1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN L. YATES, :

4 Petitioner :

5 v. : No. 13-7451.

6 UNITED STATES. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Wednesday, November 5, 2014

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:04 a.m.

14 APPEARANCES:

15 JOHN L. BADALAMENTI, ESQ., Assistant Federal Defender,

16 Tampa, Fla.; on behalf of Petitioner.

17 ROMAN MARTINEZ, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on

19 behalf of Respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 JOHN L. BADALAMENTI, ESQ.

4 On behalf of the Petitioner 3

5 ORAL ARGUMENT OF

6 ROMAN MARTINEZ, ESQ.

7 On behalf of the Respondent 24

8 REBUTTAL ARGUMENT OF

9 JOHN L. BADALAMENTI, ESQ.

10 On behalf of the Petitioner 54

11

12

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument first this morning in Case 13-7451, Yates v.

5 United States.

6 Mr. Badalamenti.

7 ORAL ARGUMENT OF JOHN L. BADALAMENTI

8 ON BEHALF OF PETITIONER

9 MR. BADALAMENTI: Mr. Chief Justice, and may

10 it please the Court:

11 The natural, sensible and contextual reading

12 of Section 1519 is that the phrase "record document or

13 tangible object" is confined to records, documents and

14 devices designed to preserve information, the very

15 matters involved in the Enron debacle. Given the

16 expansive Federal nexus of this statute, which is the

17 intent to influence the proper administration of any

18 matter within the jurisdiction of the United States, it

19 is implausible that Congress would have passed sub

20 silentio, an all-encompassing obstruction statute buried

21 within the altering documents provision of the

22 Sarbanes-Oxley Act.

23 A strong textual indicator that Section 1519

24 is confined to record-related offenses is the inclusion

25 of the unique term "makes false entry in," which

1 Congress only uses in record-related statutes. The
2 canons of ejusdem generis and noscitur a sociis confirm
3 that tangible object is related to the common thread
4 between record and document which are information
5 devices -- information mediums.
6 JUSTICE GINSBURG: Why should -- why should
7 the expression "tangible object," which stands alone,
8 it's not falsifying documents, why should the word
9 "object" in 1519 be treated differently than the word
10 "other object" in 1512 -- 1512(c)?
11 MR. BADALAMENTI: Justice Ginsburg, in
12 Section 1519 -- it was passed at the same time as
13 1512(c) as part of the Sarbanes-Oxley Act. And as this
14 Court held in Russello, when Congress includes different
15 terms in different statutes passed in the same act, it
16 is intended to mean something different.
17 JUSTICE GINSBURG: So you think there's a
18 difference between "tangible object" and "other object"?
19 MR. BADALAMENTI: Yes, there is. The first
20 reason is that the inclusion of "makes false entry in"
21 indicates that the phrase "record document and tangible
22 objects" refers to recordkeeping. Another difference is
23 that -- a common sense standpoint -- is that records can
24 only be maintained on tangible mediums. And it's a
25 distinguishing factor between "record document" and

1 "other objects" in 1512(c). It's also limited --
2 JUSTICE SOTOMAYOR: But how does the
3 Internet -- you could falsify Internet entries, or
4 things that are in the cloud, those are intangible
5 items.
6 MR. BADALAMENTI: No, those are tangible
7 items, Your Honor, because they are stored on a hard
8 drive somewhere. The cloud is not existing above. It's
9 merely being housed somewhere else that's accessed
10 through the Internet on a tangible device that's
11 designed to preserve that very type of information.
12 JUSTICE KENNEDY: Suppose the typewriter
13 were used to prepare an incriminating document. The
14 document and the typewriter were destroyed, would that
15 be covered?
16 MR. BADALAMENTI: The typewriter would not
17 be. The piece of paper that the typewriter is
18 inscribing on is a device that's designed to preserve
19 information. It's simply making the information.
20 JUSTICE KENNEDY: I -- I understand the
21 argument and the argument that you make has considerable
22 force about over criminalizing, but it seems to me that
23 the test you suggest has almost more problems with
24 vagueness, more problems with determining what its
25 boundaries are than the government's test.

1 MR. BADALAMENTI: No, the government's test
2 renders 1512(c) wholly superfluous. 1519 -- first of
3 all, the words "record document" and "tangible object"
4 are definitions providing meaning to all of them. The
5 government is saying admittedly, "record" and "document"
6 didn't need to be there and Congress had no reason to
7 put them there because it's everything, it's all
8 physical evidence. A record -- a tangible object is a
9 discrete device. It is a device that is designed to
10 preserve the information.
11 JUSTICE ALITO: Well, if that's the -- if
12 that is the case, then why is it not surplusage? Why --
13 what would be a tangible object designed to contain
14 information that would not fall into the category of
15 record or document?
16 MR. BADALAMENTI: An iPad, a laptop
17 computer, a desktop computer, an iPhone. Those --
18 JUSTICE ALITO: Those things in themselves
19 don't -- they have documents, they have something that
20 could be called a document or a record stored in them.
21 MR. BADALAMENTI: That is --
22 JUSTICE ALITO: If you -- if you have an
23 iPad that's straight from the store, has nothing -- has
24 no information stored in that, do you think that would
25 fall within the statute?

1 MR. BADALAMENTI: It would fall within the
2 statute because what Congress was trying to intend to do
3 -- and given the backdrop of the Enron situation where
4 massive servers were destroyed or deleted or otherwise
5 -- they were trying to -- to capture the devices that
6 held information. And you cannot determine what's on
7 the device unless you have the device, regardless of
8 whether or not there's information on it or not.
9 JUSTICE ALITO: What about destroying a
10 brand new empty filing cabinet?
11 MR. BADALAMENTI: That is not a device
12 that's used to preserve information. That's a container
13 of something. It's not specifically designed to
14 preserve information. You could put bowling balls in
15 a -- in a filing cabinet or otherwise. The information,
16 the distinguishing factor, Your Honor, between a
17 tangible object is that the information is being
18 preserved within it, embedded within it, like a computer
19 or otherwise. And Congress needed to use the general
20 phrase "tangible object" for a reason, because in 2002,
21 an iPad, an iPhone, and many other electronic devices
22 that preserve information didn't exist, and they --
23 JUSTICE GINSBURG: But then the Congress
24 could have said used -- tangible object used to preserve
25 information, and then your case would be solid. But it

1 just said "tangible object."
2 MR. BADALAMENTI: It said "tangible object,"
3 that is true, Justice Ginsburg, that it said "tangible
4 object." But it did so using that general phrase
5 following two specific terms, "record" and "document,"
6 which is a classic methodology in which the legislature
7 uses --
8 JUSTICE KAGAN: But could I go back to
9 Justice Ginsburg's first question, because, my fault I'm
10 sure, but I wasn't sure I understood your answer. Not
11 only in 1512(c)(1), but there are, you know, I think
12 five times in 1512 from a prior enactment this same kind
13 of phrase is used, which is "record document and other
14 object." And you say that we should treat that phrase
15 as it exists many times in 1512 differently from this
16 phrase in 1519 because of the difference between
17 tangible object and other object. And to me, it seems
18 like other object is, if anything, a more classic case
19 of that canon that I can't pronounce the name of,
20 ejusdem whatever.
21 (Laughter.)
22 JUSTICE SCALIA: Generis.
23 JUSTICE KAGAN: Good. That's what I count
24 on my colleague for.
25 (Laughter.)

1 JUSTICE KAGAN: I -- I deserved that.
2 But to me, it seems like a more -- even a
3 more classic case. So I guess I just don't understand
4 why you're treating the two differently.
5 MR. BADALAMENTI: It is, to answer your
6 question, they're being treated differently not simply
7 because of the inclusion of the word "tangible," but
8 because of the other words surrounding "tangible
9 object," like the unique phrase "makes a false entry
10 in," which is not included in any other obstruction of
11 justice statute.
12 JUSTICE KAGAN: But just because Congress
13 includes more verbs -- I mean, the reason Congress
14 includes 20 verbs instead of 4 is presumably because
15 Congress really wants to sweep in a very wide variety of
16 conduct. And not every verb has to apply to every
17 situation. In fact, we rather presume that they won't.
18 MR. BADALAMENTI: Although this Court has
19 never held that all the verbs, you know, applied to all
20 the nouns, it would make sense that they would apply.
21 The only instance that the United States points out is
22 in an amended statute. This statute was written from
23 "Whoever" to the last word of this statute at the same
24 time. It makes sense that they all apply. And "makes
25 false entry in" is a phrase that can be used only to

1 apply to all of the nouns under our particular
2 construction. And it's unique. It is only used by
3 Congress in record-related statutes.
4 JUSTICE KAGAN: So your whole argument here
5 really comes down to the fact that Congress put some
6 record-related verbs in there?
7 MR. BADALAMENTI: It does not, Your Honor.
8 There's additional things. We have a limited subject
9 matter under our definition, which makes sense because
10 you have a tremendously broad nexus to any matter within
11 the proper administration of the United States. That's
12 unlike traditional classic statutes. It makes sense
13 that Congress wanted to narrow the subject matter of
14 this particular statute when you're dealing with such a
15 broad nexus to any Federal matter.
16 JUSTICE KAGAN: But I would think -- I'm
17 sorry. I would think that that cuts against you, that
18 the fact that this is about any matter within the
19 jurisdiction of any agency in the United States shows
20 that it's really not just about corporate fraud, that
21 Congress had a broader set of things in mind. So I
22 would think that that's -- that's quite the opposite,
23 that everything about this statute, the "any matter,"
24 the "any record," suggests breadth.
25 MR. BADALAMENTI: It -- it does not, Your

1 Honor, because if you take the lens and you zoom it out
2 a little bit further, if we look at Section 802 of Title
3 VIII of the Sarbanes-Oxley Act, it's entitled "Criminal
4 Penalties For Altering Documents." Two new criminal
5 statutes were created: 1519, entitled "Destruction,
6 alteration, and falsification of records;" and 1520,
7 which is a 5-year record retention requirement on
8 auditors. They were -- or else they get a 10-year
9 penalty for that.
10 Congress was referring, passing these, 1519
11 and 1520 within Section 802 of Title VIII, as a tandem,
12 as another contextual indicator that this is intended to
13 apply to record-related matters.
14 JUSTICE GINSBURG: Then how do you -- how do
15 you respond to the illustration that the government gave
16 in its brief? That is, what sense does it make to say
17 you can be indicted under 1519 if you destroy a letter
18 that the victim that you have murdered has sent you, but
19 you can't be indicted under 1519 if you destroy the
20 murder weapon?
21 MR. BADALAMENTI: Congress did not intend
22 1519 to be applied in that situation. And as you state
23 the question, Justice Ginsburg, it is remarkable that
24 the government would use 1519 in a murder situation.
25 JUSTICE GINSBURG: But you think it could --

1 would -- let me back up and ask what I assume was -- you
2 would say yes to. A letter is shredded. It's a letter
3 from the victim to the later-turned-out-to-be murderer.
4 That letter is shredded. Does that come under 1519?
5 MR. BADALAMENTI: That does, because that is
6 record related. But the knife does not. That falls
7 into the sweep -- that particular subject matter,
8 because it indeed is a record, so that would be covered
9 under 1519, but that -- not the knife. Congress didn't
10 intend to sweep the knife into 1519, but --
11 JUSTICE SOTOMAYOR: Where did the -- I'm
12 sorry.
13 CHIEF JUSTICE ROBERTS: What if the knife
14 had the defendant's name on it? Is that, destroying the
15 knife, is that altering, destroying a record?
16 MR. BADALAMENTI: It is not. One would not,
17 Mr. Chief Justice, refer to an inscription of one's name
18 as a permanent account of an event. It's just an
19 identification. It's an identification on the knife.
20 CHIEF JUSTICE ROBERTS: Well, but presumably
21 the same would be true of a lot of documents or records
22 that are destroyed.
23 MR. BADALAMENTI: But in ordinary parlance,
24 one would not consider an inscription on a knife to be
25 it. It's evidence, but it's not a -- it's not a

1 document, it's not a record or otherwise, and it doesn't
2 fall within the very limited subject matter that
3 Congress wrote into this particular statute, which is
4 records.
5 JUSTICE SOTOMAYOR: Now, what do you say
6 about 1512(c)? Would the knife fall under that?
7 MR. BADALAMENTI: 1519 and '12(c), it would
8 make more sense that the knife fall in, and here's why.
9 It's a more classic --
10 JUSTICE SOTOMAYOR: Even if the knife was
11 used in the murder, but it was destroyed before anybody
12 was caught?
13 MR. BADALAMENTI: It would -- it would -- if
14 it was destroyed with the intent to impair that object's
15 availability in an official proceeding, which is a
16 classic, classic obstruction statute --
17 JUSTICE SOTOMAYOR: So did the government
18 mischarge here? Could they have charged your client
19 with violating 1512(c)?
20 MR. BADALAMENTI: It's possible the
21 government could have charged that particular thing,
22 but --
23 JUSTICE SOTOMAYOR: I love those words,
24 "possible."
25 MR. BADALAMENTI: It is possible.

1 (Laughter).

2 JUSTICE SOTOMAYOR: What would -- what would

3 have been your defense if they did?

4 MR. BADALAMENTI: My defense would have been

5 something very significant, difference between 1512(c)

6 and 1519. 1519 only requires that --

7 JUSTICE SOTOMAYOR: I know you were charged

8 with. What would have been your defense to 15 --

9 MR. BADALAMENTI: He didn't corruptly do it.

10 And corruptly is wrongful, immoral, depraved or evil,

11 not simply knowingly, which is required under 1519,

12 which is voluntarily and intentionally done. See,

13 "corruptly" is used in 1512(c) purposefully in that

14 particular information because it is, perhaps, a broader

15 class, and it is --

16 JUSTICE SOTOMAYOR: Destroyed and

17 substituting fish is not a corrupt act.

18 MR. BADALAMENTI: It would have been my

19 defense.

20 (Laughter.)

