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 FOR THE HONORABLE MICHAEL OXLEY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
BAKERHOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for the Amicus Curiae

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INTEREST OF THE *AMICUS*[1]

The Honorable Michael G. Oxley represented Ohio's Fourth Congressional District for 25 years and served as Chairman of the House Financial Services Committee from 2001 to 2007. In that role, he was co-author of the Sarbanes-Oxley Act of 2002 ("SOX") and led the broad, bipartisan coalition that enacted the statute. Representative Oxley and SOX's other supporters intended the statute to protect investors, to improve the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes, including "provid[ing] for criminal prosecution of persons who alter or destroy evidence in *certain* Federal investigations or defraud investors of publicly traded securities." S. Rep. No. 107-146, at 2 (2002) (Comm. Rep.) (emphasis added). Consistent with that purpose, Representative Oxley recognizes that overly broad interpretations of SOX's provisions threaten to undermine the Act's reforms by imposing undue burdens on businesses and individuals, upsetting the careful balance struck by Congress. The *amicus* therefore has an interest in vindicating the limitations inherent in SOX's anti-shredding

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or his counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

provision against the Government's attempt to expand it to reach conduct far beyond anything that Congress ever anticipated or intended.

INTRODUCTION

On October 23, 2001, David B. Duncan, the lead Arthur Andersen partner on the firm's Enron account, convened a meeting in his office. The week before Enron had disclosed charges for bad investments exceeding $1 billion, and now the Securities and Exchange Commission was requesting information from the company. Worried about what the records in Andersen's possession might reveal, Duncan ordered his staff to destroy troves of paper files, hard drives, and emails relating to the account. For the next two-and-a-half weeks, Andersen employees in offices on both sides of the Atlantic worked overtime to carry out Duncan's instruction. It was not until the SEC formally subpoenaed Duncan on November 8 that his assistant sent an email to other secretaries at the firm telling them to "stop the shredding."[2]

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[2] *See generally Arthur Andersen LLP v. United States*, 544 U.S. 696, 699–702 (2005); S. Rep. No. 107-146, at 2–5 (2002) (Comm. Rep.); Michael Brick, *Andersen Fires Lead Enron Auditor*, N.Y. Times, Jan. 15, 2002, *available at* http://www.nytimes.com/2002/01/15/business/15CND-ENRON.html; Richard A. Oppel, Jr. & Kurt Eichenwald, *Arthur Andersen Fires an Executive for Enron Orders*, N.Y. Times, Jan. 16, 2002, *available at* http://www.nytimes.com/2002/01/16/business/16ENRO.html.

The next chapter in this story is by now well known. Within a month of Duncan's subpoena, Enron declared bankruptcy, over 20,000 employees found themselves unemployed and holding worthless retirement accounts, and investors and pension funds nationwide lost literally billions of dollars. What is more, revelations of the accounting fraud cast a long shadow over other companies' public filings and statements, and investors began to lose faith in the financial reporting of public corporations, imperiling public markets and the economy. Spurred by widespread calls for action, Congress turned its attention to the legal and regulatory regime that facilitated Enron's fraud. The result was the Sarbanes-Oxley Act of 2002.

The Act's obstruction of justice provisions, in particular, grew out of frustration with shortcomings in existing federal law that had hampered prosecutors in the wake of Enron's collapse. Because the law only made it a crime to "persuade[] another person" to destroy evidence, 18 U.S.C. § 1512(b)(2)(B), prosecutors charging Arthur Andersen were forced "to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves." S. Rep. No. 107-146, at 7 (2002) (Comm. Rep.). And even that theory was tenuous, because then-existing law did not necessarily forbid the destruction of documents in *contemplation* of a federal investigation, before one had been formally launched.

That context is crucial to understanding SOX's "document-shredding" provisions, including the one at issue in this case. Section 1519 in particular was enacted to close the two loopholes identified in the Arthur Andersen case. Modeled on existing law, it expanded the scope of liability to reach third parties like accountants who themselves destroy business records. It also adopted an earlier trigger for liability, the "contemplation" of a federal investigation. In these ways, Congress sought to ensure that the Arthur Andersen scenario could not recur. That intention—and the commensurate limitation of the scope of the provision to records—is confirmed by the statutory language and its derivation, the pairing of Section 1519 with a parallel provision addressing audit records in a single statutory section concerning the destruction of "records," and the legislative history, which repeatedly recognizes Section 1519 for what it is: an "anti-shredding provision."

