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

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BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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For Chamber of Commerce of the United States

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Pursuant to this Court's Rule 37.2, *amici curiae* the Chamber of Commerce of the United States of America ("the Chamber") and the National Association of Manufacturers ("NAM") respectfully file this brief in support of Petitioner.*

INTEREST OF *AMICI CURIAE*

Founded in 1912, the Chamber is the world's largest business federation, representing approximately 300,000 members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Its membership includes businesses subject to regulation under the Sarbanes-Oxley Act, including the requirement, codified at 18 U.S.C. § 1519, that prohibits the destruction of records after a federal investigation has commenced. The scope of this law potentially concerns many, if not all, of the Chamber's members, especially to the extent it reaches beyond the financial and accounting sectors.

The National Association of Manufacturers ("NAM") is the largest association of manufacturers in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion

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* The United States has consented to the filing of this *amicus* brief and, pursuant to Rule 37.3, a letter evidencing that consent has been filed with the Clerk. In accordance with Rule 37.6, both *amici* hereby state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation or submission of this brief.

to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM advocates for sensible approaches to the law that help manufacturers compete in the global economy and create jobs across the United States. The law at issue in this case is directly relevant to NAM's members, particularly with respect to the management of their inventories.

BACKGROUND AND SUMMARY OF ARGUMENT

Section 1519 covers business records in a variety of forms — whether traditional paper documents or computer hard drives — but it does not cover fish. Statutory construction relies on the accumulated wisdom in interpretive canons and commonsense rules for reading words in context. Here, these guideposts lead to a reading that, in the context of the statute as a whole, allows Section 1519's prohibition on destroying, altering or concealing false entries in a "tangible object" to mean only those objects used for business record-keeping. The more expansive reading adopted in the court below shuns conventional tools of construction and threatens substantial penalties without a limiting principle in sight. One result of a such a sweeping interpretation of "tangible object" could be an equally sweeping reaction from businesses, which would understandably pivot away from beneficial practices to avoid destroying any physical thing, even when doing so is in the public interest and would involve nothing improper. This is not the course that Congress charted in passing Section 1519.

Congress enacted the Sarbanes-Oxley Act of 2002 to protect investors in public companies "[a]fter a

series of celebrated accounting debacles." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010); *see also* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (title). Predictably, those "debacles" shone a bright light on the Securities and Exchange Commission ("SEC") and its ability to punish deceptive accounting practices. In crafting Sarbanes-Oxley, Congress attempted to fill a perceived gap in the SEC's enforcement powers, enlisting criminal sanctions to strengthen the deterrence of problematic corporate behavior.

Enhanced enforcement was not a stealth component of the new law. Businesspeople and politicians alike expressed views about Sarbanes-Oxley and its tools for punishing dishonest record-keeping, of which Enron and WorldCom were the most notorious practitioners. The Act's namesake Senator said that "It addressed the crisis of investor confidence. It's brought about a number of marked improvements in corporate accountability." Dick Carozza, *An Interview with Sen. Paul S. Sarbanes: Sarbanes-Oxley Revisited* (May/June 2007) (interviewing Sen. Paul S. Sarbanes), available at http://www.fraud-magazine.com/article.aspx?id=442. In signing the bill, then-President George W. Bush made no reference to any generalized expansion of law enforcement tools, and certainly not to fishing regulations, but instead noted the core concerns after the accounting scandals: "No boardroom in America is above or beyond the law." Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud In Corporations*, The New York Times (July 31, 2002).

Among its specific objectives, Sarbanes-Oxley addressed a narrow but vital issue in the corporate world: alteration and even destruction of business records. The collapse of Enron and WorldCom, along with allegations of record tampering at other public companies, heightened the concerns about the need to prevent the withholding or destroying of corporate documentation. This objective fit with the larger goal of Sarbanes-Oxley "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . . ." *See* Preamble, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

To enable that protection, Congress enacted 18 U.S.C. § 1519, which provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Put more simply, the provision, where it applies, prohibits the spoliation of corporate record-keeping related to an investigation by the United States and ramps up the penalties to which spoliators are subject.

