UNITED STATES DISTRICT COURT
DISTRICT OF STETSON
WESTVIEW DIVISION

UNITED STATES OF AMERICA

CASE NO.: 1:21-cr-36

v.

WANDA MAXIMOFF,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF

DEFENDANT'S MOTION TO DISMISS

/s/ 104
104
Attorneys for the Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

When justice is at stake, there is an immeasurable difference between being on time and being too late. Criminal statutes of limitations allow the Government to prosecute a defendant within a certain amount of time and *only* that time for a reason. Pursuing charges against Wanda Maximoff ("Maximoff") even a single minute too late is still too late. Instead of realizing its lack of diligence in charging Maximoff within the limitations period, the Government asks this Court to excuse its procedural blunders. Maximoff thus motions to dismiss the Indictment because (1) it was not returned within the statute of limitations and (2) equitable tolling does not apply. Holding otherwise obfuscates the policy rationale of criminal statutes of limitations.

STATEMENT OF FACTS

When Maximoff was arrested at her home on September 23, 2021, she had no idea what was happening. Initial Appearance, 4:73–74. What happened to Maximoff started with an investigation into whether she conspired to induce aliens to unlawfully reside in the United States between May 31, 2007 and July 24, 2010. Woo Decl. ¶ 35. Under the applicable ten-year statute of limitations, the Government had until July 24, 2020 to institute charges against Maximoff. 18 U.S.C. § 3298. During this period, however, Administrative Order No. 20-019 suspended grand juries on March 23, 2020 because of COVID-19. This suspension was lifted on March 29, 2021. Initial Appearance, 3:60–65. To preserve its claim given that it could not indict Maximoff and there was no waiver of indictment, the Government filed a sealed Information on July 22, 2020 and dismissed it

the following day. Order, No. 1:20-cr-24 (July 23, 2020). As such, the statute of limitations began running again on July 23, 2020 and expired on July 24, 2020. Wrongly assuming it had six months from when the grand jury suspension was lifted to initiate proceedings against Maximoff under 18 U.S.C. § 3289, the Government only initiated sealed grand jury proceedings on September 21, 2021: over a year after the limitations period expired, leaving Maximoff in the dark until she was arrested.[1]

ARGUMENT

I. THE GOVERNMENT'S INDICTMENT SHOULD BE DISMISSED BECAUSE IT WAS NOT TIMELY RETURNED UNDER SECTION 3288.

Filing an information or indictment tolls the statute of limitations for charges within the charging documents. *United States v. Grady*, 544 F.2d 598, 601 (2d Cir. 1976). Once the limitations period is tolled, "a superseding indictment brought at any time while the first indictment is still validly pending . . . cannot be barred by the statute of limitations." *Id.* at 601–02; *United States v. Friedman*, 649 F.2d 199 (3d Cir. 1981). Instead, the statute of limitations runs again if the original indictment is dismissed. *Grady*, 544 F.2d at 601. If an indictment is dismissed "for technical defects or irregularity in the grand jury" before or after the limitations period has run, the statute of limitations is extended by six months. 18 U.S.C. §§ 3288, 3289. As such, a new indictment can be

[1] The Court has asked for briefing on Section 3288, which concerns cases where an information was dismissed *after* the statute of limitation has run. Here, the initial information was dismissed before limitations period expired. This is addressed in Section 3289, which is substantially the same statute as Section 3288. As such, the analysis is the same.

returned within six months of dismissal of an information or indictment. *Id.* § 3288; *Hattaway v. United States*, 304 F.2d 5, 10 (5th Cir. 1962).

Here, the Government argues that its Indictment was not barred by the statute of limitations because it filed a timely Information. However, *Grady*'s rule extending the limitations period for superseding indictments cannot apply here because the Information was dismissed and there was no valid pending information when the Indictment was returned. Thus, the statute of limitations began to run again on July 23, 2020 when the Government dismissed the information.