Against this unanimous evidence of congressional intent, the Government's reading of Section 1519 to reach destruction of any and all things, including piscine creatures, falls flat. Beyond failing to account for context, the Government's interpretation also obliterates the fine distinction that Congress sought to draw between Section 1519 and another SOX provision, codified at 18 U.S.C. § 1512(c)(1), that establishes a broader prohibition on destruction or alteration of any kind of object, but is triggered in narrower circumstances more likely to put persons on notice of their obligations. If the Government's position

prevails, not only would that latter provision be rendered superfluous, but the careful balance that Congress struck between law-enforcement needs and providing clarity to citizens and regulated parties would be upended, imposing an open-ended compliance burden that would place even the law-abiding at risk of criminal prosecution.

The Court should vindicate Congress's intentions and the plain language of Section 1519, understood in its proper context, by holding that it applies to business records and "tangible object[s]" that store such records, like hard drives and CD-ROMs. Not fish.

BACKGROUND

What was to become the Sarbanes-Oxley Act of 2002 began in the House of Representatives. Representative Oxley and the House Financial Services Committee took the first step in overhauling reporting and auditing standards in the hope of restoring confidence in American markets. Even before the introduction of the language that would ultimately become Section 1519, Congress expressed deep concern regarding the destruction of critical documents by parties potentially, or already, under investigation for financial fraud. *See* H.R. 3763, The Corporate and Auditing Accountability, Responsibility, and Transparency Act, hearings before the House Committee on Financial Services, 107th Cong. (Mar. 13, 20, Apr. 9, 2002), at 95, 154, 460 (hearings on the emerging bill discussing recent corporate accounting and auditing scandals).

The Financial Services Committee reported the bill to the House of Representatives on April 22, 2002. *See* H.R. Rep. No. 107-414 (2002). After two days of deliberations, the House passed the bill on April 24. On July 8 the Senate proceeded to consider its own version, the Public Company Accounting Reform and Investor Protection Act, S. 2673, which was introduced by Senator Paul Sarbanes. That bill was reported out of the Senate Committee on Banking, Housing, and Urban Affairs on June 18. *See* 148 Cong. Rec. S6327–47 (daily ed. July 8, 2002).

The "anti-shredding" provision Section 1519 was not contained in the original House or Senate bills, but was first proposed in the Senate Judiciary Committee, which had been asked, months before, to craft legislation "to provide for criminal prosecution of persons who alter or destroy evidence in certain Federal investigations or defraud investors of publicly traded securities." *See* S. Rep. No. 107-146, at 1 (2002) (Comm. Rep.). That committee, under the leadership of Senator Patrick Leahy, responded with "The Corporate and Criminal Fraud Accountability Act of 2002," S. 2010, May 6, 107th Congress, 2d. Session, which was reported to the Senate on May 6. The relevant language was adopted into SOX verbatim: no person shall "knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter 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." *See* Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002). The only aspect of this provision altered throughout the legislative process was the penalty. *Compare* S. Rep. No. 107-146, at 36 (2002) (Comm. Rep.), *with* 18 U.S.C. § 1519.

The bulk of the Judiciary Committee's bill was offered as an amendment to Senator Sarbanes's S. 2673 on July 9. *See* 148 Cong. Rec. S6491–96 (daily ed. July 9, 2002). This amendment included Section 1519, which was paired with another provision, later codified as 18 U.S.C. § 1520. These two provisions—Sections 1519 and 1520—were both placed in SOX Section 802, entitled "Criminal Penalties for Altering Documents." Section 1519 carried the title "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," and Section 1520 the title "Destruction of corporate audit records." *See* 148 Cong. Rec. S6491–96 (daily ed. July 9, 2002).

Notably, Senator Trent Lott also proposed a related amendment to 18 U.S.C. § 1512, the preexisting obstruction of justice provision that had proven inadequate in the Enron affair. Section 1512 had previously made it a crime to "knowingly use[] intimidation, threaten[], or corruptly persuade[] another person" to tamper with or destroy evidence. Senator Lott's Amendment 4188, accepted in Senate deliberation, removed the requirement that the prohibited

action be executed through another person. *See* 148 Cong. Rec. S6327–47 (daily ed. July 8, 2002).

On July 15, he Senate passed its version of Sarbanes-Oxley, including the new Section 1519, Section 1520, and the amended Section 1512, and a conference committee was convened on July 19 to iron out disagreements between the House and Senate versions. *See* Sarbanes-Oxley Act of 2002, H.R. Rep. No. 107-610 (2002) (Comm. Rep.). The committee settled on a version that included Section 1512(c), Section 1519, and Section 1520 from the Senate bill, and filed its report on July 24. *See id.* at 57, 64. The committee's compromise bill was passed by both houses the following day and signed into law by President George W. Bush on July 30, 2002.