This statutory remedy arose from and responded to frustration on the part of legislators and, importantly, investors. In the late 1990s, when government agencies charged with protecting investors turned to prosecuting corporate culprits, they found instances of hiding or destroying evidence to be especially problematic. The most visible example was the litigation surrounding Enron's auditor, Arthur Andersen LLP ("Andersen"), which culminated in this Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). With the collapse of a client unfolding and an SEC investigation looming, Andersen executives began destroying corporate documents. Andersen management issued several reminders to its staff to "ensure team members were complying with the document policy," which "were followed by substantial destruction of paper and electronic documents." *Id.* at 701.

Although the Court eventually reversed Arthur Andersen's criminal conviction, Andersen's highly publicized conduct and the frustration of enforcement officials did not go unnoticed on Capitol Hill. In fact, Senator Leahy, who authored Title VIII of the Act, bemoaned "the apparent massive document destruction by Andersen and the company's seemingly misleading document retention policy," as well as the ostensible inadequacy of the existing obstruction of justice statutes to deal with that situation. *See* 148 Cong. Rec. S7418, S7419 (2002) (daily ed. July 26, 2002) (statement of Sen. Leahy). The Senate Committee Report states "the current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected." S. Rep. No. 107-146, at 7 (2002). The report

concluded that statutory changes were necessary in this particular context to ensure that "[w]hen a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the jurisdiction of a federal agency, overly technical distinctions [will] neither hinder nor prevent prosecution and punishment." *Id.*

No one disputes that Enron's records were a scandal. Moreover, given the centrality of honest and accurate corporate records to a functioning securities market, the tools that Congress provided, including Section 1519, are understandable. Yet, even the best tool for the most important job can become a hazard when misapplied.

As set out below, in Section 1519, Congress added a supplemental tool for curtailing financial and accounting fraud. Unfortunately, the court below has construed it so broadly as to punish even small-scale fishermen for throwing undersized groupers back into the Gulf of Mexico. That construction has important and harmful reverberations for the business community at large and is simply a mistaken reading of the statutory text.

ARGUMENT

I. Familiar Tools of Statutory Interpretation Confirm that Section 1519 Does Not Extend to Petitioner's Fish.

Because it threatens fines and imprisonment — a violator "***shall*** be fined under this title, imprisoned not more than 20 years, or both" — Section 1519 already carries a presumption of narrow construction. *United States v. Cook*, 384 U.S. 257, 262 (1966) (noting "the maxim that penal statutes should be strictly construed."). Other canons of interpretation

confirm that, under an appropriately strict construction of the law, the term "tangible object" applies only to objects used for storing business records.

A. Read in Context, "Tangible Object" Refers to Record-Keeping Devices, Not the Actual Inventory of Goods that Are the Subject of Businesses' Accounts and Records.

The key term at issue in this case — "tangible object" — is the final item in a three-element list: "record, document, or tangible object." 18 U.S.C. § 1519. It is part of a larger statute enacted to prevent the destruction of corporate records used for investor disclosures.

It is axiomatic that to give statutory language its ordinary meaning, courts consider the context in which it appears. This approach leads to canons of interpretation and structural clues that inform what can otherwise be an overly rigid dependency on the dictionary. Here, instead of reading the text in context, the Eleventh Circuit erred in reading "tangible object" in a vacuum so tight that it excluded even the other words of Section 1519 itself.

As this Court recently reiterated, the "ordinary meaning" of words depends on both text and context. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 877 (2014) ("Nothing in the text or context of § 203(o) suggests anything other than the ordinary meaning of 'clothes'"). Thus, when determining the meaning of individual words, whether "clothes" in *Sandifer* or "tangible object" here, "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a

whole." *United States v. Morton*, 467 U.S. 822, 828 (1984).

1. One mechanism through which the law has operationalized the importance of context is the *noscitur a sociis* interpretive canon. In its simplest form, the canon mandates that "words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977). Or, in a more faithful translation, "a word is known by the company it keeps." *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575 (1995). However expressed, the canon's purpose is to narrow the universe of meanings that could attach to statutory text. *Id.* (explaining that the canon serves to avoid "giving unintended breadth to the Acts of Congress") (quotation omitted). *Gustafson* is an illustrative precedent. There, the Court explained that "the term 'written communication' must be read in context to refer to writings that . . . are similar to the terms 'notice, circular, [and] advertisement,'" which appeared in the same list. *Id.* at 576. Thus, the word communication applied only to a subset of what the dictionary would sweep within that term, namely those "communications held out to the public at large but that might have been thought to be outside the other words in the definitional section." *Id.*; s*ee also Paroline v. United States*, 134 S. Ct. 1710 (2014) (applying the requirement of proximate causation, which appeared in only one item in a list, to all other listed injuries); *United States v. Williams,* 553 U.S. 285, 294-95 (2008) (interpreting "promotes" and "presents" to apply only to commercial transactions based on neighboring terms).