This Court must stop the Government from jeopardizing Maximoff's right to a fair trial. *United States v. Marion*, 404 U.S. 307, 322 (1971) (citing an "irrebuttable presumption that, beyond the period of limitations, a defendant's right to a fair trial would be prejudiced"). Specifically, this Court should grant Maximoff's motion to dismiss for three reasons: (1) the Government's waiverless Information did not institute the Information for prosecution under Section 3298; (2) Section 3288 does not apply when the Government voluntarily dismissed the Information and returned an indictment beyond the limitations period; and (3) the Government's argument disregards the policy rationale behind statute of limitations.

A. Filing an Information Without a Waiver of Indictment Does Not "Institute" that Information for Prosecution Under Section 3282.

Non-capital felonies may be prosecuted by an indictment or "information if the defendant . . . waives prosecution by indictment." Fed. R. Crim. P. 7(b). The Government may not prosecute a non-capital, trafficking-related felony "unless the indictment is

found or the information is instituted not later than ten years after the commission of the offense." 18 U.S.C. § 3298. However, if the charging document is dismissed after the limitations period expires or if no regular grand jury is in session when the charging document is dismissed, the Government has six months from either dismissal or grand jury initiation to return a new indictment. 18 U.S.C. § 3288. Furthermore, the absence of a waiver of prosecution by indictment bars the commencement of trial on the charges. *United States v. Burdix-Dana*, 149 F.3d 741, 742 (7th Cir. 1998); *United States v. Watson*, 941 F. Supp. 601, 602 (N.D.W. Va. 1996). Thus, a "court in possession of an information [without] a waiver of indictment lacks subject matter jurisdiction over the case; such an information is 'virtually meaningless.'" *United States v. Machado*, No. CRIM.A.04-10232-RWZ, 2005 WL 2886213, at *2 (D. Mass. Nov. 3, 2005) (quoting *United States v. Wessels*, 139 F.R.D. 607, 609 (M.D. Pa. 1991)).

Here, the Information charges Maximoff with one non-capital, trafficking-related offense; therefore, Section 3298 applies a ten-year statute of limitations expiring on July 24, 2020. Since the Information was not accompanied by a waiver of indictment, the issue is whether filing the waiverless Information "instituted" it under Section 3298, thereby triggering Section 3288's tolling provision. This issue is one of first impression in this jurisdiction. While the majority rule is that an information is "instituted" under Section 3298 when it is filed, several courts disagree. *Compare Burdix-Dana*, 149 F.3d at 743 (majority rule citation), *with Machado*, 2005 WL 2886213 ("It defies logic and reason [to] accept an information without waiver for the purpose of applying the statute of limitations, when the same document is 'meaningless' for purposes of . . .

prosecution."), *and United States v. B.G.G.*, No. 20-80063-CR-MIDDLEBROOKS (S.D. Fla. Jan. 11, 2021) ("Congress did not intend to create a means to bypass the statute of limitations altogether by filing a defective information.").

This Court should adhere to *Machado* and *Middlebrooks* for three reasons. First, the plain meaning of "institute" in Section 3298 requires the Government to prosecute charges against a defendant and not merely file papers in court. Second, legislative history reveals that Congress did not intend to create a loophole to bypass the statute of limitations by filing a defective information. Third, allowing the dismissal of a waiverless information to toll an expired limitations period has harmful policy consequences.

1. The plain meaning of "institute" requires government prosecution.

The Government's argument that "institute" means "filed" suggests that "something less is required for an information to be 'instituted'" than prosecuting a defendant. *United States v. Machado,* No. CRIM.A.04-10232-RWZ, 2005 WL 2886213, at *2 (D. Mass. Nov. 3, 2005). This argument relies on *United States v. Rosecan* and *Burdix-Dana*, which claim to interpret "instituted" in Section 3298 by its plain meaning, but never define it. *United States v. Rosecan*, No. 20-CR-80052-RUIZ(s), 2021 WL 1026070 at *4 (S.D. Fla. Mar. 17, 2021); *Burdix-Dana*, 149 F. 3d at 741. This Court should rely on the "well-reasoned" decision in *Machado*. *See United States v. Stewert*, 425 F. Supp. 2d 727, 733 (E.D. Va. 2006) (praising *Machado*). Specifically, *Machado* defined "instituted" using dictionary definitions, holding that both "institute" and "prosecution of charges" describe commencing a criminal action because "to prosecute"

means "to institute and pursue criminal action against a person." *Machado*, 2005 WL 2886213, at *2.