ARGUMENT

I. Congress Enacted Section 1519 To Close Loopholes in Existing Law Regarding the Alteration or Destruction of Business Records

Contrary to the interpretive gloss the Government wishes to put on Section 1519, that provision is limited to destruction or alteration of records, commensurate with congressional purpose. Section 1519 was enacted in direct response to prosecutors' difficulties in targeting the destruction of evidence by Arthur Andersen and was meant to close the loopholes in the federal obstruction of justice offenses which that incident had brought to light. This purpose is reflected structurally by the provision's placement in

SOX, textually by the provision's specific language and drafting history, and historically by the unanimous view that Section 1519's scope encompasses document shredding and the like, not any conduct under the sun that may undermine a federal investigation.

A. Section 1519's placement in SOX is crucial to understanding its purpose and scope. It was not enacted as a standalone provision of the statute, but rather paired with Section 1520 in SOX Section 802, entitled "Criminal Penalties for Altering Documents." These sister provisions are closely intertwined. Section 1520 requires that corporate audit records be retained for five years, while Section 1519 prohibits the destruction of business records in contemplation of a federal investigation or proceeding. Together, they establish a comprehensive regulatory regime for preservation of corporate records: those most likely to be relevant in cases of corporate fraud (i.e., audit records) are retained for a set period of time, which may be extended and broadened to include additional records when an investigation is contemplated. In this way, Congress sought to ensure that prosecution of corporate fraud would not again be hindered by the wanton destruction of corporate records, as in the Enron case.

The legislative history reflects as much. As the Senate Report explains, "Section [802] of the bill would create two new felonies [Sections 1519 and 1520] to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrica-

tion of evidence and the preservation of financial and audit records." S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.); *see also* S. Rep. No. 107-146, Additional Views of Senators Hatch, Thurmond, Grassley, Kyl, DeWine, Sessions, Brownback, and McConnell, at 27 (2002) (Comm. Rep.) ("Section [802] creates two new Title 18 offenses: an obstruction statute specifically directed to the destruction of documents, 18 U.S.C. 1519, and a document retention provision that applies to auditors of publicly traded securities, 18 U.S.C. 1520."); 148 Cong. Rec. H4845 (daily ed. July 17, 2002) (statement of Rep. Cox) ("Section 802 of the Senate bill concerns criminal penalties for shredding documents . . . ."); Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721, 723 (2003) (describing Sections 1519 and 1520 as "the two new obstruction laws that were drafted to combat document destruction itself").

It is therefore no accident or happenstance that Section 1519 was paired with Section 1520, and that placement elucidates the scope of the "tangible object[s]" within the scope of Section 1519. Reading the two provisions together makes clear that Congress's focus was the destruction of "records," a point reinforced by that word's usage in the title to SOX Section 802 and the titles of both Section 1519 and 1520. Ascribing a substantially broader meaning to the term "tangible object" in Section 1519 renders that provision's placement in SOX incomprehensible

and therefore must be rejected. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (finding that the term "criminal penalties" in section heading indicated that a provision did not define a separate crime, but instead set out penalties for recidivists); *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 189–90 (1991) (citing *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989), and *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388–89 (1959)) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

B. The statutory text—and, in particular, its derivation—also reflects this limitation. Section 1519 was modeled on 18 U.S.C. § 1512(b)(2)(B) and departs from that provision in specific ways intended to close the two loopholes in that provision that came to light in the Arthur Andersen prosecution.

Using Section 1512(b)(2)(B) as a starting point, Congress made five key modifications in drafting Section 1519. First, to expand the temporal scope of Section 1519 and criminalize the destruction of business records before an investigation begins, Congress created a new trigger for liability: the statute's obligation attaches when a person acts in "contemplation of" a federal investigation or proceeding. 18 U.S.C. § 1519. This new trigger, which replaced the original one tied to an actual investigation, ensured that future David Duncans could not hide behind the argument that no specific investigation or criminal proceedings had yet officially commenced, and thus they had no responsibility to preserve the

records. Under the new provision, shredding documents in anticipation of a future investigation would unambiguously constitute a violation.

