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

BRIEF OF PETITIONER

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QUESTION PRESENTED

The anti-shredding provision of the Sarbanes-Oxley Act criminalizes knowingly altering, destroying, mutilating, concealing, covering up, falsifying, or making 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 federal matter. *See* 18 U.S.C. § 1519 (2002) (emphasis added). The question presented here is:

> Whether the ordinary or natural meaning of the phrase "tangible object," in light of its surrounding terms and its placement in the Sarbanes-Oxley Act, is a thing used to preserve information, such as a computer, server, or similar storage device.

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JURISDICTION

The court of appeals entered its judgment on August 16, 2013. Mr. Yates timely filed a petition for a writ of certiorari on November 13, 2013. This Court granted the petition on April 28, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The anti-shredding provision of the Sarbanes-Oxley Act of 2002 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.

18 U.S.C. § 1519 (2002).

STATEMENT OF THE CASE

Petitioner John Yates was convicted under 18 U.S.C. § 1519 for directing his crewmen to throw undersized fish back into the sea, after receiving a civil citation and being told to bring the fish to dock to be destroyed. Section 1519, commonly known as the anti-shredding provision of the Sarbanes-Oxley Act of 2002,[1] criminalizes the destruction, alteration, or falsification of "any record, document, *or tangible object*," with the intent to obstruct or influence the proper administration of any federal matter. 18 U.S.C. § 1519 (emphasis added). Concluding that a fish is a "tangible object," the court below affirmed Mr. Yates's conviction. Mr. Yates seeks reversal of that decision as it is contrary to this Court's precedents, which require that the phrase be interpreted in the context of its surrounding terms and the statutory scheme.

1. The Sarbanes-Oxley Act was enacted in the wake of the Enron Corporation debacle. *See Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161-62 (2014). Before its collapse, Enron was considered the nation's seventh largest corporation based on its reported revenues. *See United States v. Arthur Andersen LLP*, No. 02-121, 2002 WL 32153945, at ¶ 2 (S.D. Tex. Mar. 14, 2002) (indictment). Enron's financial prosperity, however, was largely a ruse perpetrated by Enron and its auditor, Arthur Andersen, which assisted Enron in defrauding its investors and reaping

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[1] *See, e.g.*, Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519 (2004); *see also* S. Rep. No. 107-146, at 17, 22 (2002).

millions of dollars for certain insiders. *Id.* at ¶ 8. Anticipating an imminent investigation, Enron and Arthur Andersen devised and orchestrated a plan to purge Enron's corporate records under the guise of enforcing Enron's document retention policy. *Id.* at ¶¶ 5, 9-11. The purge was not limited to the tons of paper records and documents that were shredded; it extended to the computer hard drives and the email system that preserved any documentation relating to Enron. *Id.* at ¶ 10; *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 698-702 (2005).

Federal obstruction of justice statutes in effect at the time did not criminalize the destruction of documents *prior* to the onset of an official federal investigation. *See generally* 18 U.S.C. §§ 152(8), 1503, 1512(a), (b) (2000).[2] Then-existing laws thus proved to be inadequate to hold Arthur Andersen criminally responsible for its involvement in the document-shredding scandal. *See Arthur Andersen LLP*, 544 U.S. at 702, 706-08. Hence, Congress passed the Sarbanes-Oxley Act 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*, 134 S. Ct. at 1162 (quoting S. Rep. No. 107-146 at 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.").

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[2] *See also* Hill, *supra* note 1.

2. Mr. Yates, a commercial fisherman, was employed as the captain of the *Miss Katie*. JA 25, 96, 125. On August 23, 2007, when the *Miss Katie* was six days into a commercial harvest of red grouper in the Gulf of Mexico, a Florida Fish and Wildlife Conservation Commission officer boarded the boat to conduct a routine inspection in federal waters. JA 22-25, 125. The officer was federally deputized to enforce size limits for fish by the National Marine Fisheries Service, which is a division of the National Oceanic and Atmospheric Administration under the Department of Commerce. JA 13, 61.