While the Government asserts that "instituted" means "filed," this interpretation in unfounded because *Machado* clarifies that "institute" and "prosecute" are synonymous. Even though filing an information technically "commences" a criminal action, the Government cannot commence this action with a waiverless information with no prosecution value. Here, the Government filed a waiverless information and immediately sought dismissal. This indicates that rather than seeking prosecution, the Government was merely attempting to extend the statute of limitations. As such, because an information filed without waiver is not "initiated" for purposes of Section 3288, the dismissal of this ineffective information cannot trigger Section 3288.

2. Congress did not intend for the Government to bypass the statute of limitations by filing a defective information.

Congress amended Section 3298 in 1964 to add the term "instituted." *United States v. Charnay*, 537 F.2d 341, 353 (9th Cir. 1976). This was done "to correct a 'loophole' in the law which occurred when it became possible to charge [felonies] by information as well as indictment." *Id.* at 354. Senate reports further clarify "instituted" was added to "permit reindictment . . . where an information was filed after the defendant waived . . . prosecution by indictment." S. REP. NO. 88-1414, at 1 (1964). The majority view looks past this compelling legislative history and instead relies on *stare decisis* to follow *Burdix-Dana*. *United States v. Stewert*, 425 F. Supp. 2d 727 (E.D. Va. 2006) (finding that it is "logical to presume that a[] criminal information could not be

'instituted' . . . until the waiver of indictment occurred"). This Court should hold that an information is only "instituted" by waiver because Congress did not intend Section 3298 to extend an expired limitations period where an information is invalid because of an absence of waiver. Allowing the Government to charge Maximoff with a waiverless information exploits the very loophole Congress eliminated in 1964.

3. Allowing the dismissal of a waiverless indictment to toll an already-expired statute of limitations allows prosecutors to wait indefinitely.

Burdix-Dana and *Rosecan* held that Section 3288 allowed the government to file an indictment after the limitations period had run because the dismissed information was "instituted" during the applicable statute of limitations. *United States v. Burdix-Dana*, 149 F. 3d 741, 743 (7th Cir. 1998); *United States v. Rosecan*, 2021 WL 1026070, at *4 (S.D. Fla. Mar. 17, 2021). However, these cases *both* concede that there are "compelling" concerns with "equating 'instituted' with 'filed' and then applying 18 U.S.C. § 3288" because this allows "prosecutors to file an information, wait indefinitely, then present the matter to a grand jury well beyond the statute of limitations but within six months of the dismissal of the information." *Burdix-Dana*, 149 F. 3d at 743; *see Rosecan*, 2021 WL 1026070, at *4 ("The Court certainly shares the concern articulated in *Machado*[.]"). While *Burdix-Dana* minimizes these concerns by arguing that a "prosecutor may only 'wait indefinitely' if the defendant chooses not to pursue dismissal on her own behalf," Maximoff here never pursued dismissal because the Information was sealed. *Id.* When an information is sealed, "the defendant might never have an opportunity to move for its dismissal" because the defendant has no knowledge of the information against her.

United States v. Machado, No. 04-10232-RWZ, 2005 U.S. Dist. LEXIS 26255, at *9 (D. Mass. Nov. 3, 2005) (citing *Burdix-Dana*, 149 F. 3d at 743 n.3).