Second, Congress broadened the new provision to include bankruptcy proceedings and investigations by agencies such as the SEC by substituting "official proceeding" with "any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11." 18 U.S.C. § 1519. As such, Section 1519 makes destroying business records to obstruct an agency investigation a crime, even if the investigation does not lead to official proceedings, and also expands the scope of proceedings and investigations to reach all those that might be implicated by corporate fraud. *See* S. Rep. No. 107-146, at 15 (2002) (Comm. Rep.) ("[Section 1519] is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title.").

Third, signaling that Section 1519 applies only to the destruction of business records, Congress added the terms "covers up, falsifies, or makes a false entry in" to the list of verbs found in Section 1512(b)(2)(B). By appending these words to "alters, destroys, mutilates, or conceals," Congress broadened the scope of conduct covered by the provision while also expressing its understanding that Section 1519 applies to a narrower domain of possible objects. "[C]overs up,

falsifies, [and] makes a false entry in"—unlike "alters, destroys, mutilates, or conceals"—are all actions specifically pertaining to documentary evidence like business records, not any possible kind of item. As such, they restrict the class of objects covered by the provision's verbs, including the potentially more general verbs drawn from Section 1512. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Babbitt v. Sweet Home Chapter of Cmties. for a Greater Or.*, 515 U.S. 687, 720–21 (1995) (Scalia, J., dissenting).

Fourth, Congress excised the requirement, found in Section 1512(b)(2)(B), that to violate the provision one must intimidate, threaten, or persuade *another person* to destroy the records. Instead, the subject of Section 1519 is the person who actually shreds the documents. This change was made in direct response to the fact that federal prosecutors had to proceed against Arthur Andersen under the legal fiction that the crime committed was persuading others to shred documents. S. Rep. No. 107-146, at 15 (2002) (Comm. Rep.) ("Finally, this section [1519] could also be used to prosecute a person who actually destroys the records himself in addition to one who persuades another to do so, ending yet another technical distinction which burdens successful prosecution of wrongdoers.").

Finally, Congress substituted "tangible object" for "object" in order to emphasize that Section 1519 reaches any and all media on which records might be

stored, such as hard drives and backup tapes. As the Senate Report detailed, "[t]he systematic destruction of records [at Arthur Andersen] apparently extended beyond paper records" to computer hard drives containing electronic documents and emails. S. Rep. No. 107-146, at 4 (2002) (Comm. Rep.). Absent such a clarification in the statutory language, it might have been unclear whether "any record [or] document" encompassed tangible objects containing records, like hard drives and CD-ROMs.

In short, a comparison of Section 1519 with its predecessor, Section 1512(b)(2)(B), confirms that Congress did not seek to craft a general prohibition on the spoliation of evidence. Instead, it took care to address specific loopholes in Section 1512(b)(2)(B) that Arthur Andersen and its employees had exploited when they shredded business documents and destroyed hard drives in anticipation of federal law-enforcement action.

C. The legislative history further confirms that purpose as well as the limited scope of Section 1519.

To begin with, Congress's focus, quite specifically, was Arthur Andersen's exploitation of shortcomings in the then-existing law. As the Senate Report observed, "the current rules on audit record retention are so vague that Andersen's lawyers issued ambiguous advice encouraging such document destruction—advice that they linked to . . . current law." S. Rep. No. 107-146, at 4 (2002) (Comm. Rep.). Reflecting on federal law as it existed at the time of the Andersen incident, Senator Trent Lott identified the

same problem: "Obviously, you cannot [shred documents] if there is something pending or if there is a subpoena. But as was the case recently, they knew an investigation was underway and a subpoena was likely, and the shredding of documents went forward." 148 Cong. Rec. S6545 (daily ed. July 10, 2002) (statement of Sen. Lott). Thus it was important to enact a provision like Section 1519 that was not limited only "to situations where the obstruction of justice can be closely tied to a pending judicial proceeding." S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.).

That Congress did not intend the expanded temporal scope of Section 1519—and the severe penalties that attach to its violation—to apply to all classes of evidence is confirmed by the repeated references to Section 1519 in the legislative history as the "anti-shredding provision." *See, e.g.*, S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.) (referring to Section 1519 as "a new general anti shredding [sic] provision"); 148 Cong. Rec. S6758 (daily ed. July 15, 2002) (statement of Sen. Kohl) ("The amendment also would establish a new felony antishredding [sic] provision . . . ."); 148 Cong. Rec. S6767–68 (daily ed. July 15, 2002) (statement of Sen. Leahy) (Section 1519 "closes loopholes and toughens penalties for shredding documents as we learned had occurred at Arthur Andersen . . . . This bill is going to send wrongdoers to jail and save documents from the shredder . . . ."); 148 Cong. Rec. S6537 (daily ed. July 10, 2002) (statement of Sen. Durbin) ("Do you know what happened? As soon as Enron got in trouble,

they called some of their buddies at Arthur Andersen, and the next thing you know, the documents are being shredded, evidence is disappearing. This underlying amendment . . . addresses this specifically."). Indeed, one need look no further than the title of the section to see Congress's intent: "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis added).