In 2007, federal law required that harvested red grouper be at least 20 inches in length. JA 31, 109, 125 & n.2; 50 C.F.R. § 622.37(d)(2)(ii) (2007).[3] While aboard the *Miss Katie*, the FWC officer noticed three red grouper that appeared to be smaller than 20 inches. JA 23-24, 125. After visually inspecting the grouper harvested by the *Miss Katie*'s crew and finding some were "obviously well oversize," the officer measured the grouper that appeared to him to be less than 20 inches long. JA 26-27, 126.

Federal law requires that fish be measured with their mouth open, their mouth closed, their tail pinched, and their tail not pinched, whichever combination yields the "greatest overall measurement." JA 58-59, 109, 125-26 n.2; *see also* 50 C.F.R. § 622.2 (2007).[4] The officer, however, opted only to measure the fish with their mouth closed and

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[3] The regulation has since been amended to reduce the size limit for grouper to 18 inches. *See* 50 C.F.R. § 622.37(d)(2)(ii) (2014).

[4] This regulation has not changed. *See* 50 C.F.R. § 622.2 (2014).

their tail pinched. JA 30, 59, 126. Using that method, he determined that 72 grouper measured between 18-3/4 and 19-3/4 inches. JA 31, 82-84, 126.

Harvesting undersized fish is not a crime; rather, it is a civil violation punishable by a fine or fishing license suspension. *See* 16 U.S.C. §§ 1857(1) (A), (G), 1858(a), (g), 1859(a) (2006). The officer thus issued Mr. Yates a civil citation for harvesting 72 undersized grouper. JA 41, 81, 126. The undersized fish were placed in crates in the *Miss Katie*'s fish box. JA 41. The officer told Mr. Yates to leave them there and return to dock, where the fish would be seized and destroyed. JA 44, 126.

Two days after the *Miss Katie* returned to dock, the officer re-measured the fish in the same manner as he had at sea. JA 46-51, 100, 125-26 & n.2, 127. This time, he determined that 69 (rather than 72) fish measured less than 20 inches. JA 53-54, 126-27. He also found that the majority of the fish at dock measured close to 20 inches long; whereas, a majority at sea measured closer to 19 to 19-1/2 inches. JA 53-55, 127.

The officer, although he had never previously re-measured fish at dock, surmised that the discrepancies in his measurements meant that the fish he measured at dock were not the same fish he had measured at sea. JA 53-56, 127. His suspicions were later supported by one of the *Miss Katie*'s crewmen, who told federal agents that Mr. Yates had directed the crew to throw the undersized fish overboard and to replace them with fish of legal size. JA 69-70, 127.

3. In 2010, Mr. Yates was indicted for violating 18 U.S.C. § 2232(a), by throwing undersized fish overboard to prevent the government from taking the fish into its custody, and with violating 18 U.S.C. § 1001(a)(2), by falsely stating to federal agents that all the undersized fish the officer measured at sea were aboard the *Miss Katie* at dock. JA 6-8. Additionally, he was charged with violating the anti-shredding provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1519, by destroying, concealing, and covering up "undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit." JA 7.

During his jury trial, Mr. Yates moved for a judgment of acquittal at the conclusion of the government's case-in-chief and of all evidence. He argued that when "tangible object" is read in the context of § 1519, the phrase means things akin to records and documents, in which "notations" can be made, such as "computer hard drives, logbooks, [and] things of that nature." JA 90-92.

The district court initially questioned whether fish fell within the meaning of "tangible object" for purposes of § 1519. Referencing the canon of statutory construction that a series of words must be interpreted consistently, the court stated, "So if you're talking about documents, and records, tangible objects are tangible objects in the nature of a document or a record, as opposed to a fish." JA 93. The court expounded, "if you look at the title for at least a clue as to what congress meant, it talks about destruction, alteration, or falsification of records in federal investigations. It might be a stretch to say

throwing away a fish is a falsification of a record." JA 95.