Here, Maximoff never pursued dismissal because she never knew she was under investigation for a crime. Even if she wanted to pursue dismissal, the Government never afforded her an opportunity to do so. Thus, the fear of prosecutors waiting indefinitely is particularly salient here where the Government dismissed its sealed Information one day after filing it and waiting indefinitely to file the Indictment. As such, the policy concerns that the majority view deems inapplicable are stark in this case, and this Court must not make the same mistake of overlooking the lack of notice afforded to Maximoff.

This Court should hold that filing an information without a waiver of indictment does not "institute" that information for prosecution. To wait for the legislature to clarify the issue as *Rosecan* suggests risks the same type of injustice against unknowing defendants as we see here. *See Rosecan*, 2021 WL 1026070, at *4. Prioritizing this policy concern, this Court must hold that the Government's Indictment was filed and instituted beyond the limitations period.

B. The Statute of Limitations Bars the Indictment Despite Section 3288.

For an indictment to be valid within an already-expired statute of limitations after an information was dismissed under Section 3288, the indictment must (1) be returned within six months of dismissal and (2) not materially broaden or substantially amend allegations in the original information. *United States v. Italiano*, 894 F.2d 1280, 1283 (11th Cir. 1990); *United States v. Jackson*, 749 F. Supp. 2d 19, 24 (N.D. N.Y. 2010), *aff'd*, 513 Fed. Appx. 51 (2d Cir. 2013). This rule applies even where an indictment was

dismissed due to a returned indictment after a defect or irregularity with the grand jury. *United States v. Macklin*, 535 F.2d 191 (2d Cir. 1976); *United States v. Hill*, 494 F. Supp. 571 (S.D. Fla. 1980). However, Section 3288 does not extend the statute of limitations when an information or indictment is dismissed at the government's discretion. *DeMarrias v. United States*, 487 F.2d 19 (8th Cir. 1973); *see United States v. Wilsey*, 458 F.2d 11, 12 (9th Cir. 1972).

The Government's attempt to indict Maximoff fails for two reasons. First, Section 3288 does not apply when an information is voluntarily dismissed at the government's discretion. Here, the Government moved to dismiss the sealed Information at its own discretion, and the Information was dismissed without prejudice. Nothing in the record suggests any defects or irregularities in the Information. The Government may argue that it sought dismissal because Administrative Order No. 20-019 suspended grand juries due to COVID-19, meaning Section 3288 applies because there was an irregularity with the grand jury. However, this misreads *Macklin*, which permits extending the statute of limitations where a defect or irregularity with the grand jury caused it to return an invalid indictment. *See Macklin*, 535 F.2d at 193. Here, the grand jury convened on September 21, 2021 and the record does not suggest any defects or irregularities. While all grand juries in Stetson were suspended until March 21, 2021, this irregularity did not contaminate the specific Indictment returned against Maximoff because there were no irregularities within that grand jury. Thus, Section 3288 does not apply because the Information was dismissed at the Government's discretion and there was no "technicality" preventing the Government from obtaining a waiver of information, nor

was there an irregularity with the grand jury's indictment. *See Wilsey*, 458 F.2d at 12; *DeMarrias*, 487 F.2d at 20.

Second, assuming Section 3288 applies, the Indictment was not returned within six months of dismissal. Specifically, the statute of limitations expired on July 24, 2020 and thus Section 3288 provides the Government until January 24, 2021 to file a valid indictment. Instead, the Government exceeded its six-month extension by filing the Indictment on September 21, 2021. In response, the Government asserts that it had six months from when grand juries were permitted in Stetson on March 29, 2021 to file an indictment, moving the limitations period to September 29, 2021. However, this Court cannot permit this six-month extension because the original Information was invalid for lack of waiver and thus "virtually meaningless." *United States v. Machado*, No. CRIM.A.04-10232-RWZ, 2005 WL 2886213, at *2 (D. Mass. Nov. 3, 2005). As such, Section 3288 cannot save the Indictment because the Government did not return an indictment within six months of dismissal or the next regular grand jury session.