21 JUSTICE SOTOMAYOR: Touche.

22 MR. BADALAMENTI: Which was the question,

23 Your Honor. Okay?

24 So what we -- what we have in 1519 -- what

25 we have in 1519 is a remarkable situation when you're

1 looking at Chapter 73 in total, is that you have this
2 incredibly broad nexus to any Federal matter within the
3 jurisdiction of the United States. What can the matter
4 be? As the amicus briefs point out, any of 300,000
5 Federal regulations that the Federal Government has
6 placed down upon the American people.
7 JUSTICE BREYER: And what is your view,
8 given what you've just said, of the best way to narrow
9 this statute?
10 MR. BADALAMENTI: The best way to narrow
11 this statute, Justice Breyer, is to interpret "tangible
12 object" in the company it keeps, and that is a device
13 that is designed to preserve information such that if
14 that device is destroyed, the information contained on
15 that device is destroyed.
16 JUSTICE BREYER: You still have the problem
17 of the language of the statute covering the destruction
18 of a document such as an EPA questionnaire that comes to
19 the door asking about recycling, where you know that the
20 EPA would like to have that back to help them do their
21 official work of finding out how the program works.
22 You, believing that that's their business, not yours,
23 tear it up and throw it in the wastebasket.
24 Now, does that fall within the statute?
25 MR. BADALAMENTI: Well, it --

1 JUSTICE BREYER: It surely does within the
2 language.
3 MR. BADALAMENTI: It falls within --
4 JUSTICE BREYER: And your effort to narrow
5 the statute has nothing to do with that.
6 MR. BADALAMENTI: The narrowing is the
7 document itself. This statute's exceedingly broad.
8 Our --
9 JUSTICE BREYER: But my problem, of course,
10 is reading the statute and taking your argument in the
11 context that you mean it, which is we must look for a
12 way to narrow this statute, which at first blush seems
13 far broader than any witness-tampering statute, any
14 obstruction of justice statute, any not lying to an FBI
15 agent statute that I've ever seen, let alone those
16 within Section 15. So what I'd like you to focus on is
17 not your problem, though they're connected, but my
18 problem.
19 MR. BADALAMENTI: Focusing on your problem,
20 Justice Breyer, I would say that it is not an onerous
21 situation for individuals to retain documents. It is
22 not an onerous situation on the American people to --
23 particularly what we have on flash drives attached to a
24 key chain that can hold thousands and thousands --
25 JUSTICE BREYER: Right. I see where you're

1 going.

2 MR. BADALAMENTI: -- of documents.

3 JUSTICE BREYER: I see where you're going.

4 Let's follow you down that road: That you say in many

5 situations it should not be a crime to retain a

6 document, even though you know that the Census Bureau

7 would like it back or perhaps the EPA.

8 MR. BADALAMENTI: Uh-huh.

9 JUSTICE BREYER: And perhaps it's nothing

10 more than trying to find out information. But where you

11 end up at the end of the road is that this is void for

12 vagueness, but not for any reason you have yet told us.

13 So what am I to do with the fact, if that is a serious

14 problem, that it has never been argued in this case?

15 MR. BADALAMENTI: Well, I would accept the

16 invitation that it would be void for vagueness, Your

17 Honor.

18 JUSTICE SCALIA: Why is it vague? It's --

19 it's just incredibly expansive.

20 MR. BADALAMENTI: It -- it --

21 JUSTICE SCALIA: What is vague about the

22 fact that if you destroy a questionnaire, you destroy a

23 document with the intent of, what is it, to impede,

24 obstruct or influence the investigation or proper

25 administration. What's vague about it?

1 JUSTICE BREYER: The answer to that, if you
2 want to pose it as a question to me --
3 (Laughter).
4 JUSTICE BREYER: -- would be that the void
5 for vagueness, if you look at Skilling, has two
6 branches. From Kolender v. Lawson -- Justice Ginsburg
7 wrote it -- a penal statute defining the criminal
8 offense, one, with sufficient definiteness that ordinary
9 people can understand. That's what Justice Scalia has
10 just talked about. You can understand what is
11 prohibited.
12 But then there is two: In a manner that
13 does not encourage arbitrary and discriminatory
14 enforcement. It's that second part, that the doctrine
15 extends the doctrine to statutes that, while they may be
16 clear, are far too broad, well beyond what any sensible
17 prosecutor would even want to prosecute.
18 MR. BADALAMENTI: Well, I agree with that.
19 JUSTICE BREYER: All right. Then back to
20 the question.
21 MR. BADALAMENTI: The answer -- the answer
22 would be that perhaps a way to reconcile this statute
23 would be not only to accept our position that it relates
24 to recordkeeping generally, but that it requires
25 specifically, relates to business recordkeeping, where

1 businesses are on notice such as is he filing quarterly
2 requirements or otherwise, that they are to do specific
3 things. And if you look against the backdrop of the
4 Sarbanes-Oxley Act, there is plenty of support that
5 Congress was targeting businesses, corporations, and
6 publicly traded companies.
7 JUSTICE GINSBURG: Isn't -- isn't running a
8 fishing vessel a business?
9 MR. BADALAMENTI: It would be running a
10 business, Your Honor, it would be. And a possible way
11 to limit this particular circumstance would be to limit
12 it to -- to businesses. It doesn't change the fact that
13 "tangible object" doesn't mean everything.
14 JUSTICE GINSBURG: Can you -- can you tell
15 me the exact consequences for your client? Because as I
16 understand it, he was also charged under 22 -- what is
17 it -- 2232?
18 MR. BADALAMENTI: Yes, Your Honor.
19 JUSTICE GINSBURG: And he could have gotten
20 the same sentence?
21 MR. BADALAMENTI: No. No, Your Honor. 2232
22 is destroying a piece of property subject to seizure.
23 That's a 5-year statutory maximum. 1519 has a 20-year
24 statutory maximum.
25 JUSTICE GINSBURG: But he in fact got what?

1 30 days.

2 MR. BADALAMENTI: 30 -- he ended up getting

3 30 days by a judge that made that individualized

4 decision under the Booker factors. But we can't count

5 on judges being like those -- that judge around the

6 United States. The fact remains is that --

7 JUSTICE GINSBURG: But you're only arguing

8 for your client. This is not some kind of class action.

9 MR. BADALAMENTI: No, Your Honor, this is

10 just related to Mr. Yates. But the idea is that -- my

11 understanding is that when the courts are writing the

12 opinions, they're thinking about all the judges in the

13 United States and providing guidance to all the judges,

14 providing guidance to the prosecutors when to use

15 particular statutes.

16 And if this Court permits that this statute

17 be applied for the disposal of all physical evidence

18 that would contravene the textual and contextual terms

19 and indicators that I brought through throughout this

20 argument, it is basically the overreaching broad thing

21 that Congress has never passed, despite the government's

22 attempt to inject in the Model Penal Code into this

23 case, which 1519 looks nothing like the Model Penal

24 Code.

25 JUSTICE KENNEDY: Suppose the fisherman took

1 pictures of the fish, and then he destroyed both the
2 pictures and the fish. Liability?
3 MR. BADALAMENTI: A picture? Although
4 Congress didn't intend this in this circumstance, and we
5 would hope the prosecutor wouldn't prosecute for this,
6 it is a permanent account of an event that is preserving
7 the information as to what the pictures -- what the fish
8 looked like. So the fish thrown overboard indeed would
9 be a record and would be covered under this statute.
10 But it wouldn't be a tangible object because it's not a
11 device designed to preserve the information.
12 JUSTICE KENNEDY: The photograph isn't?
13 MR. BADALAMENTI: The photo -- I'm sorry,
14 the photograph is not a tangible object under our
15 definition. If it were a digital camera and it's stored
16 on a memory card on it, that would be a tangible object.
17 JUSTICE KENNEDY: Is a piece of paper a
18 physical object?
19 MR. BADALAMENTI: A piece of paper is a
20 piece of paper, a physical object.
21 JUSTICE KENNEDY: Is it an object?
22 MR. BADALAMENTI: It's an object as well.
23 JUSTICE KENNEDY: But why isn't a film if
24 it's on it -- I'm talking not about a film on one of
25 these screens, but an old-time film that you can pick

1 up. A picture, a picture.

2 MR. BADALAMENTI: Well, they -- it is -- the

3 film itself is a record. The film itself is a record.

4 It's not --

5 JUSTICE KENNEDY: Would its destruction be a

6 violation of this Act?

7 MR. BADALAMENTI: Yes, it would be.

8 JUSTICE KENNEDY: It seems very odd that you

9 can throw away the fish without violating the Act, but

10 you can't throw away the picture.

11 MR. BADALAMENTI: Although it's not what

12 Congress intended, it's what requires that this statute

13 read even under our interpretation, which brings up the

14 absurdity of this particular case. This underscores

15 everything about this case that's absurd, is that the

16 prosecutor used this statute in this way. And had he

17 thrown a piece of paper overboard that had the day's

18 catch logs on it, that would have been covered, and we

19 concede that that would have been covered.

20 JUSTICE SOTOMAYOR: Well, then why is that

21 absurd? If you concede that that would have been

22 covered, the catch logs, and the prosecutor is trying to

23 do the exact same thing, it's just that he's thrown over

24 a different piece of evidence, why is that such a crazy

25 outcome?

1 MR. BADALAMENTI: The -- the absurdity
2 aspect comes down to the -- perhaps the prosecution in
3 this case, and I didn't mean to overstate that, Justice
4 Kagan. The fact is, is that throwing it overboard, the
5 log, the picture that memorializes what that fish looked
6 like at the time is a record, and it would fall within
7 it.
8 And taking a step back to Justice Breyer's
9 question earlier --
10 JUSTICE SCALIA: Wouldn't it be just as
11 absurd to give him 20 years, though, wouldn't it?
12 MR. BADALAMENTI: It would be extremely
13 absurd, Justice Scalia.
14 JUSTICE SCALIA: Yes. I don't understand.
15 JUSTICE KAGAN: But that clearly falls
16 within the statute. I mean, you can't argue that it
17 doesn't. So --
18 MR. BADALAMENTI: The only -- the only way
19 we could argue --
20 JUSTICE KAGAN: You know, it seems as though
21 this is -- Congress gives very strict penalties to lots
22 of minor things, and -- but that's, you know, that's
23 what it does.
24 MR. BADALAMENTI: Congress did something
25 that was very, very strong language to the American

1 people in the Sarbanes-Oxley Act. It added 1519 to
2 cover record-related matters, 20 years. 1512(c) is
3 related to official proceedings -- we've discussed that
4 earlier -- 20 years. It upped wire fraud, mail fraud,
5 from 5 years all the way up to 20 years. Why did
6 Congress do that? It did that because it recognized the
7 harm that Enron/Arthur Andersen type of situations did
8 to the financial well-being of this country and the
9 investors in public markets, and it wanted to send a
10 message to the public to not engage in record
11 destruction that could impede or influence the proper
12 administration of any matter. That's why it's important
13 to limit the subject matter of this particular statute
14 to just record-related matters.
15 If there are no more questions, I would like
16 to reserve the remainder of my time for rebuttal,
17 Mr. Chief.
18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Martinez.
20 ORAL ARGUMENT OF ROMAN MARTINEZ
21 ON BEHALF OF THE RESPONDENT
22 MR. MARTINEZ: Mr. Chief Justice, and may it
23 please the Court:
24 Section 1519's key phrase, "any record,
25 document, or tangible object," unambiguously encompasses

1 all types of physical evidence. That's clear from the
2 standard meaning of those words in ordinary speech and
3 from the broader statutory and historical context in
4 which those words appear.
5 CHIEF JUSTICE ROBERTS: Why are those -- why
6 are those the key words? Why don't you start earlier?
7 "Knowingly alter, destroy, mutilate, conceal, cover up,
8 falsify, "those are certainly pertinent in analyzing the
9 reach of "tangible object," aren't they?
10 MR. MARTINEZ: I think they show that --
11 that Congress was intending to essentially figure out
12 every way that -- that someone might imagine tampering
13 with or destroying or -- or obstructing justice by
14 getting rid of evidence, and so they might shed light on
15 it. But the issue in this case is the meaning of -- of
16 the phrase "any tangible object."
17 I would like to --
18 JUSTICE GINSBURG: Are you -- are you then
19 saying that this is, indeed, a general statute against
20 destroying anything that would impede a Federal --
21 MR. MARTINEZ: We think this is a general
22 statute that would cover destroying any record,
23 document, or tangible object, which we think, as a
24 manner of plain meaning and history covers all types
25 of -- of physical evidence.

1 JUSTICE KENNEDY: Assume that Congress
2 intended and wanted, to cure a void in the criminal
3 statutes, to have a general prohibition against
4 destruction of evidence and that it put it in
5 Sarbanes-Oxley, and you make that argument. Are there
6 any other laws of general application that were also
7 included in the Sarbanes Act -- Oxley, or is this the
8 only one?
9 MR. MARTINEZ: No, there -- there were a
10 number. First of all, Petitioner has conceded that
11 1512(c)(1) itself is of general application. The other
12 one that I think is the clearest to point to would be
13 1513(e), which was a new provision also added as part of
14 Sarbanes-Oxley that was the antiretaliation provision.
15 And --
16 JUSTICE SCALIA: Is there any other
17 provision of Federal law that has a lesser penalty than
18 20 years that could have been applied to this -- this
19 captain throwing a fish overboard?
20 MR. MARTINEZ: Well, Your Honor, he was
21 convicted of violating 2232. The statute that
22 Petitioner agreed he could have been charged with,
23 1512(c)(1), also applies a 20-year penalty.
24 But I'd like to address --
25 JUSTICE SCALIA: And that's it?