Here, the interpretive project is straightforward. As noted, the term at issue in this case — "tangible

object" — is the final item in a three-element list: "record, document, or tangible object." 18 U.S.C. § 1519. The plain meanings of "record" and "document" have a common focus on preserved information, and "tangible object" should be construed likewise, by applying it to record-keeping and data storage devices, and not to physical inventories. Record-keeping devices are "tangible objects", and they store accounts and records, which is why such an interpretation makes sense, while physical inventories do not.

Just as *Gustafson* read the word "communication" to exclude in-person communications (despite a dictionary definition that was sufficiently broad to include person-to-person discussions), so, too, should "tangible object" absorb a narrower meaning from its neighbors. Understood not in isolation but as an element of a list, "tangible object" refers to objects used to keep business records. The most natural application of this definition is to electronic storage devices, which is precisely what the lower courts (and most prosecutors) have done. *See infra* Part II. Because the universe of electronic storage is ever-changing, the drafters of Section 1519 could not have enumerated the specific devices that fall within the provision. Whether compact discs, DVDs, hard drives, flash drives or other means of storage, no sooner would the drafters of the law have issued their list than a new form of data storage would emerge and render the law obsolete. "Tangible object" captures all of these devices, while limited by its record-keeping context.

2. Ordinary meaning is therefore informed by — but different from — a pure dictionary definition. *See, e.g., Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct.

1997, 2003 (2012) (rejecting a dictionary definition as more broad than how the word is "ordinarily understood"). Just last Term, this Court demonstrated that a statutory interpretation derived from the dictionary can expand a statute well beyond the words' ordinary usage. *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (""We are reluctant to ignore the ordinary meaning of 'chemical weapon' when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish.").

Reliance on isolated dictionary definitions to the exclusion of context is the first and most important error in the lower court's reasoning. The Eleventh Circuit treated in a single paragraph the Sarbanes-Oxley charges against Petitioner. *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013). That court correctly noted that statutory text is paramount. *Id.* Where the court deviated from the worn interpretive path, however, was in concluding that fidelity to the text was equivalent to adopting the dictionary definition of "tangible." As the examples above illustrate, that approach does not honor the ordinary meaning in cases like this one. In *Taniguchi*, for example, the Court recognized that the denotative definition of "interpreter" could encompass professional translators as well, but its analysis did not stop there: "That a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense." 132 S. Ct. at 2003. Instead, as here, the ordinary meaning includes consideration of context.

3. Moreover, reading the term "tangible object" in context to encompass devices on which business

records are kept prevents a second error made by the Eleventh Circuit in transgressing another important canon of interpretation — the prohibition on rendering statutory language superfluous. *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."). While disagreement might arise over whether a computer hard drive, for example, is a "record," there can be no doubt that it is a tangible object capable of storing electronic records and documents, as well as raw data and other materials that might be essential to prosecutions under Sarbanes-Oxley.

4. Beyond the canons of interpretation, structural clues in the statute further confirm that Section 1519 applies only to record-keeping devices and not to other physical evidence.

The title of Section 1519 reads: "Destruction, alteration, or falsification of ***records*** in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis added). Importantly, this title appeared in the bill on which Congress voted, not a later editorial addition by the codifier. *See* Pub. L. 107-204, tit. VIII, § 802(a). While less powerful than the *noscitur a sociis* doctrine, "[t]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Porter v. Nussle*, 534 U.S. 516, 527-28 (2002) (quotation omitted). Consistent with a contextual reading of the provision, this title focuses on record-keeping rather than spawning a limitless penalty for destruction or falsification of anything in the three-dimensional universe. At the very least, inventories like Petitioner's fish, which might be evidence and therefore covered by general spoliation laws, are

certainly not records within the coverage of Sarbanes-Oxley.

In this way, Section 1519 is a penal provision, but it does not criminalize activities that were previously licit. Spoliation was illegal in every jurisdiction long before Sarbanes-Oxley. As traced above, Sarbanes-Oxley's contribution is clarified coverage of ***business records*** and enhanced penalties, including imprisonment up to 20 years, as a mechanism for discouraging the sham record-keeping that magnified investors' losses at the end of the 1990s.

