subset of physical items." Resp. Br. 32. In fact, the "Senate Report's distinction between, on the one hand, 'paper records' and, on the other, 'computer hard drives and E-mail system[s]' confirms the interpretation of 'tangible objects' as a reference to the ever-expanding universe of devices that store electronic records." Chamber of Commerce Amicus Br. 14.

E. Additional rules of statutory construction support Mr. Yates's contextual reading of "tangible object" as a thing used to preserve information, akin to a computer, server, or similar storage device.

The examples provided in the briefs of Mr. Yates and the amici demonstrate that the government's broad, non-contextual reading of "tangible object" would bring a whole host of innocent remedial measures or otherwise run-of-the-mill inventory management situations within the purview of the anti-shredding provision. *See* Pet. Br. 23; Chamber Commerce Amicus Br. 15-17; NFIB Amicus Br. 22-29. The government does not address those particular examples; it reinvents them, and then claims that "it is not absurd to prohibit the destruction of evidence to impede the investigation or administration of

matters under federal authority." Resp. Br. 50.[12] That claim, however, misses the point–that is, Section 1519 does not target the destruction of all types of evidence.

Mr. Yates and the amici also pointed to the instant case as an absurd result of reading "tangible object" out of context. Pet. Br. 24; Chamber of Commerce Amicus Br. 12; NACDL Amicus Br. 9-12. The government concedes that "Section 1519's statutory maximum punishment is substantial," Resp. Br. 52, but nevertheless seeks to minimize the potential penalties by asserting that sentencing courts have broad discretion to consider the gravity of the particular obstructive conduct at issue in each case.

That sentencing courts have broad sentencing discretion overlooks the reality that "even when a person receives a relatively light prison sentence under Section 1519 for destroying evidence of a non-criminal offense, [the person] still must deal with the harsh implications of being a convicted felon." *See* Cause of Action Amicus Br. 20. The government also ignores the fact that an "obstruction indictment is enough to call into question the future—and certainly the reputation—of any" business or organization. NFIB Amicus Br. 21.

Finally, if any doubt remains as to the meaning of "tangible object," that doubt must be resolved in Mr. Yates's favor based on the doctrine of constitutional

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[12] For instance, the government mischaracterizes Mr. Yates's example of an automaker who *voluntarily* recalls auto parts. *Compare* Pet. Br. 23, *with* Resp. Br. 51.

avoidance and the rule of lenity. *See* Pet. Br. 25-28; *see also* Law Professors Amicus Br. 18-22, 33-35.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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