1 JUSTICE BREYER: They never meant to --
2 JUSTICE SCALIA: There is nothing lesser
3 than that?
4 MR. MARTINEZ: I -- I'm sure there -- there
5 may have been other --
6 JUSTICE SCALIA: You know, frankly, you come
7 here, and, yeah, he only got -- what did he get, 30 days
8 or something?
9 MR. MARTINEZ: Yes, Your Honor.
10 JUSTICE SCALIA: But he could have gotten
11 20 years. What kind of a sensible prosecution is that?
12 MR. MARTINEZ: Your Honor --
13 JUSTICE SCALIA: Is there nothing else
14 you -- who -- who do you have out there that -- that
15 exercises prosecutorial discretion? Is this the same
16 guy that -- that brought the prosecution in Bond last
17 term?
18 MR. MARTINEZ: Your Honor, I think a couple
19 points on that. First of all, Congress passed a broad
20 statute. The statute as originally drafted and reported
21 out of the Senate Judiciary Committee had a 5-year
22 penalty. Congress looked very closely at that penalty.
23 It was -- sorry, it was drafted with 5 years. It was
24 reported out of committee with 10 years, and it was
25 ultimately at -- at the suggestion of the House of

1 Representatives, upped to 20 years.

2 JUSTICE SCALIA: No, I'm not talking about

3 Congress. I'm talking about the prosecutor. What kind

4 of a mad prosecutor would try to send this guy up for

5 20 years or risk sending him up for 20 years?

6 MR. MARTINEZ: Your Honor, we did not ask

7 for 20 years in this prosecution. And let me try to

8 explain --

9 JUSTICE GINSBURG: But you did -- you did --

10 you did charge --

11 JUSTICE KENNEDY: What did you ask for?

12 JUSTICE GINSBURG: You charged two offenses:

13 2232, and Yates is not questioning the applicability of

14 that. Is there any guidance that comes from Justice to

15 prosecutors? I mean, the code is filled with

16 overlapping offenses. So here's a case where the one

17 statute has a 5-year maximum, the other 20. The one

18 that has the 5-year clearly covers the situation.

19 Is there anything in any kind of manual in

20 the Department of Justice that instructs U.S. attorneys

21 what to do when there are these overlapping statutes?

22 MR. MARTINEZ: Your Honor, the -- my

23 understanding of the U.S. Attorney's Manual is that the

24 general guidance that's given is that the prosecutor

25 should charge -- once the decision is made to bring a

1 criminal prosecution, the prosecutor should charge
2 the -- the offense that's the most severe under the law.
3 That's not a hard and fast rule, but that's kind of the
4 default principle. In this case that was Section 1519.
5 JUSTICE SCALIA: Well, if that's going to be
6 the Justice Department's position, then we're going to
7 have to be much more careful about how extensive
8 statutes are. I mean, if you're saying we're always
9 going to prosecute the most severe, I'm going to be very
10 careful about how severe I make statutes.
11 MR. MARTINEZ: Your Honor, that's --
12 JUSTICE SCALIA: Or -- or how much coverage
13 I give to severe statutes.
14 MR. MARTINEZ: That's -- that's not what we
15 were saying. I think we're not always going to
16 prosecute every case, and obviously we're going to
17 exercise our discretion. In this case, what the
18 prosecutors did was they looked at the circumstances of
19 the offense. And just to emphasize what happened here,
20 Mr. Yates was given an explicit instruction by a law
21 enforcement officer to preserve evidence of his
22 violation of Federal law. He directly disobeyed that.
23 He then launched a -- a convoluted cover-up scheme to --
24 to cover up the fact that he had destroyed the evidence.
25 He enlisted other people, including his crew members, in

1 executing that scheme and in lying to the law
2 enforcement officers about it. And then --
3 CHIEF JUSTICE ROBERTS: You make him sound
4 like a mob boss or something. I mean, he was caught --
5 (Laughter.)
6 CHIEF JUSTICE ROBERTS: The fish were -- how
7 many inches short of permitted were the fish?
8 MR. MARTINEZ: The fish were -- it varied
9 fish by fish, Your Honor.
10 (Laughter.)
11 MR. MARTINEZ: But we did not -- the
12 prosecution in this case was not about the size of the
13 fish. The prosecution was about the destruction of the
14 evidence, and I think it would be a very strange thing
15 if this Court were to say that the obstruction of
16 justice law is somehow applied differently when the
17 offense is trivial.
18 JUSTICE KENNEDY: Did you ask -- did you ask
19 for or recommend a particular sentence?
20 MR. MARTINEZ: We asked for a sentence
21 within the guidelines range which was -- which was
22 calculated by the judge at I think 21 to 27 months. The
23 judge ended up giving 30 days. We did not appeal that.
24 We think, you know, that was a reasonable exercise of
25 the judge's discretion, which I think is a very

1 important check on the fact that this is, of course, a
2 very broad statute, and I think a 20-year penalty, of
3 course, would -- would have been too -- too much in this
4 circumstance.
5 CHIEF JUSTICE ROBERTS: But according --
6 JUSTICE KENNEDY: Go ahead.
7 CHIEF JUSTICE ROBERTS: But according -- if
8 I understand your answer to Justice Scalia, according to
9 the Justice Department manual, any case in which someone
10 destroys a tangible object, you -- you should prosecute
11 them under this statute, because I assume 20 years is
12 the maximum available penalty?
13 MR. MARTINEZ: Your Honor, we would not --
14 we do not prosecute every fish disposal case, and -- we
15 do not. So I think if you --
16 CHIEF JUSTICE ROBERTS: But the point is
17 that you could, and the point is that once you can,
18 every time you get somebody who is throwing fish
19 overboard, you can go to him and say: Look, if we
20 prosecute you you're facing 20 years, so why don't you
21 plead to a year, or something like that. It's an
22 extraordinary leverage that the broadest interpretation
23 of this statute would give Federal prosecutors.
24 MR. MARTINEZ: Your Honor, we're operating
25 with the -- with the statute that Congress passed, and

1 Congress decided that this statute was going to carry a
2 20-year penalty. And I think the issue in this case,
3 though, is whether Mr. Yates' conduct comes within the
4 terms of that statute and specifically whether a fish
5 counts as a tangible object.
6 JUSTICE BREYER: Isn't -- isn't there a
7 normal obstruction of justice statute that existed
8 before this?
9 MR. MARTINEZ: I -- there are several, and I
10 think what Congress --
11 JUSTICE BREYER: Suppose, in other words,
12 it -- wasn't this going to a criminal -- isn't a
13 criminal matter?
14 MR. MARTINEZ: I'm sorry, can you --
15 JUSTICE BREYER: Wasn't what the official,
16 the government official was investigating a minor crime,
17 catching fish that are too small? Am I right?
18 MR. MARTINEZ: It was a civil offense, Your
19 Honor, that the --
20 JUSTICE BREYER: It's a civil offense.
21 MR. MARTINEZ: Yes.
22 JUSTICE BREYER: Fine. Then isn't there a
23 statute that says that you cannot destroy evidence
24 useful for a civil offense when you know that it's going
25 to be?

1 MR. MARTINEZ: Yes, and it's 1519 and only
2 1519.
3 JUSTICE BREYER: In other words, for many,
4 many years before Sarbanes-Oxley, the Federal Government
5 could not prosecute obstruction of justice.
6 MR. MARTINEZ: Your Honor, the --
7 JUSTICE BREYER: Where there was a civil
8 offense involved?
9 MR. MARTINEZ: When there was a -- in the
10 absence of a pending judicial proceeding, the government
11 could not have prosecuted him under 1503.
12 JUSTICE BREYER: No, I'm not asking specific
13 things. I want to know the general criminal law, which
14 I do not know all of it. I had always thought there is
15 a crime called obstruction of justice, and I always
16 thought that a person who destroys evidence, where he
17 knows it's evidence, he's been asked to bring it to the
18 proceeding which may not yet have taken place, he
19 purposely destroys it, I had thought that that was a
20 crime.
21 MR. MARTINEZ: It would make perfect sense
22 for that to be a crime --
23 JUSTICE BREYER: But it was never was in the
24 criminal system? No one was ever prosecuted for it?
25 MR. MARTINEZ: Under these -- under these

1 circumstances it was not a -- it was not a crime, and
2 that's exactly what Congress realized.
3 JUSTICE SOTOMAYOR: I'm sorry --
4 MR. MARTINEZ: -- in the wake of Enron.
5 JUSTICE SOTOMAYOR: I'm sorry, but --
6 JUSTICE BREYER: What statute did you used
7 to use?
8 MR. MARTINEZ: Well, in the Arthur Andersen
9 prosecution they used 1512(b)(2). But the problem with
10 1512(b)(2) was that it had a huge loophole in it.
11 1512(b)(2) prohibited person A from persuading person B
12 to destroy evidence, but it didn't prohibit person A
13 from destroying that exact same evidence himself. And
14 so Congress decided --
15 JUSTICE BREYER: Okay, okay. I guess I can
16 look that up later. But in any case, this is a -- what
17 will you do with the problem that I put together? That
18 is my problem.
19 MR. MARTINEZ: The vague -- the potential
20 vagueness problem? Is that what --
21 JUSTICE BREYER: Yeah.
22 MR. MARTINEZ: I think there are certain
23 questions that come into play with this statute, which
24 are arguably vague, and they don't have to do with the
25 meaning of tangible object. They have to do with the --

1 the various intent-related elements of the statute. For
2 example, what does it mean to impede, obstruct or
3 influence justice? What does it mean to be acting in
4 contemplation of a proceeding, and do you need to know
5 that the proceeding is -- is under Federal jurisdiction?
6 Those are the kinds of questions that the lower courts
7 are currently dealing with. They're not presented in
8 this case.
9 JUSTICE BREYER: No, I know. It's not just
10 influence a proceeding. It is, for example -- and here
11 it's obscure, but it means to destroy something in
12 relation to any such matter or case. What matter? In
13 relation to any matter within the jurisdiction of any
14 department or agency within the United States. What?
15 (Laughter.)
16 JUSTICE BREYER: I mean, somebody comes to
17 the door and says -- I've been through this. He passes
18 a piece of paper through the door. It's the postal --
19 it's a postman. He says, please send this back. It's
20 our proper duty to deliver the mail. I say, I hate
21 postmen and I rip it up. 20 years.
22 (Laughter.)
23 MR. MARTINEZ: Your Honor, that would not be
24 covered.
25 (Laughter.)

1 JUSTICE BREYER: And why wouldn't it happen?
2 It wouldn't happen because you'd never prosecute it,
3 though I've had my doubts recently.
4 (Laughter.)
5 MR. MARTINEZ: Your Honor, it wouldn't
6 happen because the statute requires bad intent. It
7 requires the intent to impede, obstruct --
8 JUSTICE BREYER: Yes, I do. I say, I hate
9 postmen. I don't want them to find out. And I tell
10 four people, I finally got even with the postman. I
11 have -- I have the intent.
12 And I'm using a ridiculous example purposely
13 because, by using an example purposely, I'm trying to
14 get you to focus on the question of how possibly to draw
15 a line. And if you can't draw a line, it seems to me
16 that the risk of arbitrary and discriminatory
17 enforcement is a real one. And if that's a real risk,
18 you fall within the vagueness doctrine. There is the
19 whole problem spelled out, and what I do not understand
20 is the relation of this case to that doctrine or how to
21 decide this case.
22 MR. MARTINEZ: Your Honor, this case is --
23 is not related to that doctrine because the Petitioner
24 has not made a vagueness argument.
25 JUSTICE BREYER: Yes.

1 MR. MARTINEZ: What this Court has said is
2 that when -- when vagueness challenge is represented,
3 they need to be presented in as-applied challenges.
4 That hasn't happened in this case, and so --
5 JUSTICE BREYER: How do I know since there
6 could be four ways of trying to limit it? And one way
7 to try to limit it might be what your opponent says.
8 MR. MARTINEZ: I think that his way is a
9 particularly bad way to address the problem that you --
10 the exact hypothetical that you gave me because in that
11 case, we're talking about a document, a letter, that the
12 postman hands over. And so the problem that -- that
13 your -- your hypothetical poses is not addressed by the
14 solution he gives.
15 JUSTICE BREYER: That's true.
16 MR. MARTINEZ: So there's a total mismatch.
17 And I don't think there's any reason to think that
18 Congress, even if it had concerns about breadth, would
19 have wanted to solve those concerns by -- by narrowing,
20 in a very unnatural fashion, the word "tangible object,"
21 whereas, you know, leaving in place the terms "record
22 and document."
23 JUSTICE SOTOMAYOR: Mr. Martinez, can we go
24 back to what we started with -- with what Justice Breyer
25 started with? If I understood your brief right, up

1 until 1519, the general obstruction statute, 1503,
2 applied only to the destruction of evidence in a
3 judicial proceeding if you got someone else to destroy
4 it.
5 MR. MARTINEZ: 1503 applied only to pending
6 judicial proceedings. There was a different provision,
7 Section 1512(b)(2) that, as -- as the Court considered
8 and addressed in the Arthur Andersen prosecution, 1512
9 (b)(2) did not prohibit a single act or destruction.
10 You had to persuade someone else.
11 JUSTICE SOTOMAYOR: Okay. So you needed
12 something to punish people who destroyed evidence and --
13 but I see two provisions, 1519 and 1512. Are they
14 superfluous?
15 MR. MARTINEZ: I think the way to understand
16 those provisions is to -- is to understand the fact
17 that, one, they are super -- they are redundant largely,
18 not entirely; and, two, why are they both in there?
19 It's a very reasonable question to ask. And the reason
20 is, these were rival -- essentially rival provisions,
21 they were drafted by different people at different times
22 and they both ended up in the statute by the way that
23 the --
24 JUSTICE SCALIA: Well, that makes it okay.
25 That's fine. I mean, you know, that explains how it

1 happens. It doesn't explain how it makes any sense.
2 (Laughter.)
3 MR. MARTINEZ: Well, Your Honor, I think to
4 address the -- the textual component of the superfluous
5 nature of those two provisions, I think it's unambiguous
6 that they are superfluous, and I think Petitioner would
7 agree with us that they're superfluous with respect to
8 records and documents. So we know here that Congress
9 was not intending to avoid surplusage. The only
10 question is whether they also -- they -- they thought it
11 would be superfluous with the third term in the list,
12 which is either "other objects" or "tangible objects."
13 JUSTICE SCALIA: Well, not only that,
14 1519 -- 1512 only applies for use in an official
15 proceeding; isn't -- isn't that right?
16 MR. MARTINEZ: That's right. It's narrower.
17 JUSTICE SCALIA: Yes. And this applies to
18 any matter within the jurisdiction of any department or
19 agency of the United States. Is the knowingly
20 requirement of 1519, does that apply to that portion of
21 the statute or does it only apply to altering,
22 destroying, mutilating, concealing, covering up, or
23 falsifying?
24 Do you have to know that it is within the
25 jurisdiction of a -- of a Federal agency?