Thus, Section 3288 does not apply to save the Government's claims because the Information was voluntarily dismissed, and the Indictment was returned beyond the relevant statute of limitations. As such, this Court should not apply Section 3288.

C. Dismissing the Indictment Upholds Fairness and Judicial Efficiency.

Criminal statutes of limitations "limit exposure to criminal prosecution to a certain fixed period of time" as decided by the legislature. *Toussie v. United States*, 397 U.S. 112, 114 (1970). This promotes fairness by saving defendants from stale charges and improves efficiency by encouraging the government act promptly. *United States v.*

Marion, 404 U.S. 307, 322 (1971). These dual aims "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time[.]" *Toussie*, 397 U.S. at 114–15.

The Government mistakenly argues that tolling is permissible, despite returning a stale indictment rather than a waiver of information. The rationale underlying criminal statutes of limitations is clear: a defendant's right to a fair trial is inevitably compromised by the passage of time. Forcing Maximoff to defend herself against crimes that have already expired per Section 3298 blatantly ignores these policy concerns. Specifically, permitting the Government to extend limitations period by over a year to remedy the Government's self-inflicted delay greenlights filing charging documents that are not viable for prosecution because the limitations period has expired. *See Toussie*, 397 U.S. at 115. This forces defendants and courts alike to deal with stale claims simply because of the Government's lack of diligence. As such, this Court must uphold the policy behind criminal statutes of limitations and dismiss the Government's stale indictment.

II. THE GOVERNMENT IS NOT ENTITELD TO EQUITABLE TOLLING.

Equitable tolling extends a limitations period "for equitable reasons not acknowledged in the statute creating the limitations period." *Ramos-Martinez v. United States*, 638 F.3d 315, 321 (1st Cir. 2011). This remedy is used only in extraordinary circumstances. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("Federal courts have typically extended equitable relief only sparingly."); *Johnson v. United States*, 340 F.3d 1219, 1226 (11th Cir. 2003). For the Government to assert equitable tolling, it must show it (1) diligently pursued its rights, (2) but some extraordinary

circumstance prevented it from pursuing its rights. *Pace v. DiGuliemo*, 544 U.S. 408, 418 (2005). However, equitable tolling cannot "rescue a Government indictment filed after the statute of limitations has lapsed." *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005). Even so, equitable tolling in the criminal context is traditionally applied to habeas corpus proceedings. *See, e.g.*, *Cadet v. Florida*, 853 F.3d 1216, 1218 (11th Cir. 2017); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000).

Equitable tolling does not apply here for two reasons. First, the Government has not diligently pursued charging Maximoff before the limitations period lapsed. Second, even if diligent pursuit was made, the COVID-19 pandemic is not an extraordinary circumstance preventing the Government from charging Maximoff.

A. The Government Did Not Diligently Pursue the Opportunity to Timely Charge Maximoff.

The party asserting equitable tolling must demonstrate its need for the remedy. *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000). To do so, a party must act with "reasonable diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010). Reasonable diligence includes writing letters to an attorney, repeatedly contacting the court, or preparing one's own habeas petition and promptly filing it. *Id.*

Conversely, courts have illustrated several instances where parties were not reasonably diligent. Simply making general inquiries about a case is not reasonably diligent. *See Former Employees of Sonoco Products Co. v. Chao*, 372 F. 3d 1291, 1293 (Fed. Cir. 2004). Similarly, a habeas petitioner who "took no independent steps" to

timely file his habeas petition did not act with reasonable diligence. *Melson v. Alabama*, 713 F.3d 1086, 1089 (11th Cir. 2013).

The Government has not proven reasonable diligence here. The Government strategically filed the Information under seal, even though grand juries were suspended *months* earlier. The Government had ample alternatives to charge Maximoff, such as seeking a timely waiver of information not under seal, contacting her counsel, or charging her openly by information. Failing to pursue these opportunities, the Government was not reasonably diligent.