The present case illustrates how Section 1519 raises penalties. Petitioner was convicted under the general anti-spoliation provision in 18 U.S.C. § 2232(a). That provision penalizes the destruction of property "for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control." *Id.* It carries the possibility of fines and a prison sentence of up to five years. *Id.* Petitioner was convicted under that provision, and that conviction is not subject to further review here.

But the Petitioner was also convicted under Section 1519, in a ruling below that simultaneously expands Sarbanes-Oxley and renders the separate Section 2232(a) nearly superfluous, eschewing a construction that makes the statutes work in tandem. Instead, Section 1519's penalty-enhancing purpose should fit within this Court's commitment "strictly to determine the scope of the conduct the enactment forbids." *Dowling v. United States*, 473 U.S. 207, 213 (1985); *see also United States v. Reeves*, 2012 WL 1909350, at *12 (D.N.J. May 25, 2012) (relying on *Dowling* to refuse application of Section 1519 where a different statute already criminalized the conduct in

question). When Congress acted in 2002 to increase the penalties for financial legerdemain, it did so with the expectation that courts would not stretch its words to produce excessive penalization. *See, e.g., Edelman v. Lynchburg College*, 535 U.S. 106, 117 n.13 (2002) (the Court "presume[s] that Congress was thoroughly familiar with our precedents and that it expects its enactments to be interpreted in conformity with them." (modifications omitted)).

As demonstrated above and in Petitioner's brief, "tangible object" read in context extends only to objects used in keeping business records. This reading alone is consistent with Section 1519 as a whole.

B. If Any Ambiguity Remains, Legislative History and Practical Effects Illustrate that Congress Could Not Have Intended Respondents' Interpretation.

The decision below suffers from another affliction: it runs contrary to congressional intent. This is apparent not only in the history of the Sarbanes-Oxley Act, but also in the harmful consequences for businesses throughout the United States that would follow from the lower court's decision.

1. In *Bond*, the Court reasoned that an "ambiguity derives from the improbably broad reach of the key statutory definition given the term — 'chemical weapon' — being defined." 134 S. Ct at 2090. A similar, "improbably broad" definition of a key statutory term is at the center of this case. This Court has noted its "longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text."

BedRoc Ltd. v. United States, 541 U.S. 176, 187 n.8 (2004). As understood by the Eleventh Circuit, Section 1519 might extend to literally every object in the physical world (plus, one must presume, "documents" and "records" that exist only in intangible form). Since it is hard to imagine how a statute could have more sweeping scope, the term appears "improbably broad" and therefore mirrors the ambiguity identified in *Bond*.

2. The legislative history of Sarbanes-Oxley confirms that Congress's evidence-preservation objective was always confined to financial records. Congress enacted Section 1519 to "close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. 107–146, at 14. The Report continues to enumerate the destruction to which Section 1519 applies: "systematic destruction of records apparently extended beyond paper records and included efforts to purge the computer hard drives and E-mail system of Enron related files." *Id.* at 4 (quotation omitted). 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.

The statute's roots in financial and accounting fraud are readily apparent. In fact, this Court engaged in that very exercise just last term. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014). *Lawson* concerned the whistleblower provision in Sarbanes-Oxley, but the legislative history that informed that decision applies here as well. For example, the Court noted the statute's genesis in the Enron scandal and

cited the Senate Report over a dozen times. *See id.* at 1169-70. Even the Eleventh Circuit, with its peculiarly sweeping view of Section 1519, concedes that Congress created the provision to target corporate fraud. *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir. 2008) (holding that Section 1519 applies beyond the "corporate fraud and executive malfeasance" that "***prompted legislative action***" (emphasis added)).

Conversely, applying the lower court's interpretation to the scandals that spawned Sarbanes-Oxley shows a mismatch between the Eleventh Circuit's view of the law and the obstacles that frustrated prosecutors. It was not the consumption of Enron's natural gas or the sale of WorldCom's fiber optic cables that robbed investors of their savings and prevented regulators from doing their job. Rather, it was only inaccurate corporate records that had these effects and, in turn, prompted Congress to respond.

Committee Reports and historical context thus confirm the contextual reading of "tangible objects" to focus on the record-keeping and data-storage concerns that drove the enactment of Sarbanes-Oxley in the first place.