1 MR. MARTINEZ: No, you don't. It's a
2 jurisdictional element that typically that it -- as this
3 Court has read other statutes, the -- the knowledge
4 requirement does not extend to the jurisdictional
5 element.
6 JUSTICE SCALIA: Wow. Then it's really --
7 MR. MARTINEZ: Your Honor, but that's -- the
8 court of appeals have said that if this Court has
9 concerns with that -- that holding, I think there may be
10 a different case in which to bring that up. Here, of
11 course, Mr. Yates had perfect knowledge that there was a
12 Federal proceeding that was ongoing and so that concern
13 doesn't affect his case.
14 JUSTICE SCALIA: In this case, it's not a
15 problem.
16 MR. MARTINEZ: But -- can I --
17 JUSTICE SOTOMAYOR: 1512, could you have
18 charged it?
19 MR. MARTINEZ: 1512(c)(1), I think we could
20 have charged it, yes, Your Honor. And we didn't -- and
21 I think in the Eleventh Circuit there was some confusion
22 about how you deal with investigations and whether
23 investigations that are probably going to give rise to a
24 proceeding, whether that kind of is close enough to an
25 official proceeding to charge 1512(c)(1), so they made

1 the decision to charge 1519 instead. It was -- it was a
2 reasonable decision based on the language of the
3 statute.
4 But I want to emphasize, I think the most
5 important thing that Petitioner's counsel conceded here
6 today was that 1512(c)(1) is a general obstruction of
7 justice statute that was passed as part of
8 Sarbanes-Oxley and covers the destruction of fish. And
9 I think that --
10 JUSTICE GINSBURG: He said it has a stronger
11 state of mind element.
12 MR. MARTINEZ: It's -- the requirement is a
13 little bit more rigorous with respect to 1512(c)(1).
14 But I think the key point is Sarbanes-Oxley prohibits
15 the destruction of fish. You said that, that's been our
16 position, and I think that undermines the whole theme of
17 his brief and certainly the theme of all the amicus --
18 amicus briefs that's been -- that have been filed here.
19 Their whole point has been it's impossible
20 to imagine that -- that Sarbanes -- that Congress could
21 have wanted Sarbanes-Oxley, an Enron-related statute, to
22 prohibit the destruction of fish, and yet that's the
23 point on which we all agree here today.
24 I'd like to say a few words about the
25 various textual arguments that -- that Petitioner has

1 put forward, the nouns, the verbs and the headings.
2 First of all, with respect to -- with respect to the
3 nouns, I think the historical evidence that we've put
4 forward, I think, show conclusively that the term
5 "record," "document," and "tangible things" is very,
6 very similar to the standard formulation that
7 essentially everyone has used to cover all physical
8 evidence in the obstruction of justice context for over
9 five decades.
10 Secondly, 1512(c)(1) confirms that the --
11 the --
12 JUSTICE KAGAN: Could -- could you tell me,
13 Mr. Martinez, where are those other provisions? I -- I
14 think that there are about five of them in 1512. I take
15 it there are many State statutes, are there? Are there
16 other Federal statutes?
17 MR. MARTINEZ: We -- the -- the key
18 provisions that we've pointed to in our brief, there's
19 six different provisions of Section 1512. 1512
20 (a)(1)(b), (a)(2)(b)(1).
21 JUSTICE KAGAN: That's okay.
22 MR. MARTINEZ: Okay. So there's six in
23 1512. There's 16 different State provisions that have
24 essentially the same language. I think most of them say
25 "record," "document" or "thing." Some of them say

1 "record," "document" or "other object."
2 CHIEF JUSTICE ROBERTS: Well, but -- when
3 you say this -- I understood your friend to say
4 "tangible object" is only used in record statutes. In
5 1512 --
6 MR. MARTINEZ: No.
7 CHIEF JUSTICE ROBERTS: -- it's -- it's
8 "object," I mean tangible -- yeah, "tangible thing." In
9 1512 it's "object," right?
10 MR. MARTINEZ: In 1512 it's "other object."
11 CHIEF JUSTICE ROBERTS: Well, see, the
12 reason -- I mean, maybe that makes a difference if you
13 have records, documents, and then a tangible object
14 suggests that the tangible nature of it is what's
15 significant, which suggests that it may be one of the --
16 you know, whatever the drive thing is as opposed to a
17 record. And that's a point that's not present in the
18 statutes that you were citing.
19 MR. MARTINEZ: I think -- I think it's true
20 that the term "tangible" is different. I think that the
21 way to understand the term "tangible" is the way in
22 which Congress and -- and the rules always use the term
23 "tangible" in connection with things or objects, which
24 is as a way to refer to all types of -- of objects, all
25 types of evidence.

1 We've cited 35 different provisions of the
2 U.S. Code and of the -- the discovery rules in the
3 criminal context and in the civil context. Those are at
4 Footnote 3 of our brief. In all of those instances,
5 they use the phrase "tangible things" or "tangible
6 object" to refer to everything. And so there's no
7 reason to think that the addition of the word "tangible"
8 somehow shrunk the scope of the statute. And even if it
9 did shrink --
10 JUSTICE SCALIA: Is there such a thing as an
11 intangible object? I'm trying to imagine one.
12 MR. MARTINEZ: I -- I think the -- you could
13 say that the object of the game of Monopoly is to win
14 all the money, but that's not really what Congress was
15 looking at here.
16 (Laughter.)
17 JUSTICE SCALIA: Object not meaning purpose.
18 MR. MARTINEZ: I -- I don't think that the
19 word -- I agree with what Petitioner said in his opening
20 brief, which is that -- that the word "tangible" here
21 doesn't really do much. He said that at page 13 of his
22 opening brief. When you get to his reply brief,
23 suddenly the word "tangible" is doing all this amazing
24 work that -- and it's the key difference between this
25 statute and all the other statutes. So that's with

1 respect --

2 JUSTICE GINSBURG: You, in your brief, point

3 to the Model Penal Code as the model for 1519. But the

4 Model Penal Code describes a misdemeanor, and this is a

5 20-year felony. That seems kind of a mismatch.

6 MR. MARTINEZ: You know, if -- the tradition

7 of -- of the degree of penalty to attach to this offense

8 has changed over time. As you point out, the Model

9 Penal Code did identify this as a misdemeanor. The

10 Brown Commission, which built on the Model Penal Code,

11 treated it as a misdemeanor or as a felony, depending on

12 the severity of the underlying offense.

13 When Congress sat down in the '70s and '80s

14 and was trying to incorporate, essentially, that

15 provision into Federal law unsuccessfully, over a dozen

16 times it treated it as a felony. And then, or course,

17 Congress in Sarbanes-Oxley Act in both 1512(c)(1) and in

18 1519 also treated it as a felony with a 20-year penalty.

19 And -- and with respect to that penalty, again, I think

20 it's important to emphasize that the text that's at

21 issue here, any tangible object, that was fixed and that

22 was drafted -- it was in the bill that was introduced by

23 Senator Leahy at the time when it was only a 5-year

24 penalty. And there's no reason to think that when

25 Congress tinkered with that penalty, it meant to kind

1 of, by implication, shrink the scope of tangible objects
2 that's at issue here.
3 And I think just to emphasize the -- the
4 textual point, it's -- it's a very unusual and I think
5 it's -- it's highly implausible to believe that Congress
6 chose this broad and expansive phrase, "any tangible
7 object," when really what it really wanted to do was
8 refer only to a very narrow and specific category of
9 information storage devices.
10 CHIEF JUSTICE ROBERTS: Well, isn't that
11 like the Bond decision? I mean, you had text that could
12 be read broadly, and yet we suggested, well, Congress
13 could not have meant the Chemical Weapons Treaty to
14 cover a minor dusting of -- with toxic, irritating
15 chemicals.
16 MR. MARTINEZ: I think Bond it's -- I think
17 Bond is actually in some ways helpful to the government
18 in this case. Because as I understand the -- the Bond
19 decision, it turned essentially on the everyday meaning
20 of -- of the phrase and of -- and Federalism concerns as
21 well. And the everyday meaning of the phrase -- I think
22 it was "chemical weapon" in that case -- didn't apply
23 to -- to the chemicals at issue that Miss Bond used.
24 But in this case, the everyday meaning of
25 the phrase "tangible object" applies to all tangible

1 objects. Everyone -- and if you stop someone on the
2 street and ask them is a fish a tangible object, the
3 answer would almost certainly be -- would be yes. And
4 so, you don't have as well what you had in Bond, which
5 was the concern about -- about Federalism and the
6 application of that canon.
7 CHIEF JUSTICE ROBERTS: Well, what if you
8 stopped them on the street and said is a fish record
9 document or tangible object?
10 MR. MARTINEZ: I think if you -- if you
11 asked them that question and you -- you pointed them to
12 the fact that --
13 JUSTICE SCALIA: I don't think you would get
14 a polite answer to either of those questions.
15 (Laughter).
16 MR. MARTINEZ: Your Honor, maybe I could say
17 a word -- having talked about the nouns, maybe I could
18 say a word about the verbs in this statute because they
19 make a -- they place a lot of emphasis on the "makes a
20 false entry" language. Petitioner's argument rests on
21 this premise that each of the verbs has to work with --
22 with each of the nouns, but that premise is -- is
23 flawed. It's not consistent with how Congress drafts
24 statutes, it's not consistent with Petitioner's own
25 interpretation, and I think there's significant tension

1 with this Court's decision last year in Roberts. Let me
2 say a word about each.
3 With respect to how Congress drafts
4 statutes, I think you only have to look to Section 1505
5 of the statute to see that that's yet another example of
6 where Congress has used -- had a bunch of verbs and a
7 bunch of nouns and some of the nouns don't work with
8 some of the verbs. You can't mutilate oral testimony.
9 With respect to Petitioner, the inconsistency with
10 Petitioner's own theory, Petitioner agrees that 1519
11 covers the destruction of an e-mail in electronic form.
12 You can't mutilate an e-mail. No one would ever talk
13 like that.
14 Similarly, he says that it would apply to a
15 blank hard drive. But no one -- I've never heard anyone
16 talk about falsifying a blank hard drive. So the
17 implications of his argument are inconsistent with --
18 with where he wants the Court to go. And then finally,
19 the Roberts case. Roberts dealt with a circumstance, it
20 wasn't perfectly analogous, but it was -- it raised a
21 similar problem, which is that there was a broad
22 statute, it had many different applications, and there
23 was some language in the statute that was a little bit
24 awkward and a little bit superfluous with regard to some
25 of the applications of the statute.

1 And the response that the Court had to that
2 problem was not to say, well, the statute doesn't apply
3 to those circumstances. The response was to say that
4 that's the linguistic price to be paid, linguistic price
5 to be paid for having a broad statute. And then the
6 Court said Congress does not need to write extra
7 language specifically exempting, phrase by phrase,
8 applications with respect to which a portion of a phrase
9 is not needed. I think that was right in Roberts and I
10 think the same principle applies here.
11 Finally, Your Honor, with respect to the
12 headings, a couple points. First, I think the headings
13 in this case as in -- as in the Lawson case that this
14 Court also dealt with last term also involving
15 Sarbanes-Oxley, the headings here are just obviously and
16 unambiguously under inclusive. The heading is a
17 shorthand reference to the general subject matter. It's
18 not intended to spell out what the operative provisions
19 say or to mirror those operative provisions. It's
20 obviously under inclusive. It omits a whole bunch of
21 the verbs. It omits two of the nouns. The heading
22 argument, I think, is especially unreliable in this
23 context where if you look at what Congress did with
24 Sarbanes-Oxley generally, it was not paying very close
25 attention to the headings under which it put various

1 provisions.

2 That's true with respect to 1519, that's

3 true with respect to 1514, the statute that was at issue

4 in the Lawson case, and it's also true with respect to

5 Section 1512(c)(1). Section 1512(c)(1) prohibits me

6 from -- prohibits any person from destroying evidence.

7 But they put that -- that provision inside the

8 witness-tampering statute. It doesn't make sense; it

9 doesn't fit there. And that just shows that Congress

10 was not paying close attention to the headings and that

11 that shouldn't drive the outcome of this case.

12 JUSTICE ALITO: Well, Mr. Martinez, you are

13 really -- I mean, you have arguments on all of these

14 points, but you are really asking the Court to swallow

15 something that is pretty hard to swallow. Do you deny

16 that this statute, as you read it, is capable of being

17 applied to really trivial matters, and yet each of those

18 would carry a potential penalty of 20 years, and then

19 you go further and say that it is the policy of the

20 Justice Department that this has to be applied in every

21 one of those crazy little cases. And this involved a

22 business and a number of fish. What if it was one fish?

23 What if it was one undersized fish that was caught by a

24 fisherman in a national -- on Federal land? This would

25 be -- would it apply here?

