No. 13-7451

IN THE

Supreme Court of the United States

OCTOBER TERM 2013

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

REPLY TO UNITED STATES' BRIEF IN OPPOSITION

Donna Lee Elm
Federal Defender

John L. Badalamenti*
Assistant Federal Defender
Appellate Division
Florida Bar No. 0185299
400 North Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone 813-228-2715
Facsimile 813-228-2562
E-Mail: john_badalamenti@fd.org
**Counsel of Record for Petitioner*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

REPLY TO UNITED STATES' BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

The important question presented to this Court boils down to whether a fish is a "tangible object" under the "anti-shredding" criminal provision of the Sarbanes-Oxley Act of 2002, entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." 18 U.S.C. § 1519; *see Lawson v. FMR LLC et al.*, 134 S. Ct. 1158, 1161 (2014) (explaining the purpose of the Sarbanes-Oxley Act of 2002 as follows, "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.").

Petitioner, now 62 years old, is a commercial fisherman who was convicted of one count of destroying an aggregate of three purportedly undersized red grouper fish in violation of section 1519, exposing him to a 20-year statutory maximum penalty. Relying on Black's Law Dictionary's definition of "tangible" as "having or possessing physical form," the Eleventh Circuit held that because a fish has or possesses a "physical form," it is therefore a "tangible object" under section 1519. The Eleventh Circuit made no attempt to derive the plain meaning of "tangible object" from the context of section 1519. As the Eleventh Circuit would have it, the Judiciary's role in ascertaining the plain meaning of a statutory phrase ceases once a dictionary has been consulted, leaving no need to utilize any contextual canons of statutory construction to determine the meaning of a phrase that Congress neglected to define.

This Court's intervention is necessary to both decide the scope of section 1519 and to maintain uniformity of its and the courts of appeals' decisions regarding the important question of statutory interpretation involved in discerning a statute's plain and ordinary meaning. The Eleventh Circuit's published decision grants a license to lower courts to adopt broad, non-contextual dictionary definitions in all cases where Congress left ambiguous terms undefined, even where the dictionary definitions of particular words do not fit within the context of a particular criminal statute. This, in turn, unreasonably expands the reach of a criminal statute, cedes more authority to the Executive Branch than Congress intended, and, even more, reduces the Judiciary's role in interpreting statutorily-undefined words and phrases to the rudimentary consultation of a dictionary.

A. **The plain meaning of the phrase "tangible object" cannot be discerned solely by consulting a dictionary without any consideration of its statutory context.**

Respondent's attempts to reconcile the Eleventh Circuit's published decision are unavailing and its cursory and dismissive application of the statutory contextual canons of construction underscores the need for this Court's intervention. Brief in Opp. at 14-18. Respondent uses Congress's failure to define the phrase "tangible object" as a sword to invoke a broad, dictionary definition of that two-word phrase, resulting in the expansion of the reach of a criminal statute to encompass everything "'[h]aving or possessing physical form," and "able to be perceived as materially existent esp. by the sense of touch," such as fish. Brief in Opp. at 11 (citing, *inter alia*, Black's Law

Dictionary 1592 (9th ed. 2009); Webster's Third New International Dictionary 2337 (1993)).

The "meaning of the statutory [phrase]" "tangible object" is "not, however, construe[d] . . . in a vacuum. Rather, [this Court] interpret[s] the words 'in their context and with a view to their place in the overall statutory scheme.'" *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). When "tangible object" is read within the context of a criminal provision of the Sarbanes-Oxley Act, entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," it is clear that tangible object is limited to those objects capable of storing records or documents. *See* 18 U.S.C. § 1519 (providing for 20-year statutory maximum penalty for destruction of "*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 . . .") (emphasis supplied).

Respondent further points to Congress's inclusion of the word "any" in section 1519's phrase "any record, document, or tangible object" as an indication that Congress intended that section 1519 broadly applies to fish. Brief in Opp. at 11-12. Specifically, Respondent argues that "'any * * * tangible object,' taken as a whole, 'suggests a broad meaning.'" Brief in Opp. at 11 (internal citation omitted, emphasis supplied). That "broad meaning" due to Congress's use of the word "any," Respondent concludes, "thus naturally and unambiguously includes a fish." Brief in Opp. at 12.