After taking the matter under advisement, the district court entered a written order that did not mention these concerns. Instead, the court denied the motion, relying on "the nature of the matters within the jurisdiction of the government agency involved in this case, and the broad language of § 1519," to conclude that "a reasonable jury could determine that a person who throws or causes to be thrown fish overboard in the circumstances of this case is in violation of § 1519." JA 116-17.

The jury acquitted Mr. Yates on the false-statement count, but convicted him on the other two counts. JA 6-8, 118-19. The district court sentenced Mr. Yates to 30 days' imprisonment, to be followed by three years' supervised release. JA 119-20.

4. The Eleventh Circuit Court of Appeals affirmed Mr. Yates's conviction for violating § 1519. JA 134. The appellate court began by quoting case law stating that the plain meaning of a statute controls and that undefined words are given their ordinary or natural meaning. JA 132. "In keeping with those principles," the court summarily concluded, "'tangible object,' as § 1519 uses that term, unambiguously applies to fish." JA 132 (citing *Black's Law Dictionary* 1592 (9th ed. 2009) (defining "tangible" as "[h]aving or possessing physical form")). The court added, "Because the statute is unambiguous, we also conclude the rule of lenity does not apply here." JA 132.

SUMMARY OF THE ARGUMENT

Enacted in the wake of the Enron document-shredding scandal, the anti-shredding provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519, criminalizes the destruction of "any record, document, or *tangible object*." For purposes of this provision, "tangible object" means a thing used to preserve information, such as a computer, server, or similar storage device.

This construction follows from this Court's precedents, which dictate that an undefined statutory phrase – such as "tangible object" here – be ascribed its ordinary or natural meaning in everyday usage. The ordinary or natural meaning of "tangible object" necessarily depends on the context in which the phrase is used. Indeed, the dictionary definitions of "tangible" and "object" are so general that the phrase "tangible object" is chameleon-like, meaning different things in different contexts.

To ascertain the meaning of the phrase "tangible object" as used in § 1519, then, the phrase must be read in the context of its surrounding terms, "record" and "document." Those terms share a common meaning in everyday usage having to do with preserving information. It follows from the application of the canons *noscitur a sociis* and *ejusdem generis* that "tangible object" shares this common meaning. Aligned with the terms "record" and "document," "tangible object" is thus naturally read as meaning a thing used to preserve information, such as a computer, server, or similar storage device. This is also the most natural grammatical reading of "tangible object" when the

phrase is read in conjunction with the immediately preceding series of parallel transitive verbs, most notably, "makes a false entry in."

Moreover, this common-sense and contextual interpretation of "tangible object" is bolstered by its placement in the larger context of the Sarbanes-Oxley Act, and by Congress's tacit approval of the United States Sentencing Commission's construction of the phrase "records, documents, or tangible objects," as meaning those things that preserve or store information. Further, the contextual interpretation of "tangible object" avoids absurd results and constitutional concerns that follow from a non-contextual construction. Finally, if after examining "tangible object" in the context of the statute and the statutory scheme any lingering doubt remains, this criminal statute's meaning must be resolved in Mr. Yates's favor.

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.

A federally-deputized Florida Fish and Wildlife Conservation Commission officer issued John Yates a civil citation for catching undersized red grouper in federal waters. Despite being told to bring the undersized fish to dock to be destroyed, Mr. Yates directed crewmen to throw them overboard at sea. This conduct resulted in Mr. Yates's conviction under the anti-shredding provision of the Sarbanes-Oxley Act of 2002, which criminalizes the destruction, alteration, or falsification of "any record, document, or tangible object." Pub. L. 107-2014, Title VIII, § 802, 116 Stat. 745, 18 U.S.C. § 1519 (2002). Viewed in isolation and out of context, the phrase "tangible object" is elastic enough to encompass a fish. That construction, however, contravenes this Court's precedents and principles of statutory interpretation.

Interpreting an undefined phrase in a statute begins with ascertaining the phrase's ordinary or natural meaning in common usage and consistent with the statutory scheme. Context is the cornerstone in this analysis. "Tangible object" means different things in different contexts. The meaning of that phrase, therefore, is necessarily informed by the surrounding statutory terms, the statute as a whole, and the phrase's placement in the statutory scheme.