1 MR. MARTINEZ: Your Honor, I want to answer
2 that question, but I just want to clarify what I said
3 about our policy. Our policy is not that we prosecute
4 every trivial matter. That is not our policy. I want
5 to be very clear about that.
6 JUSTICE ALITO: No, I understand that. But
7 if you choose to -- if you want to find the guy who
8 caught one trout that was undersized on Federal -- on a
9 Federal -- on Federal land, you want to charge him with
10 whatever regulatory offense that would be, you have to
11 charge this, too, because this is the more severe
12 penalty.
13 MR. MARTINEZ: We only have to charge this
14 if -- if the person with knowledge and the intent to
15 obstruct the administration of Federal law deliberately
16 takes that one fish and throws it overboard or destroys
17 it so as to escape liability.
18 JUSTICE BREYER: What about every camper --
19 MR. MARTINEZ: That's what the statute says.
20 JUSTICE ALITO: He catches the fish and now
21 he sees the inspector coming toward him, throws it in
22 the lake.
23 MR. MARTINEZ: That's what the statute says,
24 Your Honor. Now, I -- I appreciate the force of the
25 hypothetical and I understand it, but I think I want

1 to -- the point I want to emphasize, because maybe
2 there's -- I understand why the Court might have
3 concerns about that. The problem -- there's a mismatch,
4 though, between Petitioner's argument and the
5 hypothetical.
6 The problem with the hypothetical is that
7 this statute might be harsh in certain particular
8 outlier applications. But Petitioner is not arguing for
9 some sort of de minimis rule, he's not saying that this
10 statute can't be applied in trivial cases. He's arguing
11 that an entire class of evidence is entirely outside the
12 scope of the statute --
13 JUSTICE KENNEDY: But he has no -- he has no
14 doctrinal basis to make that argument other than to say
15 that there is such a doctrine as prosecutorial
16 discretion and, A, that it's enforceable and, B, that it
17 has some substance, and you've indicated that it has
18 neither.
19 MR. MARTINEZ: I -- I think, Your Honor, I
20 don't think that -- I think prosecutorial discretion is
21 not an issue that he's raised. I don't think that it's
22 an issue in light of this Court -- what this Court has
23 said about prosecutorial discretion. I don't think that
24 would be a basis --
25 JUSTICE KENNEDY: Well, it seems to me that

1 we should just not use the concept or refer to the
2 concept at all anymore.
3 MR. MARTINEZ: Well, Your Honor, I think
4 that -- that -- again, to go back to some of the answers
5 I was -- I was giving earlier, I think that the concerns
6 that the Court has flagged about the potential breadth
7 of this statute, they're serious and they're the kinds
8 of concerns that courts and juries and judges are going
9 to take into consideration when they're dealing with any
10 of these crimes. But the issue in this case is not --
11 is not that. The issue in this case is what is -- what
12 did Congress intend with the term "any tangible object."
13 JUSTICE BREYER: All right. So if that's
14 so, then that's the dilemma. Suppose I worry about
15 Justice Alito's single fish in the case of a camper who
16 kicks an ember away, knowing you shouldn't have built
17 the campfire or picks a flower, knowing you're supposed
18 to let wildflowers blossom. What about that 20 years,
19 and you could multiply those beyond belief. So if
20 that's the problem, does his client go to prison because
21 we've just assumed that problem away from the case?
22 MR. MARTINEZ: No, we do not --
23 JUSTICE BREYER: How -- how do we handle it
24 if, as you say, there is a genuine concern in that
25 respect, but it wasn't argued here?

1 MR. MARTINEZ: I think that you write a very
2 narrow decision that says this case is about the meaning
3 of the term "any tangible object." And if the case --
4 the ember case comes up or the postman case comes up,
5 then -- and if the arguments are made, then I think
6 those arguments can be fleshed out, they can be briefed,
7 they can be thought through by the parties, and I think
8 they'll be properly presented to the Court in that case.
9 In this case, though, this case presents
10 just a common sense, straightforward question of
11 statutory interpretation. Does the phrase "any tangible
12 object" actually mean what Congress said? Does it refer
13 to all tangible objects? We think that the unambiguous
14 answer based on the text of the statute, based on the
15 history of the statute, is -- is clearly yes, and we ask
16 this Court to affirm.
17 JUSTICE KENNEDY: Perhaps Congress should
18 have called this the Sarbanes-Oxley Grouper Act.
19 (Laughter.)
20 MR. MARTINEZ: Perhaps, Your Honor.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Badalamenti, you have four minutes
23 remaining.
24 REBUTTAL ARGUMENT OF MR. BADALAMENTI
25 ON BEHALF OF THE PETITIONER

1 MR. BADALAMENTI: I'll be brief. Regarding
2 Justice Breyer's question regarding the void for
3 vagueness, the government stated that we had not stated
4 that in our brief. It's on pages 25 and 26, as well as
5 squarely raised in Footnote 7.
6 JUSTICE BREYER: Yes, but it wasn't raised
7 below. And these are very difficult issues and it's
8 sort of flying blind not to have lower court opinions
9 and the thing fully argued out before we get it.
10 MR. BADALAMENTI: Yes, Your Honor. We just
11 wanted to point out where it was in the briefing in
12 this -- in this Court.
13 The "tangible object" notion is extremely
14 important, which the justices have pointed out under
15 Russello. You have the fact that you have two statutes
16 passed in the same act. One includes different language
17 than the other. To presume that that language is
18 included in there intentionally and that major
19 significance makes false entry in all of the statutes
20 that are -- we've cited in our brief in Footnote 4, that
21 reference of the reply brief -- all of them are
22 record-related statutes. Every single one of them has a
23 textural indication of what Congress had meant.
24 The breadth of the statute regarding any
25 Federal matter is -- is an extraordinary thing that the

1 American people will be walking on eggshells for if this
2 Court were to not limit, at least, the subject matter of
3 this. And the last point --
4 JUSTICE SCALIA: Of course, it doesn't
5 entirely solve that problem, simply to narrow --
6 MR. BADALAMENTI: It does not -- it doesn't,
7 Your Honor. And Mr. Yates would open up any other
8 constitutional issues as well. But no, certainly the
9 last comment is directed -- is that for more than 200
10 years, the United States has existed without this mega,
11 all-inclusive obstruction of justice statute with the
12 intent to impede anything, any matter, that the
13 possibility of the United States could or may or may
14 never be interested in. It didn't create it buried
15 within the Sarbanes-Oxley Act and this Court shouldn't
16 put it in there now.
17 For these reasons, Mr. Yates requests that
18 this Court vacate the conviction under Section 1519,
19 reverse, remand the decision to the Eleventh Circuit.
20 Thank you.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 The case is submitted.
23 (Whereupon, at 11:03 a.m., the case in the
24 above-entitled matter was submitted.)
25

A

a.m 1:13 3:2 56:23
above-entitled 1:11 56:24
absence 33:10
absurd 22:15,21 23:11,13
absurdity 22:14 23:1
accept 17:15 18:23
accessed 5:9
account 12:18 21:6
act 3:22 4:13,15 11:3 14:17 19:4 22:6,9 24:1 26:7 38:9 45:17 54:18 55:16 56:15
acting 35:3
action 20:8
added 24:1 26:13
addition 44:7
additional 10:8
address 26:24 37:9 39:4
addressed 37:13 38:8
administration 3:17 10:11 17:25 24:12 51:15
admittedly 6:5
affect 40:13
affirm 54:16
agency 10:19 35:14 39:19,25
agent 16:15
agree 18:18 39:7 41:23 44:19
agreed 26:22
agrees 48:10
ahead 31:6
ALITO 6:11,18 6:22 7:9 50:12 51:6,20
Alito's 53:15
all-encompass... 3:20
all-inclusive 56:11
alter 25:7
alteration 11:6
altering 3:21 11:4 12:15 39:21
amazing 44:23
amended 9:22
American 15:6 16:22 23:25 56:1
amicus 15:4 41:17,18
analogous 48:20
analyzing 25:8
Andersen 24:7 34:8 38:8
answer 8:10 9:5 18:1,21,21 31:8 47:3,14 51:1 54:14
answers 53:4
antiretaliation 26:14
anybody 13:11
anymore 53:2
appeal 30:23
appeals 40:8
appear 25:4
APPEARAN... 1:14
applicability 28:13
application 26:6 26:11 47:6
applications 48:22,25 49:8 52:8
applied 9:19 11:22 20:17 26:18 30:16 38:2,5 50:17 50:20 52:10
applies 26:23 39:14,17 46:25 49:10
apply 9:16,20,24 10:1 11:13 39:20,21 46:22 48:14 49:2 50:25
appreciate 51:24
arbitrary 18:13 36:16
arguably 34:24
argue 23:16,19
argued 17:14 53:25 55:9
arguing 20:7 52:8,10
argument 1:12 2:2,5,8 3:4,7 5:21,21 10:4 16:10 20:20 24:20 26:5 36:24 47:20 48:17 49:22 52:4,14 54:24
arguments 41:25 50:13 54:5,6
Arthur 34:8 38:8
as-applied 37:3
asked 30:20 33:17 47:11
asking 15:19 33:12 50:14
aspect 23:2
Assistant 1:15 1:17
assume 12:1 26:1 31:11
assumed 53:21
attach 45:7
attached 16:23
attempt 20:22
attention 49:25 50:10
Attorney's 28:23
attorneys 28:20
auditors 11:8
availability 13:15
available 31:12
avoid 39:9
awkward 48:24

B

b 34:11 38:9 42:20,20 52:16
back 8:8 12:1 15:20 17:7 18:19 23:8 35:19 37:24 53:4
backdrop 7:3 19:3
bad 36:6 37:9
Badalamenti 1:15 2:3,9 3:6 3:7,9 4:11,19 5:6,16 6:1,16 6:21 7:1,11 8:2 9:5,18 10:7,25 11:21 12:5,16 12:23 13:7,13 13:20,25 14:4 14:9,18,22 15:10,25 16:3 16:6,19 17:2,8 17:15,20 18:18 18:21 19:9,18 19:21 20:2,9 21:3,13,19,22 22:2,7,11 23:1 23:12,18,24 54:22,24 55:1 55:10 56:6
balls 7:14
based 41:2 54:14,14
basically 20:20
basis 52:14,24
behalf 1:16,19 2:4,7,10 3:8 24:21 54:25
belief 53:19
believe 46:5
believing 15:22
best 15:8,10
beyond 18:16 53:19
bill 45:22
bit 11:2 41:13 48:23,24
blank 48:15,16
blind 55:8
blossom 53:18
blush 16:12
Bond 27:16 46:11,16,17,18 46:23 47:4
Booker 20:4
boss 30:4
boundaries 5:25
bowling 7:14
branches 18:6
brand 7:10
breadth 10:24 37:18 53:6 55:24
Breyer 15:7,11 15:16 16:1,4,9 16:20,25 17:3 17:9 18:1,4,19 27:1 32:6,11 32:15,20,22 33:3,7,12,23 34:6,15,21 35:9,16 36:1,8 36:25 37:5,15 37:24 51:18 53:13,23 55:6
Breyer's 23:8 55:2
brief 11:16 37:25 41:17 42:18 44:4,20

44:22,22 45:2 55:1,4,20,21
briefed 54:6
briefing 55:11
briefs 15:4 41:18
bring 28:25 33:17 40:10
brings 22:13
broad 10:10,15 15:2 16:7 18:16 20:20 27:19 31:2 46:6 48:21 49:5
broader 10:21 14:14 16:13 25:3
broadest 31:22
broadly 46:12
brought 20:19 27:16
Brown 45:10
built 45:10 53:16
bunch 48:6,7 49:20
Bureau 17:6
buried 3:20 56:14
business 15:22 18:25 19:8,10 50:22
businesses 19:1 19:5,12

C

C 2:1 3:1
cabinet 7:10,15
calculated 30:22
called 6:20 33:15 54:18
camera 21:15
camper 51:18 53:15
campfire 53:17
canon 8:19 47:6
canons 4:2
capable 50:16
captain 26:19
capture 7:5
card 21:16
careful 29:7,10
carry 32:1 50:18
case 3:4 6:12 7:25 8:18 9:3 17:14 20:23 22:14,15 23:3 25:15 28:16 29:4,16,17 30:12 31:9,14 32:2 34:16 35:8,12 36:20 36:21,22 37:4 37:11 40:10,13 40:14 46:18,22 46:24 48:19 49:13,13 50:4 50:11 53:10,11 53:15,21 54:2 54:3,4,4,8,9,9 56:22,23
cases 50:21 52:10
catch 22:18,22
catches 51:20
catching 32:17
category 6:14 46:8
caught 13:12 30:4 50:23 51:8
Census 17:6
certain 34:22 52:7
certainly 25:8 41:17 47:3 56:8
chain 16:24
challenge 37:2
challenges 37:3
change 19:12
changed 45:8
Chapter 15:1
charge 28:10,25 29:1 40:25 41:1 51:9,11 51:13
charged 13:18 13:21 14:7 19:16 26:22 28:12 40:18,20
check 31:1
chemical 46:13 46:22
chemicals 46:15 46:23
Chief 3:3,9 12:13,17,20 24:17,18,22 25:5 30:3,6 31:5,7,16 43:2 43:7,11 46:10 47:7 54:21 56:21
choose 51:7
chose 46:6
Circuit 40:21 56:19
circumstance 19:11 21:4 31:4 48:19
circumstances 29:18 34:1 49:3
cited 44:1 55:20
citing 43:18
civil 32:18,20,24 33:7 44:3
clarify 51:2
class 14:15 20:8 52:11
classic 8:6,18 9:3 10:12 13:9 13:16,16
clear 18:16 25:1 51:5
clearest 26:12
clearly 23:15 28:18 54:15
client 13:18 19:15 20:8 53:20
close 40:24 49:24 50:10
closely 27:22
cloud 5:4,8
code 20:22,24 28:15 44:2 45:3,4,9,10
colleague 8:24
come 12:4 27:6 34:23
comes 10:5 15:18 23:2 28:14 32:3 35:16 54:4,4
coming 51:21
comment 56:9
Commission 45:10
committee 27:21 27:24
common 4:3,23 54:10
companies 19:6
company 15:12
component 39:4
computer 6:17 6:17 7:18
conceal 25:7
concealing 39:22
concede 22:19 22:21
conceded 26:10 41:5
concept 53:1,2
concern 40:12 47:5 53:24
concerns 37:18 37:19 40:9 46:20 52:3 53:5,8
conclusively 42:4
conduct 9:16 32:3
confined 3:13,24
confirm 4:2
confirms 42:10
confusion 40:21
Congress 3:19 4:1,14 6:6 7:2 7:19,23 9:12 9:13,15 10:3,5 10:13,21 11:10 11:21 12:9 13:3 19:5 20:21 21:4 22:12 23:21,24 24:6 25:11 26:1 27:19,22 28:3 31:25 32:1,10 34:2 34:14 37:18 39:8 41:20 43:22 44:14 45:13,17,25 46:5,12 47:23 48:3,6 49:6,23 50:9 53:12 54:12,17 55:23
connected 16:17
connection 43:23
consequences 19:15
consider 12:24
considerable 5:21
consideration 53:9
considered 38:7
consistent 47:23 47:24
constitutional 56:8
construction 10:2
contain 6:13
contained 15:14
container 7:12
contemplation 35:4