Respondent's argument that Congress's utilization of the word "any" stretches the reach of a statute in all circumstances has been squarely rejected in a recent unanimous decision of this Court. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042-44 (2012) (rejecting Petitioners' invitation to expand the reach of 12 U.S.C. § 2607(b) to a single settlement-service provider simply because Congress utilized the word "any" in the phrase: "any portion, split, or percentage, of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed"). Moreover, in *Freeman*, this Court expressed the importance of analyzing statutory terms in their context, in order to ascertain Congress's "common 'core of meaning.'" *Id.* at 2042 (quoting *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson,* 559 U.S. 280, 289 n.7 (2010)). That is, this Court employed the commonsense contextual canon of *noscitur a sociis*, which "'counsels that a word is given more precise content by the neighboring words with which it is associated.'" *Id.* at 2042 (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)).[1]

Although Respondent would have it that Congress's use of the word "any" in section 1519 could include all "tangible object[s]," with no limitations of any kind, the *Freeman* Court rejected a similar argument, focusing on the statutory context of the phrase utilizing the word "any." *Id.* at 2042-44. If section 1519's phrase "any . . .

---

[1] Although Respondent similarly rejects the applicability of the *ejusdem generis*, and *expressio unius est exclusio alterius* canons of statutory construction, Petitioner maintains their applicability in determining the meaning of "tangible object" in the context of section 1519. *See* Pet. at 16-18.

tangible object" is read in *isolation* and given the broad dictionary definition of possessing "physical form," then fish are indeed "tangible objects," as are baseballs, desk chairs, and dogs. That fish, baseballs, desk chairs, and dogs possess "physical form" does not render them "any . . . tangible object" within the context of section 1519.

B. The Eleventh Circuit's decision must be reversed.

The Eleventh Circuit interpreted the phrase "tangible object" in a Black's Law Dictionary vacuum without ascertaining a more precise meaning of that phrase from the overall statutory context, which is contrary to decisions of this Court and other courts of appeals. This underscores the need for this Court's intervention in order to create uniformity in the law. *See Sebelius v. Cloer,* 133 S. Ct. 1886, 1893 (2013) (explaining that ordinary meaning of statutory words is to be "applied to the text of the statute"); *Federal Communications Comm'n v. AT&T, Inc.*, 131 S. Ct. 1177, 1182-83 (2011) ("The construction of statutory language often turns on context . . ., which certainly may include the definition of related words. . . . [W]hen interpreting a statute . . . we construe language . . . in light of the terms surrounding it.") (citing *Johnson v. United States*, 559 U.S. 133, 138 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (interpreting a public disclosure provision of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A); explaining that statutory interpretation requires courts to place a dictionary-defined word or phrase's meaning into the "provision's 'entire text,' read as an 'integrated whole'") (internal citation omitted); *Nken v. Holder*, 556 U.S. 418, 426 (2009) (explaining that "statutory interpretation turns on 'the language itself, the

specific context in which that language is used, and the broader context of the statute as a whole'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context.") (internal citation and alterations omitted). Furthermore, this Court has explained, "[W]e do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning." *Johnson*, 559 U.S. at 139 (construing, based on the overall context of the statute, the meaning of "physical force" more narrowly than dictionary definitions).[2]

The Eleventh Circuit did not analyze the phrase "tangible object" within the overall statutory context of section 1519. This was fatal because its ambiguity "only