Aligned with the terms "record" and "document" in the anti-shredding provision of the Sarbanes-Oxley Act, "tangible object" naturally means a thing used to preserve information, akin to a computer, server, or similar storage device. This Court's principles of statutory construction support this contextual meaning. Mr. Yates therefore asks the Court to reverse the decision of the court of appeals.

A. The ordinary or natural meaning of "tangible object" is based on its context.

The inquiry into what Congress meant by "tangible object" in the anti-shredding provision of the Sarbanes-Oxley Act starts by giving the statutory phrase its ordinary or natural meaning in everyday usage. *See United States v. Ressam*, 553 U.S. 272, 274 (2008) (relying on the "most natural reading of the relevant statutory text"); *Watson v. United States*, 552 U.S. 74, 83 (2007) (applying the "ordinary meaning and the conventions of English"); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (looking to the "everyday" or "regular usage" to maintain coherency with the "commonsense conception" of the term); *Smith v. United States*, 508 U.S. 223, 228 (1993) (referencing "ordinary or natural meaning" and "everyday meaning").

McBoyle v. United States, 283 U.S. 25 (1931), illustrates this point. In *McBoyle*, this Court construed the term "vehicle" in the National Motor Vehicle Theft Act, which defined "motor vehicle" as including "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled *vehicle* not designed for running on rails." *Id.* at 26 (emphasis added). An aircraft plainly falls

within the dictionary definition of "vehicle." *Id.* This Court, however, unanimously held that an aircraft was *not* a vehicle *for purposes of the Act*, because "in everyday speech 'vehicle' calls up the picture of a thing moving on land." *Id.* The Court cautioned that statutory terms, like "vehicle," should not be extended beyond the meaning they "evoke in the common mind." *Id.* at 27.[5]

The dictionary, while often a helpful tool in resolving questions of the ordinary or natural meaning, is particularly unhelpful here because it defines the words "tangible" and "object" so generally that the phrase "tangible object" is chameleon-like. It adapts to whatever context it is used in. *See, e.g., Federal Aviation Administration v. Cooper*, 132 S. Ct. 1441, 1150 (2012) ("Because the term 'actual damages' has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears.").

Consider first the noun "object." It is essentially just "a discrete visible or tangible thing." *Webster's Third New International Unabridged Dictionary* 1555 (2002) (*Webster's Third*).[6] The adjective "tangible"

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[5] "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents and that it expects its enactments to be interpreted in conformity with them." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (internal citations, alterations, and quotation marks omitted).

[6] For additional definitions of "object," *see American Heritage Dictionary of English Language* 1211 (4th ed. 2000) ("Something perceptible by one or more of the senses, especially by vision or touch; a material thing"; "A focus of attention, feeling, thought, or action"; "The purpose, aim, or goal of a specific action or

does little to clarify the type of thing, given that "tangible" is defined as "capable of being touched" or "capable of being realized by the mind[.]" *Webster's Third* 2337.[7]

By dictionary definition alone, then, the phrase "tangible object" only has substance when used in context. For example, if a person says, "General Motors sells tangible objects," one would naturally understand the person to be referring to automobiles, automobile parts, and the like. But if a person says,

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effort"); *Black's Law Dictionary* 1101 (7th ed. 1999) ("A person or thing to which thought, feeling, or action is directed"; "Something sought to be attained or accomplished"); *Ninth New Collegiate Dictionary* 814 (1998) ("something material that may be perceived by the senses"; "something mental or physical to which thought, feeling, or action is directed"; "the goal or end of effort or activity"); 10 *Oxford English Dictionary* 640 (2d ed. 1986) ("Something placed before the eyes, or presented to the sight or other sense; an individual thing seen or perceived, or that may be seen or perceived; a material thing"); *Random House Webster's Unabridged Dictionary* 1335 (2001) ("anything that is visible or tangible and is relatively stable in form"; "a thing, person, or matter to which thought or action is directed").