context 16:11 25:3 42:8 44:3 44:3 49:23
contextual 3:11 11:12 20:18
contravene 20:18
convicted 26:21
conviction 56:18
convoluted 29:23
corporate 10:20
corporations 19:5
corrupt 14:17
corruptly 14:9 14:10,13
counsel 24:18 41:5 54:21 56:21
count 8:23 20:4
country 24:8
counts 32:5
couple 27:18 49:12
course 16:9 31:1 31:3 40:11 45:16 56:4
court 1:1,12 3:10 4:14 9:18 20:16 24:23 30:15 37:1 38:7 40:3,8,8 48:18 49:1,6 49:14 50:14 52:2,22,22 53:6 54:8,16 55:8,12 56:2 56:15,18
Court's 48:1
courts 20:11 35:6 53:8
cover 24:2 25:7 25:22 29:24 42:7 46:14
cover-up 29:23
coverage 29:12
covered 5:15 12:8 21:9 22:18,19,22 35:24
covering 15:17 39:22
covers 25:24 28:18 41:8 48:11
crazy 22:24 50:21
create 56:14
created 11:5
crew 29:25
crime 17:5 32:16 33:15,20,22 34:1
crimes 53:10
criminal 11:3,4 18:7 26:2 29:1 32:12,13 33:13 33:24 44:3
criminalizing 5:22
cure 26:2
currently 35:7
cuts 10:17

D

D 3:1
D.C 1:8,18
day's 22:17
days 20:1,3 27:7 30:23
de 52:9
deal 40:22
dealing 10:14 35:7 53:9
dealt 48:19 49:14
debacle 3:15
decades 42:9
decide 36:21
decided 32:1 34:14
decision 20:4 28:25 41:1,2 46:11,19 48:1 54:2 56:19
default 29:4
defendant's 12:14
Defender 1:15
defense 14:3,4,8 14:19
defining 18:7
definiteness 18:8
definition 10:9 21:15
definitions 6:4
degree 45:7
deleted 7:4
deliberately 51:15
deliver 35:20
deny 50:15
department 1:18 28:20 31:9 35:14 39:18 50:20
Department's 29:6
depending 45:11
depraved 14:10
describes 45:4
deserved 9:1
designed 3:14 5:11,18 6:9,13 7:13 15:13 21:11
desktop 6:17
despite 20:21
destroy 11:17,19 17:22,22 25:7 32:23 34:12 35:11 38:3
destroyed 5:14 7:4 12:22 13:11,14 14:16 15:14,15 21:1 29:24 38:12
destroying 7:9 12:14,15 19:22 25:13,20,22 34:13 39:22 50:6
destroys 31:10 33:16,19 51:16
destruction 11:5 15:17 22:5 24:11 26:4 30:13 38:2,9 41:8,15,22 48:11
determine 7:6
determining 5:24
device 5:10,18 6:9,9 7:7,7,11 15:12,14,15 21:11
devices 3:14 4:5 7:5,21 46:9
difference 4:18 4:22 8:16 14:5 43:12 44:24
different 4:14 4:15,16 22:24 38:6,21,21 40:10 42:19,23 43:20 44:1 48:22 55:16
differently 4:9 8:15 9:4,6 30:16
difficult 55:7
digital 21:15
dilemma 53:14
directed 56:9
directly 29:22
discovery 44:2
discrete 6:9
discretion 27:15 29:17 30:25 52:16,20,23
discriminatory 18:13 36:16
discussed 24:3
disobeyed 29:22
disposal 20:17 31:14
distinguishing 4:25 7:16
doctrinal 52:14
doctrine 18:14 18:15 36:18,20 36:23 52:15
document 3:12 4:4,21,25 5:13 5:14 6:3,5,15 6:20 8:5,13 13:1 15:18 16:7 17:6,23 24:25 25:23 37:11,22 42:5 42:25 43:1 47:9
documents 3:13 3:21 4:8 6:19 11:4 12:21 16:21 17:2 39:8 43:13
doing 44:23
door 15:19 35:17,18
doubts 36:3
dozen 45:15
drafted 27:20,23 38:21 45:22
drafts 47:23 48:3
draw 36:14,15
drive 5:8 43:16 48:15,16 50:11
drives 16:23
dusting 46:14
duty 35:20

E

E 2:1 3:1,1
e-mail 48:11,12
earlier 23:9 24:4 25:6 53:5
effort 16:4
eggshells 56:1
either 39:12

47:14
ejusdem 4:2 8:20
electronic 7:21 48:11
element 40:2,5 41:11
elements 35:1
Eleventh 40:21 56:19
embedded 7:18
ember 53:16 54:4
emphasis 47:19
emphasize 29:19 41:4 45:20 46:3 52:1
empty 7:10
enactment 8:12
encompasses 24:25
encourage 18:13
ended 20:2 30:23 38:22
enforceable 52:16
enforcement 18:14 29:21 30:2 36:17
engage 24:10
enlisted 29:25
Enron 3:15 7:3 34:4
Enron-related 41:21
Enron/Arthur 24:7
entire 52:11
entirely 38:18 52:11 56:5
entitled 11:3,5
entries 5:3
entry 3:25 4:20 9:9,25 47:20 55:19
EPA 15:18,20 17:7
escape 51:17
especially 49:22
ESQ 1:15,17 2:3 2:6,9
essentially 25:11 38:20 42:7,24 45:14 46:19
event 12:18 21:6
everyday 46:19 46:21,24
evidence 6:8 12:25 20:17 22:24 25:1,14 25:25 26:4 29:21,24 30:14 32:23 33:16,17 34:12,13 38:2 38:12 42:3,8 43:25 50:6 52:11
evil 14:10
exact 19:15 22:23 34:13 37:10
exactly 34:2
example 35:2,10 36:12,13 48:5
exceedingly 16:7
executing 30:1
exempting 49:7
exercise 29:17 30:24
exercises 27:15
exist 7:22
existed 32:7 56:10
existing 5:8
exists 8:15
expansive 3:16 17:19 46:6
explain 28:8 39:1
explains 38:25
explicit 29:20
expression 4:7
extend 40:4
extends 18:15
extensive 29:7
extra 49:6
extraordinary 31:22 55:25
extremely 23:12 55:13

F

facing 31:20
fact 9:17 10:5,18 17:13,22 19:12 19:25 20:6 23:4 29:24 31:1 38:16 47:12 55:15
factor 4:25 7:16
factors 20:4
fall 6:14,25 7:1 13:2,6,8 15:24 23:6 36:18
falls 12:6 16:3 23:15
false 3:25 4:20 9:9,25 47:20 55:19
falsification 11:6
falsify 5:3 25:8
falsifying 4:8 39:23 48:16
far 16:13 18:16
fashion 37:20
fast 29:3
fault 8:9
FBI 16:14
Federal 1:15 3:16 10:15 15:2,5,5 25:20 26:17 29:22 31:23 33:4 35:5 39:25 40:12 42:16 45:15 50:24 51:8,9,9,15 55:25
Federalism 46:20 47:5
felony 45:5,11 45:16,18
figure 25:11
filed 41:18
filing 7:10,15 19:1
filled 28:15
film 21:23,24,25 22:3,3
finally 36:10 48:18 49:11
financial 24:8
find 17:10 36:9 51:7
finding 15:21
fine 32:22 38:25
first 3:4 4:19 6:2 8:9 16:12 26:10 27:19 42:2 49:12
fish 14:17 21:1,2 21:7,8 22:9 23:5 26:19 30:6,7,8,9,9,13 31:14,18 32:4 32:17 41:8,15 41:22 47:2,8 50:22,22,23 51:16,20 53:15
fisherman 20:25 50:24
fishing 19:8
fit 50:9
five 8:12 42:9,14
fixed 45:21
Fla 1:16
flagged 53:6
flash 16:23
flawed 47:23
fleshed 54:6
flower 53:17
flying 55:8
focus 16:16 36:14
Focusing 16:19
follow 17:4
following 8:5
Footnote 44:4 55:5,20
force 5:22 51:24
form 48:11
formulation 42:6
forward 42:1,4
four 36:10 37:6 54:22
frankly 27:6
fraud 10:20 24:4 24:4
friend 43:3
fully 55:9
further 11:2 50:19

G

G 3:1
game 44:13
general 1:18 7:19 8:4 25:19 25:21 26:3,6 26:11 28:24 33:13 38:1 41:6 49:17
generally 18:24 49:24
generis 4:2 8:22
genuine 53:24
getting 20:2 25:14
Ginsburg 4:6,11 4:17 7:23 8:3 11:14,23,25 18:6 19:7,14 19:19,25 20:7 25:18 28:9,12 41:10 45:2
Ginsburg's 8:9
give 23:11 29:13 31:23 40:23
given 3:15 7:3 15:8 28:24 29:20
gives 23:21 37:14

giving 30:23 53:5
go 8:8 31:6,19 37:23 48:18 50:19 53:4,20
going 17:1,3 29:5,6,9,9,15 29:16 32:1,12 32:24 40:23 53:8
Good 8:23
gotten 19:19 27:10
government 6:5 11:15,24 13:17 13:21 15:5 32:16 33:4,10 46:17 55:3
government's 5:25 6:1 20:21
Grouper 54:18
guess 9:3 34:15
guidance 20:13 20:14 28:14,24
guidelines 30:21
guy 27:16 28:4 51:7

H

handle 53:23
hands 37:12
happen 36:1,2,6
happened 29:19 37:4
happens 39:1
hard 5:7 29:3 48:15,16 50:15
harm 24:7
harsh 52:7
hate 35:20 36:8
heading 49:16 49:21
headings 42:1 49:12,12,15,25 50:10
hear 3:3
heard 48:15
held 4:14 7:6 9:19
help 15:20
helpful 46:17
highly 46:5
historical 25:3 42:3
history 25:24 54:15
hold 16:24
holding 40:9
Honor 5:7 7:16 10:7 11:1 14:23 17:17 19:10,18,21 20:9 26:20 27:9,12,18 28:6,22 29:11 30:9 31:13,24 32:19 33:6 35:23 36:5,22 39:3 40:7,20 47:16 49:11 51:1,24 52:19 53:3 54:20 55:10 56:7
hope 21:5
House 27:25
housed 5:9
huge 34:10
hypothetical 37:10,13 51:25 52:5,6

I

idea 20:10
identification 12:19,19
identify 45:9
illustration 11:15
imagine 25:12 41:20 44:11
immoral 14:10
impair 13:14
impede 17:23 24:11 25:20 35:2 36:7 56:12
implausible 3:19 46:5
implication 46:1
implications 48:17
important 24:12 31:1 41:5 45:20 55:14
impossible 41:19
inches 30:7
included 9:10 26:7 55:18
includes 4:14 9:13,14 55:16
including 29:25
inclusion 3:24 4:20 9:7
inclusive 49:16 49:20
inconsistency 48:9
inconsistent 48:17
incorporate 45:14
incredibly 15:2 17:19
incriminating 5:13
indicated 52:17
indicates 4:21
indication 55:23
indicator 3:23 11:12
indicators 20:19
indicted 11:17 11:19
individualized 20:3
individuals 16:21
influence 3:17 17:24 24:11 35:3,10
information 3:14 4:4,5 5:11 5:19,19 6:10 6:14,24 7:6,8 7:12,14,15,17 7:22,25 14:14 15:13,14 17:10 21:7,11 46:9
inject 20:22
inscribing 5:18
inscription 12:17,24
inside 50:7
inspector 51:21
instance 9:21
instances 44:4
instruction 29:20
instructs 28:20
intangible 5:4 44:11
intend 7:2 11:21 12:10 21:4 53:12
intended 4:16 11:12 22:12 26:2 49:18
intending 25:11 39:9
intent 3:17 13:14 17:23 36:6,7,11 51:14 56:12
intent-related 35:1
intentionally 14:12 55:18
interested 56:14
Internet 5:3,3 5:10
interpret 15:11
interpretation 22:13 31:22 47:25 54:11
introduced 45:22
investigating 32:16
investigation 17:24
investigations 40:22,23
investors 24:9
invitation 17:16
involved 3:15 33:8 50:21
involving 49:14
iPad 6:16,23 7:21
iPhone 6:17 7:21
irritating 46:14
issue 25:15 32:2 45:21 46:2,23 50:3 52:21,22 53:10,11
issues 55:7 56:8
items 5:5,7

J

JOHN 1:3,15 2:3,9 3:7
judge 20:3,5 30:22,23
judge's 30:25
judges 20:5,12 20:13 53:8
judicial 33:10 38:3,6
Judiciary 27:21
juries 53:8
jurisdiction 3:18 10:19 15:3 35:5,13 39:18 39:25
jurisdictional 40:2,4
justice 1:18 3:3 3:9 4:6,11,17 5:2,12,20 6:11 6:18,22 7:9,23 8:3,8,9,22,23 9:1,11,12 10:4 10:16 11:14,23