Finally, the legislative history is replete with statements that Section 1519 was specifically intended to reach persons who destroy documents themselves, and not only those who instruct others do so. *See, e.g.*, 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch) ("Certainly, one who acts with the intent to obstruct an investigation should be criminally liable even if he or she acts alone in destroying or altering documents."); S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.) ("First, [the bill] creates a new general anti shredding [sic] provision, 18 U.S.C. Sec. 1519, with a 10-year maximum prison sentence. Currently, provisions governing the destruction or fabrication of evidence are a patchwork that have been interpreted, often very narrowly, by federal courts. For instance, certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself.").

Review of the legislative history reveals that Congress intended Section 1519—SOX's signature "anti-

shredding provision"—to apply to the destruction of business records, not any and all kinds of evidence.

II. The Government's Interpretation of Section 1519 Cannot Be Reconciled with Congress's Intentions

The Government's interpretation and application of an anti-shredding provision to reach the destruction of fish runs into three insurmountable problems. First, it would obliterate the careful and deliberate distinction that Congress drew between Section 1519 and another of SOX's obstruction-of-justice provisions, Section 1512(c). Second, in so doing, it would also render Section 1512(c) entirely superfluous. And third, it expands Section 1519 into a comprehensive, superseding obstruction of justice provision—a role quite clearly never intended by those who crafted the statute.

A. By reading "tangible object" in Section 1519 to reach any and all manner of objects, the Government negates important limitations in that provision that distinguish it from Section 1512(c), the SOX provision that actually does reach all kinds of evidence but is only triggered by an "official proceeding."

Section 1512(c) is a more customary obstruction of justice provision, imposing criminal liability on a person who corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(c)(1). While its scope is

exceedingly broad—reaching any alteration of anything—its "official proceeding" requirement ensures that persons are likely to have notice of this broad obligation so that they can comply with it.

Application of Section 1519, by contrast, turns on application of a far looser temporal trigger that may not provide actual, clear notice to a person potentially subject to liability under it. As discussed above, no official proceeding is required; it is enough that an investigation or proceeding merely be "contemplat[ed]." But that broad temporal scope is balanced by the limited scope of prohibited conduct: wrongful manipulation of *records*. A person can thereby avoid any risk of liability simply by acting to preserve and maintain business records, something that businesses are accustomed to doing. That essential limitation prevents Section 1519 from becoming a trap for the unwary.

Thus, both provisions carefully balance the needs of law enforcement with concerns regarding procedural fairness, efficiency, and business risk. While Section 1519 combines an unusually broad and amorphous temporal scope with a clear and well-understood obligation, Section 1512(c) prohibits a broader range of conduct, but only in circumstances where a person subject to its obligation is likely to have notice of it.

The distinction between these two SOX provisions is precisely why the Government's attempt to read "tangible object" in Section 1519 to include all manner of evidence is so misguided. That approach seeks

to establish the one thing that Congress diligently avoided: a criminal prohibition on altering anything at all that applies at potentially any time at all, so long as any kind of federal investigation or proceeding may be contemplated. And Congress avoided that kind of provision for good reason. In addition to imposing undue compliance burdens, it would be "of such a standardless sweep [that it] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). Such a statute would raise serious Due Process concerns. *Id.* But Congress avoided those problems entirely by limiting Section 1519 to a narrower, more precisely defined scope of conduct.

This particular legislative design should be respected. The Government's reading seizes upon Congress's particular goal of preventing destruction of a certain class of objects in Section 1519, and stretches it to cover all destruction of all objects. But the judiciary is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n. 4 (1994). The Government overlooks the fact that "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary

objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987).

In sum, the "tangible object[s]" of Section 1519 cannot be the same as the "object[s]" of Section 1512(c). The Government's attempt to blur the line between these two provisions should be rejected as inconsistent with congressional intent.