[7] For additional definitions of "tangible," *see American Heritage* 1767 ("Discernible by touch"; "Possible to be treated as fact; real or concrete"; "Possible to understand or realize"); *Black's* 1468 ("Having or possessing physical form"; "Capable of being touched and seen; perceptible to the touch; capable of being possessed or realized"; "Capable of being understood by the mind"); *Ninth New Collegiate* 1205 ("capable of being perceived esp. by the sense of touch"; "substantially real"; "capable of being precisely identified or realized by the mind"; "capable of being appraised at an actual or approximate value"); 17 *OED* 610 ("Capable of being touched"; "Material, externally real, objective"); *Random House* 1941 ("capable of being touched; material or substantial"; "real or actual, rather than imaginary or visionary").

"Apple sells tangible objects," one would not think of automobiles; rather, one would ordinarily understand the person to be referring to MacBooks, iMacs, iPhones, iPads, and other similar electronic "i" products. *See also* Paul Larkin, *Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes-Oxley Act*, 103 Geo. L.J. 17, 18 (2014) (observing that "tangible object" draws its meaning from context similar to the term "soccer," which is considered "football" for purposes of the World Cup, but not for purposes of the Super Bowl).

As these examples illustrate, the phrase "tangible object" is so elastic that it stretches to the contours of whatever setting it is used in and conveys different meanings in different contexts. The ordinary or natural meaning of the phrase thus necessarily depends on reading it in the context in which it is used and identifying the category of things to which it refers. *See, e.g.*, *Caraco Pharmaceutical Labs, Ltd. v. Nordisk A/S*, 132 S. Ct. 1670, 1681 (2012) (explaining that the meaning of the phrase "not an" depends on how it is used, and therefore its meaning "turns on its context"); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("Particularly when interpreting a statute that features as elastic a word as 'use,' the Court construes language in its context and in light of the terms surrounding it."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

For instance, in *Johnson v. United States*, 559 U.S. 133 (2010), this Court construed the phrase "physical force" in the definition of "violent felony" in the Armed Career Criminal Act, 18 U.S.C. § 924(e). Observing that "force has a number of meanings[,]"

the Court stressed that "context determines meaning[.]" 559 U.S. at 138-39. And while in the context of the common law offense of battery, "force" could mean "even the slightest offensive touching," in "the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force – that is, capable of causing physical pain or injury to another person." *Id*. at 140.

As with the meaning of "force" in *Johnson*, the meaning of "tangible object" must derive from "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotation marks and citation omitted); *see also Dolan v. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *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.").

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.

Two contextual canons, *noscitur a sociis* and *ejusdem generis*, are of particular assistance in determining the meaning of "tangible object" in the context of its surrounding words.[8] The canon *noscitur a sociis* instructs that "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990). Similarly, the canon *ejusdem generis* dictates that where general or vague words follow specific words in a statute, the "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001)).[9]

For instance, when addressing the meaning of "discovery" in the Excess Profits Tax Act, this Court noted that the statutory term – much like "tangible object" here – "is a word usable in many contexts and with various shades of meaning." *Jarecki v. G. D.*

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[8] "It is presumable that Congress legislates with knowledge of [this Court's] basic rules of statutory construction." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991).

[9] *See also F.W. Fitch Co. v. United States*, 323 U.S. 582, 585-86 (1945) (holding that in light of the *ejusdem generis* doctrine, "other charge" in the phrase "transportation, delivery, insurance, or other charge" included only shipment costs, not pre-shipment costs).

Searle & Co., 367 U.S. 303, 307 (1961). The Court thus looked to the words around it, observing that "discovery" was used in conjunction with "exploration" and "prospecting" in the statute. *Id.* Reasoning that the three words had a common meaning in that "all describe income-producing activity in the oil and gas and mining industries[,]" the Court concluded that "discovery" in that statute "means only the discovery of mineral resources." *Id.* *See also Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) ("It is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.") (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)).