11:25 12:11,13 12:17,20 13:5 13:10,17,23 14:2,7,16,21 15:7,11,16 16:1,4,9,14,20 16:25 17:3,9 17:18,21 18:1 18:4,6,9,19 19:7,14,19,25 20:7,25 21:12 21:17,21,23 22:5,8,20 23:3 23:8,10,13,14 23:15,20 24:18 24:22 25:5,13 25:18 26:1,16 26:25 27:1,2,6 27:10,13 28:2 28:9,11,12,14 28:20 29:5,6 29:12 30:3,6 30:16,18 31:5 31:6,7,8,9,16 32:6,7,11,15 32:20,22 33:3 33:5,7,12,15 33:23 34:3,5,6 34:15,21 35:3 35:9,16 36:1,8 36:25 37:5,15 37:23,24 38:11 38:24 39:13,17 40:6,14,17 41:7,10 42:8 42:12,21 43:2 43:7,11 44:10 44:17 45:2 46:10 47:7,13 50:12,20 51:6 51:18,20 52:13 52:25 53:13,15 53:23 54:17,21 55:2,6 56:4,11 56:21
justices 55:14

K

Kagan 8:8,23 9:1,12 10:4,16 23:4,15,20 42:12,21
keeps 15:12
KENNEDY 5:12,20 20:25 21:12,17,21,23 22:5,8 26:1 28:11 30:18 31:6 52:13,25 54:17
key 16:24 24:24 25:6 41:14 42:17 44:24
kicks 53:16
kind 8:12 20:8 27:11 28:3,19 29:3 40:24 45:5,25
kinds 35:6 53:7
knife 12:6,9,10 12:13,15,19,24 13:6,8,10
know 8:11 9:19 14:7 15:19 17:6 23:20,22 27:6 30:24 32:24 33:13,14 35:4,9 37:5,21 38:25 39:8,24 43:16 45:6
knowing 53:16 53:17
knowingly 14:11 25:7 39:19
knowledge 40:3 40:11 51:14
knows 33:17
Kolender 18:6

L

L 1:3,15 2:3,9 3:7
lake 51:22
land 50:24 51:9
language 15:17 16:2 23:25 41:2 42:24 47:20 48:23 49:7 55:16,17
laptop 6:16
largely 38:17
later-turned-o... 12:3
Laughter 8:21 8:25 14:1,20 18:3 30:5,10 35:15,22,25 36:4 39:2 44:16 47:15 54:19
launched 29:23
law 26:17 29:2 29:20,22 30:1 30:16 33:13 45:15 51:15
laws 26:6
Lawson 18:6 49:13 50:4
Leahy 45:23
leaving 37:21
legislature 8:6
lens 11:1
lesser 26:17 27:2
Let's 17:4
letter 11:17 12:2 12:2,4 37:11
leverage 31:22
liability 21:2 51:17
light 25:14 52:22
limit 19:11,11 24:13 37:6,7 56:2
limited 5:1 10:8 13:2
line 36:15,15
linguistic 49:4,4
list 39:11
little 11:2 41:13 48:23,24 50:21
log 23:5
logs 22:18,22
look 11:2 16:11 18:5 19:3 31:19 34:16 48:4 49:23
looked 21:8 23:5 27:22 29:18
looking 15:1 44:15
looks 20:23
loophole 34:10
lot 12:21 47:19
lots 23:21
love 13:23
lower 35:6 55:8
lying 16:14 30:1

M

mad 28:4
mail 24:4 35:20
maintained 4:24
major 55:18
making 5:19
manner 18:12 25:24
manual 28:19 28:23 31:9
markets 24:9
Martinez 1:17 2:6 24:19,20 24:22 25:10,21 26:9,20 27:4,9 27:12,18 28:6 28:22 29:11,14 30:8,11,20 31:13,24 32:9 32:14,18,21 33:1,6,9,21,25 34:4,8,19,22 35:23 36:5,22 37:1,8,16,23 38:5,15 39:3 39:16 40:1,7 40:16,19 41:12 42:13,17,22 43:6,10,19 44:12,18 45:6 46:16 47:10,16 50:12 51:1,13 51:19,23 52:19 53:3,22 54:1 54:20
massive 7:4
matter 1:11 3:18 10:9,10,13,15 10:18,23 12:7 13:2 15:2,3 24:12,13 32:13 35:12,12,13 39:18 49:17 51:4 55:25 56:2,12,24
matters 3:15 11:13 24:2,14 50:17
maximum 19:23 19:24 28:17 31:12
mean 4:16 9:13 16:11 19:13 23:3,16 28:15 29:8 30:4 35:2 35:3,16 38:25 43:8,12 46:11 50:13 54:12
meaning 6:4 25:2,15,24 34:25 44:17 46:19,21,24 54:2
means 35:11
meant 27:1 45:25 46:13 55:23
mediums 4:5,24
mega 56:10
members 29:25
memorializes 23:5
memory 21:16
merely 5:9
message 24:10

methodology 8:6
mind 10:21 41:11
minimis 52:9
minor 23:22 32:16 46:14
minutes 54:22
mirror 49:19
mischarge 13:18
misdemeanor 45:4,9,11
mismatch 37:16 45:5 52:3
mob 30:4
model 20:22,23 45:3,3,4,8,10
money 44:14
Monopoly 44:13
months 30:22
morning 3:4
multiply 53:19
murder 11:20 11:24 13:11
murdered 11:18
murderer 12:3
mutilate 25:7 48:8,12
mutilating 39:22

N

N 2:1,1 3:1
name 8:19 12:14 12:17
narrow 10:13 15:8,10 16:4 16:12 46:8 54:2 56:5
narrower 39:16
narrowing 16:6 37:19
national 50:24
natural 3:11
nature 39:5 43:14
need 6:6 35:4 37:3 49:6
needed 7:19 38:11 49:9
neither 52:18
never 9:19 17:14 20:21 27:1 33:23 36:2 48:15 56:14
new 7:10 11:4 26:13
nexus 3:16 10:10,15 15:2
normal 32:7
noscitur 4:2
notice 19:1
notion 55:13
nouns 9:20 10:1 42:1,3 47:17 47:22 48:7,7 49:21
November 1:9
number 26:10 50:22

O

O 2:1 3:1
object 3:13 4:3,7 4:9,10,18,18 6:3,8,13 7:17 7:20,24 8:1,2,4 8:14,17,17,18 9:9 15:12 19:13 21:10,14 21:16,18,20,21 21:22 24:25 25:9,16,23 31:10 32:5 34:25 37:20 43:1,4,8,9,10 43:13 44:6,11 44:13,17 45:21 46:7,25 47:2,9 53:12 54:3,12 55:13
object's 13:14
objects 4:22 5:1 39:12,12 43:23 43:24 46:1 47:1 54:13
obscure 35:11
obstruct 17:24 35:2 36:7 51:15
obstructing 25:13
obstruction 3:20 9:10 13:16 16:14 30:15 32:7 33:5,15 38:1 41:6 42:8 56:11
obviously 29:16 49:15,20
odd 22:8
offense 18:8 29:2,19 30:17 32:18,20,24 33:8 45:7,12 51:10
offenses 3:24 28:12,16
officer 29:21
officers 30:2
official 13:15 15:21 24:3 32:15,16 39:14 40:25
okay 14:23 34:15,15 38:11 38:24 42:21,22
old-time 21:25
omits 49:20,21
once 28:25 31:17
one's 12:17
onerous 16:20 16:22
ongoing 40:12
open 56:7
opening 44:19 44:22
operating 31:24
operative 49:18 49:19
opinions 20:12 55:8
opponent 37:7
opposed 43:16
opposite 10:22
oral 1:11 2:2,5 3:7 24:20 48:8
ordinary 12:23 18:8 25:2
originally 27:20
outcome 22:25 50:11
outlier 52:8
outside 52:11
overboard 21:8 22:17 23:4 26:19 31:19 51:16
overlapping 28:16,21
overreaching 20:20
overstate 23:3
Oxley 26:7

P

P 3:1
page 2:2 44:21
pages 55:4
paid 49:4,5
paper 5:17 21:17,19,20 22:17 35:18
parlance 12:23
part 4:13 18:14 26:13 41:7
particular 10:1 10:14 12:7 13:3,21 14:14 19:11 20:15 22:14 24:13 30:19 52:7
particularly 16:23 37:9
parties 54:7
passed 3:19 4:12 4:15 20:21 27:19 31:25 41:7 55:16
passes 35:17
passing 11:10
paying 49:24 50:10
penal 18:7 20:22 20:23 45:3,4,9 45:10
penalties 11:4 23:21
penalty 11:9 26:17,23 27:22 27:22 31:2,12 32:2 45:7,18 45:19,24,25 50:18 51:12
pending 33:10 38:5
people 15:6 16:22 18:9 24:1 29:25 36:10 38:12,21 56:1
perfect 33:21 40:11
perfectly 48:20
permanent 12:18 21:6
permits 20:16
permitted 30:7
person 33:16 34:11,11,12 50:6 51:14
persuade 38:10
persuading 34:11
pertinent 25:8
Petitioner 1:4,16 2:4,10 3:8 26:10,22 36:23 39:6 41:25 44:19 48:9,10 52:8 54:25
Petitioner's 41:5 47:20,24 48:10 52:4
photo 21:13

photograph 21:12,14
phrase 3:12 4:21 7:20 8:4,13,14 8:16 9:9,25 24:24 25:16 44:5 46:6,20 46:21,25 49:7 49:7,8 54:11
physical 6:8 20:17 21:18,20 25:1,25 42:7
pick 21:25
picks 53:17
picture 21:3 22:1,1,10 23:5
pictures 21:1,2,7
piece 5:17 19:22 21:17,19,20 22:17,24 35:18
place 33:18 37:21 47:19
placed 15:6
plain 25:24
play 34:23
plead 31:21
please 3:10 24:23 35:19
plenty 19:4
point 15:4 26:12 31:16,17 41:14 41:19,23 43:17 45:2,8 46:4 52:1 55:11 56:3
pointed 42:18 47:11 55:14
points 9:21 27:19 49:12 50:14
policy 50:19 51:3,3,4
polite 47:14
portion 39:20 49:8
pose 18:2
poses 37:13
position 18:23 29:6 41:16
possibility 56:13
possible 13:20 13:24,25 19:10
possibly 36:14
postal 35:18
postman 35:19 36:10 37:12 54:4
postmen 35:21 36:9
potential 34:19 50:18 53:6
premise 47:21 47:22
prepare 5:13
present 43:17
presented 35:7 37:3 54:8
presents 54:9
preserve 3:14 5:11,18 6:10 7:12,14,22,24 15:13 21:11 29:21
preserved 7:18
preserving 21:6
presumably 9:14 12:20
presume 9:17 55:17
pretty 50:15
price 49:4,4
principle 29:4 49:10
prior 8:12
prison 53:20
probably 40:23
problem 15:16 16:9,17,18,19 17:14 34:9,17 34:18,20 36:19 37:9,12 40:15 48:21 49:2 52:3,6 53:20 53:21 56:5
problems 5:23 5:24
proceeding 13:15 33:10,18 35:4,5,10 38:3 39:15 40:12,24 40:25
proceedings 24:3 38:6
program 15:21
prohibit 34:12 38:9 41:22
prohibited 18:11 34:11
prohibition 26:3
prohibits 41:14 50:5,6
pronounce 8:19
proper 3:17 10:11 17:24 24:11 35:20
properly 54:8
property 19:22
prosecute 18:17 21:5 29:9,16 31:10,14,20 33:5 36:2 51:3
prosecuted 33:11,24
prosecution 23:2 27:11,16 28:7 29:1 30:12,13 34:9 38:8
prosecutor 18:17 21:5 22:16,22 28:3 28:4,24 29:1
prosecutorial 27:15 52:15,20 52:23
prosecutors 20:14 28:15 29:18 31:23
providing 6:4 20:13,14
provision 3:21 26:13,14,17 38:6 45:15 50:7
provisions 38:13 38:16,20 39:5 42:13,18,19,23 44:1 49:18,19 50:1
public 24:9,10
publicly 19:6
punish 38:12
purpose 44:17
purposefully 14:13
purposely 33:19 36:12,13
put 6:7 7:14 10:5 26:4 34:17 42:1,3 49:25 50:7 56:16

Q

quarterly 19:1
question 8:9 9:6 11:23 14:22 18:2,20 23:9 36:14 38:19 39:10 47:11 51:2 54:10 55:2
questioning 28:13
questionnaire 15:18 17:22
questions 24:15 34:23 35:6 47:14
quite 10:22

R

R 3:1
raised 48:20 52:21 55:5,6
range 30:21
reach 25:9
read 22:13 40:3 46:12 50:16
reading 3:11 16:10
real 36:17,17
realized 34:2
really 9:15 10:5 10:20 40:6 44:14,21 46:7 46:7 50:13,14 50:17
reason 4:20 6:6 7:20 9:13 17:12 37:17 38:19 43:12 44:7 45:24
reasonable 30:24 38:19 41:2
reasons 56:17
rebuttal 2:8 24:16 54:24
recognized 24:6
recommend 30:19
reconcile 18:22
record 3:12 4:4 4:21,25 6:3,5,8 6:15,20 8:5,13 10:24 11:7 12:6,8,15 13:1 21:9 22:3,3 23:6 24:10,24 25:22 37:21 42:5,25 43:1,4 43:17 47:8
record-related 3:24 4:1 10:3,6 11:13 24:2,14 55:22
recordkeeping 4:22 18:24,25
records 3:13 4:23 11:6 12:21 13:4 39:8 43:13
recycling 15:19
redundant

