

No. 13-7451

IN THE
Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

**BRIEF OF THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AND THE
AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER JOHN YATES**

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**CERTIFICATE OF INTERESTED
PERSONS AND CORPORATE DISCLOSURE
STATEMENT**

The National Association of Criminal Defense Lawyers, Inc. submits the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to FRAP 26.1. The following persons and entities have an interest in the outcome of this appeal in addition to those previously identified by the parties in their briefs:

National Association of Criminal
Defense Lawyers, Inc.
American Fuel & Petrochemical
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The National Association of Criminal Defense Lawyers, Inc. is a not-for-profit corporation headquartered in Washington, DC. It has no parent corporation and no stock.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and The American Fuel & Petrochemical Manufacturers ("AFPM") as *amici curiae* in support of the Petitioner in *United States v. Yates*, on petition for writ of certiorari.¹

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before this Court, the federal courts of appeals, and the highest courts of numerous states. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association often appears as *amicus curiae* in cases involving

¹ Pursuant to Rule 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

overcriminalization, over-federalization, and prosecutorial abuse.

AFPM is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM members operate 122 U.S. refineries comprising approximately 98% of U.S. refining capacity. AFPM petrochemical members support about 1.4 million American jobs, including about 214,000 employed directly in petrochemical manufacturing plants. AFPM members operate in a highly regulated environment and could be adversely impacted by overcriminalization and the expansive reading of the anti-shredding provisions at issue in the case at bar.

NACDL and AFPM appear as friends of the Court to provide a broader perspective of the vast implications arising from the overcriminalization of offenses at the executive level. With NACDL's long history championing the interests of criminal defendants wrongly convicted, NACDL respectfully suggests that its views may assist the Court in this matter.

SUMMARY OF THE ARGUMENT

Before this Court is the case of a commercial fisherman and three missing grouper.² At the heart of the issue presented is an unconstitutional expansion of federal law, resulting in Petitioner's

² Pursuant to Rule 37, counsel for NACDL states that counsel of record was notified of NACDL's intent to file an *amicus* brief under this Rule. The Solicitor General and Petitioner's counsel have consented to this filing.

wrongful conviction. Petitioner's conviction is but one more example of the overcriminalization epidemic.

Overcriminalization places a growing burden on the administration of justice, often resulting in ludicrous federal convictions for conduct that, traditionally, falls outside constitutionally anticipated federal purview. In recent years, NACDL, and others, as *amicus curiae*, have brought the overcriminalization epidemic to the attention of the federal courts. Ordinarily, overcriminalization describes laws that are drafted with vague or overbroad language, preventing fair notice to the alleged offender. The overcriminalization attack is commonly asserted against Congress; i.e., those who draft the laws are to blame. But overcriminalization also includes instances where the *executive* branch uses criminal provisions in specific laws and regulations in ways never intended by Congress. For instance, improper prosecutorial discretion can result in the expansion of federal criminal law beyond legislative predictions where so-called "process crimes" are brought against defendants rather than charges directly relating to the underlying offense. The result is an overcriminalized society by virtue of executive overreach. This is squarely demonstrated in the instant appeal.

Indeed, NACDL has long argued that "expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from [its] anchor." Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The

Heritage Found. & NACDL, April 2010, at forward, VI. Thus, with overcriminalization as a guidepost, *amici curiae* urge this Court to reverse the Petitioner's conviction for the legal errors committed in the district court. As a matter of law, the Petitioner could not have been adjudicated guilty under 18 U.S.C. § 1519 (2012), because the application of an anti-shredding statute to three rotten fish is an unconstitutional expansion of the law and a violation of statutory construction.

ARGUMENT

I. PETITIONER'S CONVICTION UNDER SARBANES-OXLEY EXEMPLIFIES OVERCRIMINALIZATION THROUGH AN UNCONSTITUTIONAL EXPANSION OF THE LAW.

An overly broad construction of 18 U.S.C. § 1519 (2012) injures the integrity of the criminal justice system. Section 1519 is part of a class of "process crimes" that focus on offenses "not against a particular person or property, but against the machinery of justice itself." Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1437 (2009). In particular § 1519 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.

(emphasis added). Section 1519 is also part of the Sarbanes-Oxley Act of 2002, described as "An [a]ct [t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." Sarbanes-Oxley Act of 2002, PL 107–204, 116 Stat 745. Section 801 of the Sarbanes-Oxley public law, short-titled the "Corporate and Criminal Fraud Accountability Act of 2002," introduced § 1519 into law, under the sub-heading "criminal penalties for altering documents."