Here, the nouns immediately preceding "or tangible object" in § 1519 are "record" and "document." A "record" is commonly defined as a permanent account of events that preserves information. *See, e.g.*, *Webster's Third* 1898 ("an account in writing or print (as in a document) or in some other permanent form (as on a monument) intended to perpetuate a knowledge of acts or events").[10] Likewise, the

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[10] For additional definitions of "record," *see American Heritage* 1461 ("An account, as of information or facts, set down especially in writing as a means of preserving knowledge"); *Black's* 1279 ("A documentary account of past events, usu. designed to memorialize those events; information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form"); *Ninth New Collegiate* 984 ("something that recalls or relates past events"; "an official document that records the acts of a public body or officer"); 13 *OED* 359 ("The fact or attribute of being, or having been, committed to writing as authentic evidence of a matter having legal importance"); *Random House* 1612 ("an account in

common meaning of "document" is a writing that preserves certain information. *See, e.g.*, *Webster's Third* 666 ("an original or official paper relied upon as the basis, proof, or support of something").[11]

"Record" and "document" thus share a common meaning in everyday usage having to do with preserving information. *See Jarecki*, 367 U.S. at 307. It follows from the application of the canons *noscitur a sociis* and *ejusdem generis* that "tangible object" shares that common meaning as well. Within the context of the anti-shredding provision, then, "tangible object" is naturally understood to be a thing that is used to preserve information, such as a computer, server, or similar storage device.

This is also the natural reading of the nouns when read in conjunction with the immediately preceding series of parallel transitive verbs: "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." 18 U.S.C. § 1519.

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writing or the like preserving the memory or knowledge of facts or events").

[11] For additional definitions of "document," *see American Heritage* 530 ("A written or printed paper that bears the original, official, or legal form of something and can be used to furnish evidence or information"); *Black's* 498 ("Something tangible on which words, symbols, or marks are recorded"); *Ninth New Collegiate* 371 ("an original or official paper relied on as the basis, proof, or support of something"; "a writing conveying information"); 4 *OED* 916 ("That which serves to show, point out, or prove something; evidence, proof"); *Random House* 578 ("a written or printed paper furnishing information or evidence").

Of particular significance, Congress placed the verb phrase "makes a false entry in" immediately before "any record, document, or tangible object." *Id*. The use of the preposition "in" means that "tangible object," as used in the anti-shredding provision, must be a thing "in" which a false entry can be made. *See, e.g., Lopez*, 549 U.S. at 56 ("[O]ur interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them, and the last thing this approach would do is divorce a noun from the modifier next to it without some extraordinary reason."). A false entry can be made in a document, record, or other thing that is used to preserve information, such as a computer, server, or similar storage device. But a false entry cannot be made in every thing. More specifically, a false entry cannot be made in a fish.

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.

In addition to the immediately surrounding words, a contextual analysis requires examination of the placement of the phrase "tangible object" in the larger statutory scheme.[12] "Tangible object" is found in

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[12] *See generally Food and Drug Administration v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (holding that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted); *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning" of the critical word or phrase "but also its placement and purpose in the statutory scheme.").

§ 1519, which was enacted as part of the Sarbanes-Oxley Act. Congress passed that Act in response to the systematic campaign by Enron and its auditor, Arthur Anderson, to purge records and documents in anticipation of a federal investigation. *See generally Lawson*, 134 S. Ct. at 1161. The purge extended beyond paper records and documents to computer drives and the email system. *See Arthur Anderson LLP*, 2002 WL 32153945, at ¶¶ 5, 9-11.

The Sarbanes-Oxley Act was enacted, "To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation," and 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*, 134 S. Ct. at 1161-62 (quoting S. Rep. No. 107-146, p. 2 (2002)).

The anti-shredding provision was placed in § 802 of Title VIII of the Sarbanes-Oxley Act. The titles of these provisions are informative. *See Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991).

Title VIII, titled, "Corporate and Criminal Fraud Accountability Act of 2002," contains two new criminal offenses in § 802, which is titled "Criminal Penalties for Altering *Documents*." Pub. L. 107-2014, Title VIII, § 802, 116 Stat. 745 (emphasis added). The first is 18 U.S.C. § 1519, titled, "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis added).