38:17
refer 12:17 43:24 44:6 46:8 53:1 54:12
reference 49:17 55:21
referring 11:10
refers 4:22
regard 48:24
regarding 55:1 55:2,24
regardless 7:7
regulations 15:5
regulatory 51:10
related 4:3 12:6 20:10 24:3 36:23
relates 18:23,25
relation 35:12 35:13 36:20
remainder 24:16
remaining 54:23
remains 20:6
remand 56:19
remarkable 11:23 14:25
renders 6:2
reply 44:22 55:21
reported 27:20 27:24
Representatives 28:1
represented 37:2
requests 56:17
required 14:11
requirement 11:7 39:20 40:4 41:12
requirements 19:2
requires 14:6 18:24 22:12 36:6,7
reserve 24:16
respect 39:7 41:13 42:2,2 45:1,19 48:3,9 49:8,11 50:2,3 50:4 53:25
respond 11:15
Respondent 1:19 2:7 24:21
response 49:1,3
rests 47:20
retain 16:21 17:5
retention 11:7
reverse 56:19
rid 25:14
ridiculous 36:12
right 16:25 18:19 32:17 37:25 39:15,16 43:9 49:9 53:13
rigorous 41:13
rip 35:21
rise 40:23
risk 28:5 36:16 36:17
rival 38:20,20
road 17:4,11
Roberts 3:3 12:13,20 24:18 25:5 30:3,6 31:5,7,16 43:2 43:7,11 46:10 47:7 48:1,19 48:19 49:9 54:21 56:21
ROMAN 1:17 2:6 24:20
rule 29:3 52:9
rules 43:22 44:2
running 19:7,9
Russello 4:14 55:15

S

S 2:1 3:1
Sarbanes 26:7 41:20
Sarbanes-Oxley 3:22 4:13 11:3 19:4 24:1 26:5 26:14 33:4 41:8,14,21 45:17 49:15,24 54:18 56:15
sat 45:13
saying 6:5 25:19 29:8,15 52:9
says 32:23 35:17 35:19 37:7 48:14 51:19,23 54:2
Scalia 8:22 17:18,21 18:9 23:10,13,14 26:16,25 27:2 27:6,10,13 28:2 29:5,12 31:8 38:24 39:13,17 40:6 40:14 44:10,17 47:13 56:4
scheme 29:23 30:1
scope 44:8 46:1 52:12
screens 21:25
second 18:14
Secondly 42:10
Section 3:12,23 4:12 11:2,11 16:16 24:24 29:4 38:7 42:19 48:4 50:5,5 56:18
see 14:12 16:25 17:3 38:13 43:11 48:5
seen 16:15
sees 51:21
seizure 19:22
Senate 27:21
Senator 45:23
send 24:9 28:4 35:19
sending 28:5
sense 4:23 9:20 9:24 10:9,12 11:16 13:8 33:21 39:1 50:8 54:10
sensible 3:11 18:16 27:11
sent 11:18
sentence 19:20 30:19,20
serious 17:13 53:7
servers 7:4
set 10:21
severe 29:2,9,10 29:13 51:11
severity 45:12
shed 25:14
short 30:7
shorthand 49:17
show 25:10 42:4
shows 10:19 50:9
shredded 12:2,4
shrink 44:9 46:1
shrunk 44:8
significance 55:19
significant 14:5 43:15 47:25
silentio 3:20
similar 42:6 48:21
Similarly 48:14
simply 5:19 9:6 14:11 56:5
single 38:9 53:15 55:22
situation 7:3 9:17 11:22,24 14:25 16:21,22 28:18
situations 17:5 24:7
six 42:19,22
size 30:12
Skilling 18:5
small 32:17
sociis 4:2
Solicitor 1:17
solid 7:25
solution 37:14
solve 37:19 56:5
somebody 31:18 35:16
sorry 10:17 12:12 21:13 27:23 32:14 34:3,5
sort 52:9 55:8
SOTOMAYOR 5:2 12:11 13:5 13:10,17,23 14:2,7,16,21 22:20 34:3,5 37:23 38:11 40:17
sound 30:3
specific 8:5 19:2 33:12 46:8
specifically 7:13 18:25 32:4 49:7
speech 25:2
spell 49:18
spelled 36:19
squarely 55:5
standard 25:2 42:6
standpoint 4:23
stands 4:7
start 25:6
started 37:24,25
state 11:22 41:11 42:15,23
stated 55:3,3
States 1:1,6,12 3:5,18 9:21 10:11,19 15:3 20:6,13 35:14

statute 3:16,20 6:25 7:2 9:11 9:22,22,23 10:14,23 13:3 13:16 15:9,11 15:17,24 16:5 16:10,12,13,14 16:15 18:7,22 20:16 21:9 22:12,16 23:16 24:13 25:19,22 26:21 27:20,20 28:17 31:2,11 31:23,25 32:1 32:4,7,23 34:6 34:23 35:1 36:6 38:1,22 39:21 41:3,7 41:21 44:8,25 47:18 48:5,22 48:23,25 49:2 49:5 50:3,8,16 51:19,23 52:7 52:10,12 53:7 54:14,15 55:24 56:11
statute's 16:7
statutes 4:1,15 10:3,12 11:5 18:15 20:15 26:3 28:21 29:8,10,13 40:3 42:15,16 43:4,18 44:25 47:24 48:4 55:15,19,22
statutory 19:23 19:24 25:3 54:11
step 23:8
stop 47:1
stopped 47:8
storage 46:9
store 6:23
stored 5:7 6:20 6:24 21:15
straight 6:23
straightforward 54:10
strange 30:14
street 47:2,8
strict 23:21
strong 3:23 23:25
stronger 41:10
sub 3:19
subject 10:8,13 12:7 13:2 19:22 24:13 49:17 56:2
submitted 56:22 56:24
substance 52:17
substituting 14:17
suddenly 44:23
sufficient 18:8
suggest 5:23
suggested 46:12
suggestion 27:25
suggests 10:24 43:14,15
super 38:17
superfluous 6:2 38:14 39:4,6,7 39:11 48:24
support 19:4
Suppose 5:12 20:25 32:11 53:14
supposed 53:17
Supreme 1:1,12
sure 8:10,10 27:4
surely 16:1
surplusage 6:12 39:9
surrounding 9:8
swallow 50:14 50:15
sweep 9:15 12:7 12:10
system 33:24

T

T 2:1,1
take 11:1 42:14 53:9
taken 33:18
takes 51:16
talk 48:12,16
talked 18:10 47:17
talking 21:24 28:2,3 37:11
Tampa 1:16
tampering 25:12
tandem 11:11
tangible 3:13 4:3,7,18,21,24 5:6,10 6:3,8,13 7:17,20,24 8:1 8:2,3,17 9:7,8 15:11 19:13 21:10,14,16 24:25 25:9,16 25:23 31:10 32:5 34:25 37:20 39:12 42:5 43:4,8,8 43:13,14,20,21 43:23 44:5,5,7 44:20,23 45:21 46:1,6,25,25 47:2,9 53:12 54:3,11,13 55:13
targeting 19:5
tear 15:23
tell 19:14 36:9 42:12
tension 47:25
term 3:25 27:17 39:11 42:4 43:20,21,22 49:14 53:12 54:3
terms 4:15 8:5 20:18 32:4 37:21
test 5:23,25 6:1
testimony 48:8
text 45:20 46:11 54:14
textual 3:23 20:18 39:4 41:25 46:4
textural 55:23
Thank 24:18 54:21 56:20,21
theme 41:16,17
theory 48:10
thing 13:21 20:20 22:23 30:14 41:5 42:25 43:8,16 44:10 55:9,25
things 5:4 6:18 10:8,21 19:3 23:22 33:13 42:5 43:23 44:5
think 4:17 6:24 8:11 10:16,17 10:22 11:25 25:10,21,23 26:12 27:18 29:15 30:14,22 30:24,25 31:2 31:15 32:2,10 34:22 37:8,17 37:17 38:15 39:3,5,6 40:9 40:19,21 41:4 41:9,14,16 42:3,4,14,24 43:19,19,20 44:7,12,18 45:19,24 46:3 46:4,16,16,21 47:10,13,25 48:4 49:9,10 49:12,22 51:25 52:19,20,20,21 52:23 53:3,5 54:1,5,7,13
thinking 20:12
third 39:11
thought 33:14 33:16,19 39:10 54:7
thousands 16:24 16:24
thread 4:3
throw 15:23 22:9,10
throwing 23:4 26:19 31:18
thrown 21:8 22:17,23
throws 51:16,21
time 4:12 9:24 23:6 24:16 31:18 45:8,23
times 8:12,15 38:21 45:16
tinkered 45:25
Title 11:2,11
today 41:6,23
told 17:12
total 15:1 37:16
Touche 14:21
toxic 46:14
traded 19:6
tradition 45:6
traditional 10:12
treat 8:14
treated 4:9 9:6 45:11,16,18
treating 9:4
Treaty 46:13
tremendously 10:10
trivial 30:17 50:17 51:4 52:10
trout 51:8
true 8:3 12:21 37:15 43:19 50:2,3,4
try 28:4,7 37:7
trying 7:2,5 17:10 22:22

36:13 37:6 44:11 45:14
turned 46:19
two 8:5 9:4 11:4 18:5,12 28:12 38:13,18 39:5 49:21 55:15
type 5:11 24:7
types 25:1,24 43:24,25
typewriter 5:12 5:14,16,17
typically 40:2

U

U.S 28:20,23 44:2
Uh-huh 17:8
ultimately 27:25
unambiguous 39:5 54:13
unambiguously 24:25 49:16
underlying 45:12
undermines 41:16
underscores 22:14
undersized 50:23 51:8
understand 5:20 9:3 18:9,10 19:16 23:14 31:8 36:19 38:15,16 43:21 46:18 51:6,25 52:2
understanding 20:11 28:23
understood 8:10 37:25 43:3
unique 3:25 9:9 10:2
United 1:1,6,12 3:5,18 9:21 10:11,19 15:3 20:6,13 35:14 39:19 56:10,13
unnatural 37:20
unreliable 49:22
unsuccessfully 45:15
unusual 46:4
upped 24:4 28:1
use 7:19 11:24 20:14 34:7 39:14 43:22 44:5 53:1
useful 32:24
uses 4:1 8:7

V

v 1:5 3:4 18:6
vacate 56:18
vague 17:18,21 17:25 34:19,24
vagueness 5:24 17:12,16 18:5 34:20 36:18,24 37:2 55:3
varied 30:8
variety 9:15
various 35:1 41:25 49:25
verb 9:16
verbs 9:13,14,19 10:6 42:1 47:18,21 48:6 48:8 49:21
vessel 19:8
victim 11:18 12:3
view 15:7
VIII 11:3,11
violating 13:19 22:9 26:21
violation 22:6 29:22
void 17:11,16 18:4 26:2 55:2
voluntarily 14:12

W

wake 34:4
walking 56:1
want 18:2,17 33:13 36:9 41:4 51:1,2,4,7 51:9,25 52:1
wanted 10:13 24:9 26:2 37:19 41:21 46:7 55:11
wants 9:15 48:18
Washington 1:8 1:18
wasn't 8:10 32:12,15 48:20 53:25 55:6
wastebasket 15:23
way 15:8,10 16:12 18:22 19:10 22:16 23:18 24:5 25:12 37:6,8,9 38:15,22 43:21 43:21,24
ways 37:6 46:17
we're 29:6,8,15 29:16 31:24 37:11
we've 24:3 42:3 42:18 44:1 53:21 55:20
weapon 11:20 46:22
Weapons 46:13
Wednesday 1:9
well-being 24:8
wholly 6:2
wide 9:15
wildflowers 53:18
win 44:13
wire 24:4
witness-tampe... 16:13 50:8
word 4:8,9 9:7 9:23 37:20 44:7,19,20,23 47:17,18 48:2
words 6:3 9:8 13:23 25:2,4,6 32:11 33:3 41:24
work 15:21 44:24 47:21 48:7
works 15:21
worry 53:14
wouldn't 21:5 21:10 23:10,11 36:1,2,5
Wow 40:6
write 49:6 54:1
writing 20:11
written 9:22
wrongful 14:10
wrote 13:3 18:7

X

x 1:2,7

Y

Yates 1:3 3:4 20:10 28:13 29:20 32:3 40:11 56:7,17
yeah 27:7 34:21 43:8
year 31:21 48:1
years 23:11 24:2 24:4,5,5 26:18 27:11,23,24 28:1,5,5,7 31:11,20 33:4 35:21 50:18 53:18 56:10

Z

zoom 11:1

0

1

1 42:20,20
10 27:24
10-year 11:8
10:04 1:13 3:2
11:03 56:23
12(c) 13:7
13 44:21
13-7451 1:5 3:4
15 14:8 16:16
1503 33:11 38:1 38:5
1505 48:4
1512 4:10 8:12 8:15 38:8,13 39:14 40:17 42:14,19,19,23 43:5,9,10
1512(b)(2) 34:9 34:10,11 38:7
1512(c) 4:10,13 5:1 6:2 13:6,19 14:5,13 24:2
1512(c)(1) 8:11 26:11,23 40:19 40:25 41:6,13 42:10 45:17 50:5,5
1513(e) 26:13
1514 50:3
1519 3:12,23 4:9 4:12 6:2 8:16 11:5,10,17,19 11:22,24 12:4 12:9,10 13:7 14:6,6,11,24 14:25 19:23 20:23 24:1 29:4 33:1,2 38:1,13 39:14 39:20 41:1 45:3,18 48:10 50:2 56:18
1519's 24:24
1520 11:6,11
16 42:23

2

2 38:9 42:20
20 9:14 23:11 24:2,4,5 26:18 27:11 28:1,5,5 28:7,17 31:11 31:20 35:21 50:18 53:18
20-year 19:23 26:23 31:2 32:2 45:5,18
200 56:9
2002 7:20
2014 1:9
21 30:22
22 19:16
2232 19:17,21 26:21 28:13
24 2:7
25 55:4
26 55:4
27 30:22

3

3 2:4 44:4
30 20:1,2,3 27:7 30:23
300,000 15:4
35 44:1

4

4 9:14 55:20

5

5 1:9 24:5 27:23
5-year 11:7 19:23 27:21 28:17,18 45:23
54 2:10

6

7

7 55:5
70s 45:13
73 15:1

8

802 11:2,11
80s 45:13