---

[2] Indeed, several courts of appeals have similarly deduced a statutory phrase's plain meaning after looking at the context of that phrase within the statute. *See, e.g.*, *Al Janko v. Gates*, 741 F.3d 136, 141 (D.C. Cir. 2014) (interpreting statutory phrase "the United States," as used in 28 U.S.C. § 2241(e)(2), is "informed by the context in which the words appear," and noting "[C]iting to dictionaries creates a sort of optical illusion, conveying the existence of certainty – or 'plainness' – when appearance may be all there is.") (internal citation omitted); *Perez v. Postal Police Officers Assoc.*, 736 F.3d 736, 741 (6th Cir. 2013) (explaining that "broad [dictionary] definitions" do not end a "plain meaning analysis . . . . We discover a statute's plain meaning by looking at the language and design of the statute as a whole.") (internal citation and quotation omitted); *Johnson v. Zimmer*, 686 F.3d 224, 233 (4th Cir. 2012) (rejecting "expansive" dictionary definition of an undefined statutory word, explaining that it is a "cardinal rule of statutory interpretation that 'statutory language must be read in context [because] a phrase gathers meaning from the words around it") (internal quotation and citation omitted); *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) ("Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings.").

become[s] evident when placed in context" of the remainder of section 1519. *Zuni Public School Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 98-99 (2007). Employing the commonsense contextual canon of *noscitur a sociis* gives a "more precise content" of the phrase "tangible object" when viewed in the context of the "neighboring words" with which it is "associated.'" *Freeman*, 132 S. Ct. at 2042.

Section 1519 prohibits the destruction of "a record, document, or tangible object . . . ." 18 U.S.C. § 1519. Examining the ordinary meanings of "record" and "document" to discern a "more precise" meaning of "tangible object" is thus necessary. After initially consulting the dictionary definitions of "record" and "document," we look to the context of the statute to determine "a more precise content" of "tangible object."

Black's Law Dictionary defines "document" as follows:, "1. *Something tangible on which words, symbols, or marks are recorded.* . . . 2. (pl.) The deeds, agreements, title papers, letters, receipts, and other written instruments used to prove a fact." Black's Law Dictionary 555 (9th ed. 2009) (emphasis supplied). Black's Law Dictionary defines "record" as follows:

> 1. A *documentary account* of past events, usu. designed to memorialize those events. 2. Information that is *inscribed on a tangible medium or that, having been stored in an electronic or other medium*, is retrievable in perceivable form. . . . .

Black's Law Dictionary 1387 (9th ed. 2009) (emphasis supplied). Thus, after determining the plain and ordinary meanings of the neighboring words of "record" and "document," it is readily discernible that the "common core" and "more precise" meaning of the statutory phrase "tangible object" is that the tangible object (like

"record" and "document") must be something that is capable of storing records or documents. To say otherwise would absurdly extend the reach of section 1519 to everything containing "physical form." That, in turn, would give the Executive Branch broad authority to utilize the severe penalties set forth in section 1519 to encompass everything containing "physical form," such as a fish.[3] This could not have been Congress's intent when drafting section 1519, entitled,"Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis supplied).

A fish is no more a "record" or "document" than is a baseball, a desk chair, or a dog, which, as both Respondent and the Eleventh Circuit would have it, all fit within a "broad triad" of "any record, document, or tangible object." Brief in Opp. at 12. The Eleventh Circuit's decision should not be left undisturbed because it gives "'improbable breadth'" to the "Anti-Shredding Provision" of the Sarbanes-Oxley Act of 2002.

---

[3] Respondent is effectively treating "tangible object" as a catchall provision, even though a record or document can be in the form of a tangible object. That construction would essentially write "record" and "document" out of section 1519. Indeed, in *Begay v. United States*, 553 U.S. 137 (2008), notwithstanding the broad language of what had, until then, been known as "the catch-all provision" of 18 U.S.C. § 924(e)(2)(B)(ii), this Court, applying the rules of statutory construction, concluded that "the provision's listed examples – burglary, arson, extortion, or crimes involving the use of explosives – illustrate the kinds of crimes that fall within the statute's scope." *Id.* at 142. Their presence indicates that the statute covers only similar crimes, rather than *every* crime that "presents a serious potential risk of physical injury to another." *Id.* This Court continued, "If Congress meant the latter, *i.e.,* if it meant the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all." *Id.* Here, there would have been no purpose for Congress to have included "record" or "document" in section 1519 if "tangible object" were meant to apply as broadly as Respondent and the Eleventh Circuit suggest.