Section 1519's companion provision in § 802 of Title VIII is 18 U.S.C. § 1520, titled, "Destruction of corporate audit *records*." *See* 18 U.S.C. § 1520 (2002) (emphasis added). That provision directs the Securities and Exchange Commission to promulgate rules for the retention of documents and records (including electronic records). It also penalizes accountants for willfully failing to preserve "workpapers" of audits conducted for issuers of regulated securities. *Id.*[13]

Given the placement of "tangible object" in this statutory scheme, which is so obviously intended to preserve corporate records, documents, computer drives, and email servers, an ordinary person would naturally read "tangible object" to mean a thing used to preserve information, like a computer, server, or similar storage device.

Further insight into the meaning and purpose of "tangible object" can be found in § 805 of the Act, which directed the United States Sentencing Commission to amend the United States Sentencing Guidelines relating to § 1519 and § 1520. *See* Pub. L. 107-2014, Title VIII, § 805, 116 Stat. 745. In response to that directive, the Sentencing Commission enhanced the guideline penalties for

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[13] The provisions immediately preceding the anti-shredding provision apply to obstruction in specific cases, such as in federal audits, examination of financial institutions, and criminal investigations of health care offenses. *See* 18 U.S.C. §§ 1516-1518 (2000). Thus, it makes sense that § 1519 also would apply to a specific category of obstruction offenses – those involving the destruction of things that preserve information, like the things involved in the Enron scandal that prompted the passage of the Act.

obstruction of justice offenses involving "the destruction, alteration, or fabrication of a substantial number of *records, documents, or tangible objects*[.]" U.S. Sentencing Guidelines Manual, app. C, amend. 647 (2003) (emphasis added); *see also* U.S. Sentencing Guidelines Manual § 2J1.2(b)(3) (2003). The Commission then provided the following commentary:

> "Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

U.S. Sentencing Guidelines Manual, app. C, amend. 653 (2003); *see also* U.S. Sentencing Guidelines Manual § 2J1.2 cmt. n.1 (2003).

The Sentencing Commission clearly borrowed the language "records, documents, or tangible objects" from the anti-shredding provision, as no other provision in the Sarbanes-Oxley Act uses that exact language. If the Commission's construction of "records, documents, or tangible objects" did not comport with Congress's intentions, certainly Congress would have voiced its opposition. *See* 28 U.S.C. § 994(p). Congress's tacit approval of the Sentencing Commission's construction indicates that construction effectuates Congress's intended meaning of "tangible object." *See id.* That meaning is a thing that is used to preserve information, similar to a computer, server, or similar storage device.

D. Interpreting "tangible object" to mean a thing used to preserve information, such as a computer, server, or similar storage device, avoids absurd results.

Reading the phrase "tangible object" in context and consistently with the legislative purpose will avoid absurd, odd, and unreasonable results. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."); *see also Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 & n.3 (1993) (citing cases dating back to 1869 applying "the common mandate of statutory construction to avoid absurd results").

A broad reading of "tangible object," in contrast, would produce unreasonable results. Consider, for example, an automobile manufacturer that voluntarily recalls defective automobile parts and decides to scrap ("destroy") its inventory of recalled defective parts ("tangible objects"). That manufacturer could be prosecuted under the anti-shredding provision if the automaker's intent in taking this remedial measure was to avoid ("influence") the levy of a fine by the National Highway Traffic and Safety Administration. The automaker would thus be forced to retain and store all of those defective auto parts to comply with this law.

This case also illustrates the absurdity that results when "tangible object" is construed outside of its context. For the act of directing that fish be thrown overboard to obstruct a civil investigation, Mr. Yates

was convicted of violating § 1519, which subjected him to up to 20 years in prison. There were certainly other statutes covering Mr. Yates's acts. Indeed, he was also charged with and convicted of the "destruction or removal of property to prevent seizure," which is punishable by up to five years' imprisonment. *See* 18 U.S.C. § 2232(a).[14] Moreover, the vast majority of obstruction-of-justice statutes are punishable by no more than five years in prison.[15]

It makes little sense then to conclude that the anti-shredding provision makes it a 20-year felony to destroy any thing, including a fish, with intent to influence the administration of any federal matter. And it makes even less sense to conclude that Congress intended to convert every attempt to evade a federal civil sanction into a 20-year felony. Certainly Congress did not intend such unreasonable results when it enacted the anti-shredding provision.