While the Government may argue that investigating this case constitutes reasonable diligence, this is not persuasive because not every investigation leads to a formal charge. This logic means that every investigated case involved reasonable diligence. Additionally, the Government's investigation took place before grand juries were suspended, so it could have diligently pursued charging Maximoff before the limitations period expired. The Government did not do so. While the Government may assert that Maximoff's failure to waive indictment justifies equitable tolling, Maximoff never truly had the opportunity to waive an indictment because the charging documents were sealed, and the Government never sought waiver from Maximoff.

As in *Chao* and *Melson*, the Government took no independent steps outside of filing the Information to charge Maximoff. As such, the Government cannot meet their burden of proof necessary to assert equitable tolling.

B. The COVID-19 Pandemic Is Not an Extraordinary Circumstance That Prevented the Government from Charging Maximoff.

Equitable tolling is justified when an extraordinary circumstance prevents a party from timely filing. *Donovan v. Maine*, 276 F.3d 87, 93 (1st Cir. 2002). Extraordinary circumstances occur due to counsel's complete mishandling of a case or misconduct from opposing counsel. *See, e.g., Holland v. Florida*, 560 U.S. 631 (2010) (concerning counsel's case mishandling); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (concerning opposing counsel misconduct). These extraordinary circumstances must be "both extraordinary and beyond [a party's] control." *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257 (2016). Thus, "a litigant seeking tolling [must] show 'that some extraordinary circumstance *stood in his way.*'" *Id.* at 255 (*quoting Holland*, 560 U.S. at 649). A party responsible for their own delay cannot rely on equitable tolling. *Id.*

Here, COVID-19 is not an extraordinary circumstance for three reasons. First, the Government had ample alternatives to charge Maximoff outside of filing an indictment regardless of any extraordinary circumstances. Second, the Government delay is self-inflicted, barring the use of equitable tolling. Finally, allowing the Government to assert equitable tolling as a remedy is contrary to its policy rationales.

1. <u>The Government did not pursue its ample alternatives to charge Maximoff.</u>

Only a circumstance that is both "extraordinary *and* beyond [the party's] control" tolls the limitations period. *Id.* Such extraordinary circumstance must "st[and] in the way of meeting the statute of limitations." *Klick v. Cenikor Foundation*, 509 F. Supp.3d. 951,

957 (S.D. Tex. 2020). However, the *mere existence* of an extraordinary circumstance is not enough to assert an equitable tolling remedy; the extraordinary circumstance must obstruct a party from pursuing its claim. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). COVID-19 is not an extraordinary circumstance where a party does not indicate the pandemic delayed their filing before the limitations period expired. *State v. Barnes*, 18-CR-0154-CVE, 2020 WL 4550389, at *2 (N.D. Oklahoma, August 6th, 2020); *Johnson v. Fargione*, 1:20-CV-764, 2021 WL 1406683, at *3 (N.D. New York, Feb. 17, 2021).

Here, the Government had ample opportunities to charge Maximoff despite COVID-19 and the suspension of grand juries for three reasons. First, the pandemic did not prevent the Government from timely filing charges against Maximoff. The Government began investigating Maximoff before the pandemic, amassing enough evidence to establish an information or indictment. Moreover, the grand jury suspension occurred *before* the Government filed an Information against Maximoff. The suspension of grand juries put the Government on notice that, if it wanted to purse a charge against Maximoff, it would have to do so through the means available to them at the time: charging by a valid information. While the Government did not pursue waiver of indictment, the existence of this opportunity proves that COVID-19 and the suspension of grand juries did not obstruct the Government.

Second, COVID-19 did not impact the administration of justice outside of grand juries. Trials, arraignments, pretrial hearings, plea deals, and police investigations seamlessly adapted to the times. No facts suggest the Government could not contact Maximoff or her counsel prior to filing and dismissing the Information against her. Albeit

with slight modifications due to the pandemic, the Government could still function. While COVID-19 is a unique dilemma, the Government is not automatically entitled to equitable tolling simply because significant risks, uncertainties, and litigation expenses complicate pursuing charges. *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257–59 (2016). The Government's assertion that significant risks, uncertainties, and expenses were heightened due to COVID-19 is a nonstarter because "significant risk[s] and expense[s] associated with presenting and litigating [] claims is far from extraordinary." *Id*. at 258. While not necessarily sitting on infinite resources, the Government possesses vastly more resources than other parties—like habeas corpus petitioners—who traditionally request equitable tolling.