It should come as no surprise, then, that at least one of the drafters noted that § 1519 was designed to respond to the Enron-related shredding of audit documents which was beyond the reach of existing obstruction of justice statutes. *See* 148 Cong. Rec. S1785–86 (daily ed. March 12, 2002) (statement of Sen. Leahy). But the matter of *Yates v. United States* does not involve a corporation, or any business entity for that matter. Nor does it involve a document or record. Rather, it involves three fish. The absurdity of this factual scenario, unfortunately, is all too common in today's overcriminalized society.

A. THE OVERCRIMINALIZATION EPIDEMIC

Today, it is seemingly impossible to list all of the federal criminal statutes and regulations currently in existence. Walsh & Joslyn, at 2-4, 6. In the late 1980s, the Department of Justice suggested there were more than 3,000 federal criminal laws. See James A. Strazzella, *The Federalization of Criminal Law*, Criminal Justice Section, American Bar Association, 1998, at 94. That number now stands near 10,000. Walsh & Joslyn, at 6-7. (citing an American Bar Association Task Force estimation from 1998). The American Bar Association's report also found more than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970. *Id.* at 7. Extrapolated, this means that the amount of federal criminal provisions enacted in the twenty-six year period between 1970 and 1996 was almost equivalent to the amount of federal criminal provisions enacted in the preceding 106 years. Alarming, this trend continues.

Justice Scalia recently described the plight facing the Petitioner, and so many like him, in finding that "[w]e face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the

Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt." *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

In this case, the continued emergence of a new form of overcriminalization is exposed—wherein the executive branch overextends process crimes to prosecute individuals instead of under the statutes or regulations they were initially investigated under; i.e., over/undersized fishing. In these cases, defendants may be exposed to penalties far in excess of those penalties set by Congress for the underlying crime, and prosecutors are relieved of the burden of proving the elements of the underlying offense. Thus, with Congress overcriminalizing through the enactment of laws, which are later exacerbated through agency regulations, and the executive branch arresting and prosecuting individuals for acts not contemplated in already overly broad process crimes, the criminal justice system is overburdened.

B. CONGRESSIONAL TASK FORCE ON OVERCRIMINALIZATION

The nation's overcriminalization concerns were presented to a bi-partisan congressional judicial committee task force in 2013, specifically created to address the overcriminalization phenomenon. See Hearing Tr. Over-Criminalization Task Force of 2013, Serial No. 113-44, at 21-22 (June 14, 2013). William Shepherd (counsel for NACDL herein), and Florida's former Statewide Prosecutor,

discussed the facts of this very case in response to a question from a Member of Congress, whose dismay was a prime example of how executive decisions leading to overcriminalization are an unwarranted expansion of Congress's intent. *Id.* Mr. Shepherd explained that though Mr. Yates was prosecuted under a criminal law drafted by Congress, "my guess would be that Congress had no idea that a post-Enron anti-document-shredding statute would be used to convict a man of destroying three red grouper." *Id.* at 22. Several other legal scholars and practitioners testified on similar matters before the overcriminalization task force, all of varying political persuasions, but cohesive in the main message: more and more criminal defendants are deprived of fair notice.

Ironically, perhaps, is that to this day the government cannot even tell its citizens how many crimes are on the federal books. Nor can the Congressional Research Service (CRS) so inform the Chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security, because as Congressman John Sensenbrenner stated at the June 14, 2013 overcriminalization committee hearing referenced above, "CRS's initial response to our request [for a listing of all federal crimes] was that they lack the manpower and resources to accomplish this task. . . . I think this confirms the point that all of us have been making on this issue and demonstrates the breadth of overcriminalization."

**C. EXECUTIVE EXPANSION OF 18
U.S.C. § 1519 TO INCLUDE RED
GROUPER FURTHERS THE
OVERCRIMINALIZATION
EPIDEMIC**

If § 1519 is read to encompass the destruction of fish, then the statute truly knows no bounds. It is up to the courts, as the gatekeepers, to ensure that congressional laws are not abused by the executive branch to criminalize conduct not contemplated under the applicable statute. Here, there are several fundamental concerns present in the government's approach to § 1519. First, § 1519 is a process crime. As discussed above, the government has been relying on this process crime, and similar process crimes, for retrieving convictions on individuals that would likely not be convicted under the underlying statute that was the cause of the investigation. Indeed, here, the Petitioner was not charged with violating any statutory provision specific to fishing. Second, there is clear language in the Congressional Record that § 1519 is an "anti-shredding provision" and that "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." 148 Cong. Rec. S7418-01, S7419 (2002). Third, this provision was passed after public pressure was placed on Congress to ensure that situations like Enron would not arise again in the future; it is no coincidence that the provision came into being less than a full year after Enron was exposed. And last, the government ignores the threat that such an over-expansion of the statute can have on everyday citizens living their everyday lives.