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[14] Additionally, Mr. Yates was charged with, but acquitted of, making a false statement to federal agents, in violation of 18 U.S.C. § 1001(a)(2). *See* JA 7-8, 119.

[15] *See, e.g.*, 18 U.S.C. § 245(b) (2006) (obstruction of civil rights); 18 U.S.C. § 505 (2006) (court forgeries); 18 U.S.C. § 1505 (2006) (obstruction before departments, agencies, and committees, unless terrorism is involved, in which case the penalty rises to eight years); 18 U.S.C. §1510 (2006) (obstruction of criminal investigations).

E. A contextual construction of "tangible object" as a thing used to preserve information, like a computer, server or similar storage device, comports with the rules of constitutional avoidance and lenity.

Two additional rules of statutory construction further militate in favor of construing "tangible object" in the context of the anti-shredding provision to mean a thing used to preserve information – the rules of constitutional avoidance and lenity. Concerning the former, "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984)).[16]

For example, in *Skilling v. United States*, 561 U.S. 358 (2010), this Court held that the honest-services statute "presents no vagueness problem" when narrowly construed to apply only to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party." *Id.* at 404; *see also id.* at 402-13. The Court explained that the statute, so construed, does not raise either of the concerns that the void-for-

[16] *See also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (noting the well-settled rule that when "an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

vagueness doctrine addresses, namely, providing "fair notice" and preventing "arbitrary and discriminatory prosecutions." *Id.* at 412.

The lower court's non-contextual expansion of the anti-shredding provision's phrase "tangible object," on the other hand, raises serious constitutional questions. For example, an offense defined by terms that are so indefinite that law is made concerning their meaning on a case-by-case basis is void for vagueness. *See Ashton v. Kentucky*, 384 U.S. 195, 198-99 (1966) ("[S]ince the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it . . . leav[es] to the executive and judicial branches too wide a discretion in its application.") (internal quotation marks and citations omitted). "Tangible object" is such a term if given a broad, non-contextual construction.

Moreover, given the anti-shredding provision's de minimus connection to any federal matter,[17] a broad reading of "tangible object" may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). This is tantamount to executive legislating, which is offensive to the Constitution's separation of powers. Thus, to insist on the broadest

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[17] The only connection that the conduct prohibited by § 1519 must have to a federal matter is that the conduct must be done "*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." 18 U.S.C. § 1519 (emphasis added).

interpretation of "tangible object" is to add to the phrase's vagueness and exacerbate constitutional concerns.

This Court can avoid these constitutional concerns by interpreting "tangible object" narrowly and within its context to mean a thing that is used to preserve information, akin to a computer, server, or similar storage device. As this Court has previously observed, "We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen LLP*, 554 U.S. at 703 (internal citations and quotation marks omitted). Similar restraint is appropriate here.

Finally, if any doubt remains as to the meaning of "tangible object," the rule of lenity requires that the doubt be resolved in Mr. Yates's favor. *See McNally v. United States*, 483 U.S. 350, 359-60 (1987) (observing that the rule of lenity requires that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language"); *cf. United States v. Bass*, 404 U.S. 336, 347-349 (1971) (applying rule of lenity in defendant's favor where Congress had "not 'plainly and unmistakably,' . . . made it a federal criminal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce") (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)). Mr. Yates's contextual reading of "tangible object" as meaning things used to preserve

information, akin to a computer, server, or similar storage device, is at least as valid as the Eleventh Circuit's non-contextual interpretation. Accordingly, the rule of lenity dictates that the breadth of "tangible object" in the anti-shredding provision be limited to things used to preserve information.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed, and the case should be remanded with instructions that Mr. Yates's conviction under 18 U.S.C. § 1519 be vacated.

Respectfully submitted,

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