B. The Government's interpretation of Section 1519 should also be rejected because it renders Section 1512(c) entirely superfluous. As described above, Section 1519's temporal scope is already broader than Section 1512's. If Section 1519's "tangible object[s]" are, as the Government would have it, to include any conceivable physical evidence, then that provision would prohibit the same conduct—alteration or destruction of evidence—as Section 1512(c), but over a broader period of time. Section 1512(c) would thus cease to serve any purpose.

It is unlikely, to say the least, that Congress sought to render its handiwork superfluous at the same time that it was enacting it. Both provisions were established by SOX, and both came from the Senate and were adopted by the conference committee that reconciled the House and Senate bills. A more reasonable assumption is reflected in the canon of interpretation that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181–86 (rev. 6th ed. 2000)).

Here, that assumption would accurately reflect that Congress was aware of both provisions, had different purposes for them, and intended them to reach different conduct. *See, e.g.*, 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch) ("This amendment [to Section 1512] closes this loophole by broadening the scope of the Section 1512. Like the new document destruction provision contained in S. 2010 [Leahy's Section 1519 Amendment], this amendment would permit the government to prosecute an individual who acts alone in destroying evidence, even where the evidence is destroyed prior to the issuance of a grand jury subpoena.").

In sum, the Government's suggestion that Congress enacted a nullity can and should be rejected by according Section 1519 its proper scope.

C. Finally, the Government's reading of Section 1519 tends to convert what was intended as a scalpel into a hatchet. It would expand the provision so as to absorb nearly all other obstruction of justice charges. But there is no indication in the legislative record that Congress intended to create a new, general, and comprehensive obstruction of justice provision, to supersede all others. To the contrary, members of the Senate Judiciary Committee observed that "section 1519 overlaps with a number of existing obstruction of justice statutes," but they considered it necessary to "capture[] a small category of criminal acts which are not currently covered under existing laws—for example, acts of destruction com-

mitted by an individual acting alone and with the intent to obstruct a future criminal investigation." S. Rep. No. 107-46, Additional Views of Senators Hatch, Thurmond, Grassley, Kyl, DeWine, Sessions, Brownback, and McConnell, at 27 (2002) (Comm. Rep.). In no instance did any member or committee suggest that Section 1519 would overtake those other statutes.

In fact, some members of the Senate Judiciary Committee, which drafted the provision, expressed "concern that section 1519 . . . could be interpreted more broadly than we intend." *Id*. The closest any member of Congress came to suggesting as broad an application of the provision as pressed by the Government here was a passing statement in the Senate Report that Section 1519 was meant to "apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States . . . ." S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.). But immediately before this passage, the Report states that Section 1519 was intended merely to "close loopholes," not create a new, all-encompassing provision. *Id*. And, yet, an all-encompassing statute is precisely what even a basic application of the Government's reading would make it.

Commentators and courts have long recognized that there is no general spoliation of evidence provi-

sion in Title 18 of the U.S. Code. Indeed, both before and after SOX's enactment, it was recognized that obstruction of justice provisions are a patchwork of different rules, containing overlapping provisions and myriad loopholes. *See United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999) (describing obstruction of justice as a "medley of crimes"); Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 Harv. L. Rev. 1521, 1544 (2014); Chris William Sanchirico, *Evidence Tampering*, 53 Duke L.J. 1215, 1252 (2004). This reflects Congress's choice to develop this area of the law organically, rather than to impose a one-size-fits-all standard that applies to all conduct that might be characterized as manipulating evidence in ways that hinder criminal investigation or prosecution.

While arguments nonetheless can be made that a broad, more comprehensive statute preventing destruction of any and all evidence would serve well the aims of federal criminal investigation and prosecution, Section 1519 is not that provision. The legislative record shows that Section 1519 was meant to serve a particular purpose, in the particular context of corporate financial fraud. *See, e.g.*, Daniel A. Shtob, *Corruption of a Term: The Problematic Nature of 18 U.S.C. § 1512(c), the New Federal Obstruction of Justice Provision,* 57 Vand. L. Rev. 1429, 1443–44 (2004) ("Sections 1516 through 1519 address obstructive acts in specific contexts, including federal audits, examinations of financial institutions,

inquiries into health care-related offenses, and bankruptcy investigations."). But there is no indication that, in enacting Section 1519, Congress sought to refashion the federal law of obstruction of justice in one fell swoop.

CONCLUSION

The Court should give Section 1519 the meaning that Congress intended and recognize that it is directed at the destruction of documents and records, not fish. The decision of the court below should be reversed.

Respectfully submitted,

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
BAKERHOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for the Amicus Curiae

JULY 2014