Lastly, national emergencies are nothing new in America and the Constitution, and its principles have survived it all. *United States v. B.G.G.*, No. 20-80063-CR-MIDDLEBROOKS, at *19 (S.D. Fla. Jan. 11, 2021) ("But our legal system has experienced public emergencies before . . . [i]ndeed, if our laws are to carry any force, they must stand despite the trials and tribulations of society."). It is Congress' job, not the courts, to amend the rigidity of criminal statute of limitations to accommodate prosecutors. *Id.* ("Congress may certainly make exceptions; however, it has not done so here."). The Government cannot assert equitable tolling without Congressional authorization and is not entitled to charge Maximoff under the guise of COVID-19.

Thus, this Court should find that the Government had ample opportunities to charge Maximoff because there were no extraordinary circumstances here.

2. Equitable tolling does not apply where the Government caused its own delay.

Equitable tolling is reserved for "circumstances beyond the litigant's control [that] prevented him from promptly filing." *Lattimore v. Dubois*, 311 F.3d 46, 55 (1st Cir. 2002). However, a party cannot assert the remedy where delay is self-inflicted. *See Menominee*, 577 U.S. at 256–57 (holding that *Holland* and *Pace* "would make little sense if equitable tolling were available when a litigant was responsible for its *own* delay"); *Sandoz v. Cingular Wireless*, 700 Fed. Appx. 317, 320 (5th Cir. 2017); *D.J.S.-W by Steward v. United States*, 962 F.3d 745, 752 (3d Cir. 2020). If a "strategic litigation decision" emerges as "a misguided judgement," equitable tolling does not apply. *Quintero Perez v. United States*, NO. 17-56610, 2021 WL 3612108, at *6 (9th Cir. 2021).

Here, the Government's delay was self-inflicted. While the Government is not responsible for COVID-19, the issue is whether it delayed prosecuting Maximoff *in light of* the pandemic. Here, the Government strategically waited days before the limitations period expired to charge her by Information, and then it waited over a year to pursue an alternative to the dismissed Information. This misguided, self-inflicted delay bars the Government from invoking equitable tolling remedy.

3. Equitable tolling's policy rationale bars its use here.

Equitable tolling is limited to rare and exceptional circumstances. *Cadet v. Florida*, 853 F.3d 1216, 1221 (11th Cir. 2017). These circumstances are typically confined to habeas proceedings, where an individual's freedom interests are at stake. *See e.g., id.* at 1218 (11th Cir. 2017); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000).

However, equitable tolling cannot "rescue a Government indictment filed after the statute of limitations has lapsed" because there is "no convincing rationale to do so[.]" *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005).

Since equitable tolling is typically used where a person's liberty interest is at stake, the Government should not benefit from equitable tolling. The Government is not similarly situated to other parties, like habeas petitioners, that traditionally invoke the remedy. The Government has far more resources and collective knowledge of the law than other private litigants who often rely on equitable tolling while behind bars. As such, this Court should not rescue the Indictment because the limitations period has lapsed.

While COVID-19 has brought about unique challenges, the Government cannot claim it was prevented from filing charges against Maximoff. There was no extraordinary circumstance here because the Government had ample alternatives to charge Maximoff. Thus, the Government is not entitled to equitable tolling.

CONCLUSION

Permitting the Government to maneuver around a clear statute of limitations justifies prosecutors waiting indefinitely to pursue charges. As justice demands timely prosecution, Maximoff respectfully asks this Court to grant its Motion to Dismiss the Government's Indictment.

Date: 08/30/2021

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104
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