1. *Red Grouper are Not "Tangible Objects" under Sarbanes-Oxley*

Section 1519 is inapplicable to the Petitioner because it provides criminal sanctions for persons that knowingly destroy or alter any "record, document, or tangible object" with the intent to impede a federal investigation—red grouper is not a document, record, or tangible object as envisioned in § 1519. *See* 18 U.S.C. § 1519 (2012). *Ejusdem generis*, one of the more powerful canons of statutory constructions recognized by this Court, provides where "general words follow specific words in a statutory enumeration, the general words are to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001). Where "several items in a list share an attribute," *ejusdem generis* "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994). Moreover, under the maxim of *noscitur a sociis*, "a word is known by the company it keeps." *Edison v. Douberty*, 604 F.3d 1307, 1309 (11th Cir 2010) (internal quotation and citation omitted). Finally, the government would have this Court believe that a fish is like a record or a document, but it ignores Congress's own admission that § 1519 is an "anti-shredding" statute designed to prevent the conduct used in the Enron investigation and like cases. This anti-shredding intent would naturally flow to certain "tangible objects," such as computers, disks, and flash drives, because deleting information from those items is akin to an electronic document shred. But the

aforesaid canons of construction, when paired with Congress's unambiguous intent to create a stronger anti-document-shredding provision, expose the government's assertion that fish are among the "tangible objects" contemplated under § 1519 as nothing more than an attempt to expand the statute's reach as an unconstitutional means to overcriminalize.

2. *Bond v. United States*

This Court recently reviewed another case that exemplified overcriminalization in the matter of *Bond v. United States*, No. 12-158 (June 2, 2014). The issue in *Bond* was whether the Chemical Weapons Convention Implementation Act of 1998, enacted to combat terrorism and the use of weapons of mass destruction, applied to an "amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water." *Id.* at 1. Federal prosecutors charged Bond with possessing and using a "chemical weapon" in violation of the Implementation Act. Bond issued a guilty plea with appellate rights reserved, and was sentenced to a prison term, fines, and restitutionary damages.

This Court reversed the convictions under the Implementation Act, finding that "the Government's reading of section 229 would transform a statute concerned with acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. In light of the principle that Congress does not normally intrude upon the States' police power, this Court is

reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack." *Id.* at *syllabus*.

Like the Implementation Act in *Bond*, if § 1519 was drafted to include red grouper, then the overbreadth of the statute alone creates constitutional concerns. Finally, because the post-*Enron* enactment of § 1519 suggests that red grouper were not among the tangible items contemplated by that anti-white collar crime effort (like disks and CDs), its expansion to grouper in this case is indicative of prosecutorial creep and is an unauthorized executive expansion of the law. Overcriminalization cannot be combated effectively if the executive branch expands criminal laws that are already overly broad. The courts must continue to perform their role to protect individual liberties and refuse to apply § 1519 to unspecified areas—in this case, grouper.

**D. EVEN IF SARBANES-OXLEY
APPLIES TO FISH, YATES'
CONDUCT DID NOT IMPEDE,
OBSTRUCT, OR INFLUENCE A
FEDERAL INVESTIGATION**

The matter of *Yates v. United States* provides ample opportunity for legal practitioners and scholars to debate issues such as legislative intent, governmental overreach, and statutory construction. And these issues/concerns are undoubtedly important to consider (indeed, NACDL writes as a friend of the court to provide its perspective on several of these important issues). But, perhaps this

Court need only consider the Government's admission in the lower courts that Yates' prosecution for obstruction was based entirely on *three* missing fish. That is, the federal agent that boarded the *Miss Katie* counted 72 undersized red grouper at sea, but only 69 undersized red grouper were onboard the *Miss Katie* at port. There is no federal law or regulation governing undersized fishing that distinguishes, in any manner, a fisherman with allegedly 69 undersized fish on board from a fisherman with allegedly 72 undersized fish on board. Therefore, the Government could not have met an essential element of a § 1519 conviction, because three missing fish would not (and could not) "impede, obstruct, or influence" Yates' investigation.

CONCLUSION

For the foregoing reasons, *amici curiae*, NACDL, respectfully asks this Court to reverse the Petitioner's § 1519 conviction.

Respectfully submitted,

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