3. Similar corroboration appears in the ***practical consequences*** of adopting Respondent's position. These consequences, like legislative history, are not necessary to resolve this case, but they are useful in the event that the Court finds the textual argument inconclusive. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice."). As if the facts of Petitioner's case did not

already illustrate the folly in the government's reading of Section 1519, the Chamber, NAM, and their members are concerned about further risks to public health, the environment and the American economy if that flawed interpretation survives. The necessary consequences of sweeping Petitioner's fish within Sarbanes-Oxley include heavy compliance costs for American businesses and risks for the public generally. Indeed, the Eleventh Circuit's capacious reading could expose companies to significant liability for otherwise run-of-the-mill inventory management in situations where the company faces an investigation that is expressly or even tangentially related to its inventory. For a few examples:

- A consumer-products company faces allegations of tainted products and, under the Eleventh Circuit's reading, potentially must retain not only its records but its entire inventory — not just samples for testing — for the duration of the federal investigation. Doing so requires halting production of new wares or doubling warehouse costs.
- A chemical company sustains a spill and must delay or vary its response to avoid destroying or altering the spilled chemicals, which may be "tangible objects" in the Eleventh Circuit's understanding.
- A commercial butcher, subject to FDA regulation, discovers that it has sold contaminated meat. Because meat may be a "tangible object" in the Eleventh Circuit's view, the butcher cannot advise consumers to discard the product (*i.e.,* destroy it), the company risks that consumers misunderstand the danger and possibly continue eating the contaminated meat.

- An automobile dealership that depends on factory financing to maintain an inventory of cars and trucks learns that federal authorities are investigating its franchisor. As construed by the court below, the entire inventory of vehicles may represent "tangible objects" that cannot be sold, bringing the dealer's business to a halt.
- A high-end retailer that regularly removes brand designations and donates unsold products at the end of a season faces a Customs dispute. Even if the company has accurate records of all garments thus "alter[ed]," it nevertheless may be in violation of Section 1519, according to the court below.

As these examples demonstrate, the government's reading of Section 1519 has consequences beyond scholarly debate over how to read a statute. It threatens every corner of the American economy, often with perverse consequences for other facets of life as well. Retaining, without "alter[ing]" or "destroy[ing]," entire inventories of goods visits an extraordinary burden on businesses, and for no valid reason under the statute.

4. The Court should not assume that Congress endorsed these consequences when passing a law in response to a specific type of misconduct. When one possible interpretation of a statute "would produce an absurd and unjust result which Congress could not have intended," the Court should follow an alternative reading. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998). Here, as in *Clinton*, "[t]here is no plausible reason" that Congress would have buried an unlimited prohibition on the disposal of business inventories in a law targeted to fraud in the ***records*** of companies in the financial and accounting fields.

The consequences of an interpretation that brings Petitioner's fish within Sarbanes-Oxley demonstrate that Congress could not have intended the outcome created by the Eleventh Circuit. These factors thus confirm the message of the legislative history and the text of the statute itself.

II. Section 1519 Is an Important and Workable Provision of Sarbanes-Oxley when Construed Properly as Urged Here.

Reading the term "tangible object" to encompass only data-storage and other record-keeping devices does not undermine the objectives of Sarbanes-Oxley. Courts around the country have proven as much. Without allowing the statute to balloon in the way that the Eleventh Circuit has, they have used Sarbanes-Oxley to punish missing hard drives, deleted computer files and destroyed external storage devices. The statute need not catch fish in order to catch criminals.

Courts adopting Petitioner's more natural and restrained interpretation of the statute have used Section 1519 to reach an array of evidence-destroying conduct. *See, e.g., United States v. Gray,* 692 F.3d 514, 519-20 (6th Cir. 2012) (applying § 1519 to omission in correctional officer's incident reports); *United States v. Kernell*, 667 F.3d 746, 750 (6th Cir. 2012) (upholding defendant's conviction under § 1519 for deleting information on a computer); *United States v. Wortman*, 488 F.3d 752, 754-55 (7th Cir. 2007) (affirming conviction of girlfriend punished for breaking compact disc containing child pornography).