Freeman, 132 S. Ct. at 2041 (quoting *Abuelhawa v. United States*, 556 U.S. 816, 823 n.3 (2009)).

The broad and literal interpretation of the undefined phrase "tangible object" to include "fish" also produces the "absurd" result here; that is, a conviction under the Sarbanes-Oxley Act of 2002 for destroying purportedly undersized fish, which were the subject of a civil fishing citation. *See, e.g.*, *Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (noting that "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of ... the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act").

At best, fish fit "awkwardly with the language Congress chose" for section 1519. *Dowling v. United States*, 473 U.S. 207, 218 (1985). At a minimum, as amicus curiae aptly argues, the rule of lenity should be applied to the construction of this ambiguous criminal statute, yielding Petitioner relief from application of this statute to his alleged conduct of disposing of purportedly undersized fish. *Id.* at 228-29; Brief for Cause of Action as Amicus Curiae in Support of Petitioner, at 9-10.[4]

---

[4] On a Constitutional level, it neglects to give individuals "fair warning . . . of what the [criminal] law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (explaining that a criminal law violates the Due Process Clause "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits...." (internal citation and quotation omitted).

C. This case is an excellent vehicle for this Court to decide the scope of "tangible object" within a criminal provision of the Sarbanes-Oxley Act of 2002.

This case perfectly illustrates the flaw and danger of applying, without more, a broad dictionary definition to a statutory phrase that Congress neglected to define. The Eleventh Circuit endorsed the Executive Branch's broad utilization of the statutorily undefined phrase "tangible object." The broad application of section 1519's phrase "tangible object" resulted in Petitioner's current term of criminal punishment for a federal felony conviction arising from a Florida Fish and Wildlife Commission civil fishing citation issued 985 days (2 years, 8 months, and 11 days) prior to the grand jury's return of the indictment in this case.[5]

If tangible object is read within its context of "any record, document, or tangible object," the Executive Branch would not have had the authority to criminally prosecute Petitioner under section 1519. Petitioner has asserted that section 1519 did not

---

[5] Amici curiae make cogent arguments explaining the importance of granting the writ of certiorari in this case, as this case presents an "ideal vehicle" for this Court to decide an important issue of statutory interpretation. The overarching theme of both Cause of Action and the National Association of Criminal Defense Lawyers' briefs reflect the strong sense that utilization of the "Anti-Shredding Provision" of the Sarbanes-Oxley Act of 2002 to prosecute the purported destruction of fish by a "captain for hire" on a commercial fishing vessel stretches the reach of a criminal law to unreasonable lengths, resulting in "overcriminalization," "overfederalization," and the "significant risk of Executive Branch Overreach." Amicus Curiae Brief of the National Association of Criminal Defense Lawyers, at 6-12; Amicus Curiae Brief of Cause of Action, at 2-6.

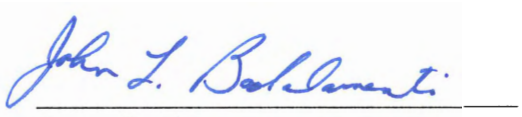
encompass the destruction of purportedly undersized fish in the district court, circuit court of appeals, and now this Court.

The issue has been thoroughly preserved, developed, and briefed in the courts below, providing this Court with a complete record to decide this important issue. Petitioner thus asks this Court to issue a writ of certiorari to address an important issue of statutory construction regarding the scope of 18 U.S.C. § 1519.

CONCLUSION

For the reasons stated above and in Mr. Yates's petition for writ of certiorari, the Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013). *See* S. Ct. R. 10(c).

Donna Elm
Federal Defender



JOHN L. BADALAMENTI
ASSISTANT FEDERAL DEFENDER
Florida Bar No. 0185299
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone 813-228-2715
Facsimile 813-228-2723
E-Mail: john_badalamenti@fd.org