In opposing *certiorari*, the United States cited cases purportedly supporting the Eleventh Circuit's expansive reading of Section 1519. *See* Br. for the

United States at 13-14. Upon examination, these cases fall into two groups: (1) those that do not address the scope of Section 1519 at all, and (2) those that interpret "tangible object" consistently with Petitioner's view. Of the former group, *United States v. Perez*, 603 F.3d 44 (D.C. Cir. 2010), is typical. The court in *Perez* affirmed a plea agreement without ever considering whether Section 1519 extended to the defendant's action of washing cocaine down the sink. *Id.* at 45. While an inventory of cocaine would come close to mirroring Petitioner's inventory of noncompliant fish, the D.C. Circuit never adopted that interpretation. *See also United States v. Vosburgh*, 602 F.3d 512, 525 (3d Cir. 2010) (not reaching the Sarbanes-Oxley count because defendant was ***acquitted*** of destroying evidence in violation of Section 1519); *United States v. Giuseppe Bottiglieri Shipping Co., S.P.A.*, No. 12-0057, 2012 WL 1899844, at *2 (S.D. Ala. May 24, 2012) (upholding the sufficiency of an indictment on two grounds unrelated to Section 1519); *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 456-57 (D.N.J. 2009) (saying nothing about the jury's conviction of the defendant under Section 1519).

The second type of cases identified by the United States only confirm that "tangible object" extends to some items that would otherwise lie beyond the statute's reach because they are not obviously "documents" or "records." In each case, the evidence at issue would come within the interpretation of "tangible object" urged by Petitioner. *E.g., Wortman*, 488 F.3d at 755 (applying Section 1519 to a compact disk); *Vosburgh*, 602 F.3d at 525 (noting that prosecutors charged the defendant with destroying computer hard drives). The same pattern also

emerges in the few lower court opinions that argue — in *dicta* — for a more sweeping interpretation of the statute. *See United States v. Russell*, 639 F. Supp. 2d 226, 237-38 (D. Conn. 2007) (rejecting Petitioner's position, but in a case concerning the destruction of a laptop computer).

The government's inability to identify courts outside the Eleventh Circuit that construe Section 1519 to reach non-record-keeping contraband is telling. It testifies to the apparent consensus among lower courts that Sarbanes-Oxley can accomplish its investor-protection purpose without becoming another all-purpose anti-spoliation statute.

Just as significant is that numerous courts have relied on Section 1519's "tangible object" language to bring electronic storage media within the scope of the provision in the way Petitioner's reading would support. *E.g., Wortman*, 488 F.3d at 755 (compact disc); *United States v. Smyth*, 213 F. App'x 102 (3d Cir. 2007) (computer hard drive); *United States v. Atkinson*, 2012 WL 3206446, at *2 (S.D. Ala. Aug. 7, 2012) (digital video recorder (DVR) hard drive). These cases are especially illustrative because they concern the destruction of storage ***devices***, rather than ***files*** stored on those devices. While a file itself might constitute a "record" or "document," the device on which it is stored belongs to neither definition. This insight is a full response to the allegations of superfluousness in the *Russell dicta*. The inclusion of "tangible object" is not redundant because it encompasses storage devices that are not themselves documents or records. At the very least, it clarifies that such devices are within the reach of Section 1519, which can suffice to avoid violating the canon. *Krause v. Titleserv, Inc.*, 402 F.3d 119, 127-28 (2nd

Cir. 2005) ("Some repetition can help clarify the meaning of a statute, and we are reluctant to endorse an awkward reading of its words for no better reason than to satisfy the canon of construction that cautions against adopt[ing] a construction making another statutory provision superfluous." (quotation omitted)). Doing so also enables Section 1519 to supplement Section 2232 for a specific purpose, rather than rendering the latter a weaker and superfluous tool relative to the former.

Precedent in the lower courts — including that cited by the United States in opposition to *certiorari* — confirms that Section 1519 plays the important role of bringing electronic storage devices within the protective scope of Sarbanes-Oxley. In context, Petitioner is correct that Section 1519's reference to "tangible objects" in conjunction with "documents" and "records" plainly refers to record-keeping devices. That is the proper and correct construction, and the provision needs no judicial embellishment or expansion to fulfill that role.

CONCLUSION

Respondent's interpretation of Section 1519 is beyond what Congress intended in enacting Sarbanes-Oxley, misreads the text in its context, and would impose significant burdens on the business community, with obvious harm to our national economy. Thankfully, familiar tools of statutory interpretation avoid this outcome by confining "tangible objects" in context to record-keeping devices rather than entire physical inventories. For these reasons, as well as those set forth in Petitioner's brief, the judgment in this case should be reversed.

Respectfully submitted,

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