IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF STETSON
WESTVIEW DIVISION

UNITED STATES OF AMERICA,

Prosecution,

v. CASE NO. 1:21-cr-36

WANDA MAXIMOFF

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS AND IN OPPOSITION TO
GOVERNMENT'S REQUEST FOR EQUITABLE TOLLING

/s/ 108
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Counsel for Defendant

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INTRODUCTION

It is often expressed, "say what you mean and mean what you say." Courts presume that Congress "says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). This case illustrates the importance of following Congress' intent when a woman's liberty hangs in the balance. Congress has carefully crafted statutes of limitation to protect an accused's fundamental constitutional rights. To enlarge the plain language of those statutes of limitation is to limit an accused's constitutional rights in favor of extending the government's power. For the reasons set forth below, this court should grant Defendant's motion to dismiss and deny the Government's request for equitable tolling.

STATEMENT OF FACTS

On July 22, 2020, the Government filed an Information ("2020 Information") charging Ms. Maximoff with felony violation of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324(a)(1)(A)(iv), (v), between May 31, 2007, and July 24, 2010, for which there is a ten-year statute of limitation. R. at 2-3. The 2020 Information was accompanied by an affidavit in support of the charges sworn by Department of Homeland Security Special Agent Jimmy Woo. R. at 23-31. The information was not accompanied by a waiver of indictment and Ms. Maximoff was unaware of the charges brought against her. R. at 11-12.

Agent Woo investigated from May 4, 2018, to February 2019. However, despite knowing time was of the essence and the latest known occurrence being in 2010, Agent Woo tabled his investigation in August 2018, for six months to pursue other work. R. at 25, 27. The last contact Agent Woo had with the case was on October 28, 2019, nearly one year before the 2020 Information was filed. R. at 29.

The Government filed the 2020 Information only two days before the expiration of the limitations period. R. at 11-12. Ms. Maximoff did not waive indictment. R. at 11-12. Twenty-four hours later, on July 23, 2020, this Court granted the Government's motion to dismiss the 2021 Indictment. The statute of limitations expired on July 24, 2020. In response to the COVID-19 pandemic, this Court suspended all grand juries from March 23, 2020, until March 29, 2021. R. at

11. The Government did not take any other action in this case until September 21, 2021, when a grand jury returned a materially identical indictment ("2021 Indictment") and Ms. Maximoff was arrested. R. at 11.

Between the 2020 Information and the 2021 Indictment, neither Agent Woo nor the Government discovered additional evidence or investigated further. R. at 32-34.

ARGUMENT

The Framers of the Constitution expended considerable effort to protect the rights of accused persons from unreasonable and unsubstantiated prosecution. In that pursuit, the Due Process clause and statutes of limitation protect criminal defendants against unreasonable delays prior to trial that may result in prejudice. U.S. CONST. amends. V, XIV. The First Congress passed the Crimes Act of 1790 which established a set of federal crimes and paired them with statutes of limitations that limited the accused's exposure to prosecution to a fixed amount of time after the date of the alleged offense. Crimes Act of 1790, § 32, 112, 119; *Toussie v. United States*, 397 U.S. 112, 115 (1970). These limitations balance the interests of the government and the accused in the "administering and receiving of justice." *United States v. Marion*, 404 U.S. 307 (1971). Congress continues to employ statutes of limitation to protect the accused from having to defend against events wherein the facts may have been muddled by the passage of time. *United*

States v. Ewell, 383 U.S. 116, 122 (1966).

The statute of limitations for offenses under section 274(a) of the Immigration and Nationality Act, including 8 U.S.C. § 1324(a)(1)(A)(iv), (v), requires that an "indictment is found or the information is instituted" within ten years. 18 U.S.C. § 3298 (2021). Whether an indictment or an information is appropriate depends on the type of offense charged. This distinction is essential to effectuate the Fifth Amendment's protection against frivolous prosecution. *See Toussie* at 114-15.

The Fifth Amendment provides "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. Federal Rule of Criminal Procedure 7(a) gives effect to that amendment by requiring that "felony offenses, other than criminal contempt, must be prosecuted by an *indictment* if it is punishable by death or by imprisonment for more than one year." Fed. R. Crim. P. 7(a) (emphasis added). The government may prosecute felony offenses by information, instead of indictment only when the defendant, "in open court and after being advised of the nature of the charge and of the defendant's rights, waives prosecution by indictment." Fed. R. Crim. P. 7(b). If the government does not bring an indictment or information before the statutory period expires, it is barred from bringing those charges in the future. *United States v. Schmick*, 904 F.2d 936, 940 (5th Cir. 1990).

However, 18 U.S.C. § 3288 provides a backdoor for the Government to effectively extend the statute of limitations by dismissing and reindicting on the same allegations after the limitations period has expired. 18 U.S.C. § 3288 (2021). Section 3288 provides:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of dismissal of the indictment or information . . . .

Id. There are circumstances in which the six-month extension may be further drawn-out. Section 3288 provides:

> . . . if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar moths of the date when the next grand jury is convened, which new indictment shall not be barred by any statute of limitations . . . .

Id. In this case, the Court should grant Ms. Maximoff's motion to dismiss the 2021 Indictment because it was not timely returned in view of §§ 3288, 3298, and because the Government is not entitled to equitable tolling of the statute of limitations.

I. THE COURT SHOULD GRANT MS. MAXIMOFF'S MOTION TO DISMISS BECAUSE THE 2020 INFORMATION WAS (A) NOT "INSTITUTED" WITHIN THE MEANING OF 18 U.S.C. §§ 3288, 3298, AND (B) DISMISSED BEFORE THE LIMITATIONS PERIOD EXPIRED, AND (C) WAS INEFFECTIVE TO TOLL THE LIMITATIONS PERIOD UNDER § 3288

If an information is not effective to toll the statute of limitations under § 3288, any subsequent indictments returned after the expiration of the limitations period are invalid. As set forth below, the 2020 Indictment was not effective to toll the limitations period and therefore the 2021 Indictment is invalid.

A. The 2020 Information Was Not "Instituted" Within the Meaning of §§ 3288, 3298 Because Ms. Maximoff Did Not Waive Her Right to a Grand Jury.

Neither the Supreme Court nor the Fourteenth Circuit have directly addressed the issue as to what qualifies as "instituted" for an information under §§ 3288, 3298 and whether the government may "institute" an information by merely filing a waiver-less information with the clerk of court. *United States v. Palacio*, 2021 U.S. Dist. LEXIS 149837 at *11 (S.D. Fla. July 12, 2021) ("There is no controlling law on the meaning of how 'information is instituted.'"). While one federal court of appeals has held a waiver-less information sufficient to "institute," that court's reasoning has been questioned or departed from in at least three district courts. *United States v. Burdix-Dana,* 149 F.3d 741, 743 (7th Cir. 1998); *see United States v. Machado*, 2005 U.S. Dist. LEXIS 26255 (D. Mass. Nov. 3, 2005); *United States v. Charnay*, 537 F.2d 341 (9th Cir. 1976), cert. denied, 429 U.S. 1000 (1976), app. after remand, 577 F.2d 81 (9th Cir. 1978)*; United States v. Stewert*, 425 F. Supp. 2d 727 (E.D. Va. 2006) (following *Burdix-Dana* with some reservations, including finding that it is only logical to presume that an information

could not be "instituted" for the purposes of the statute of limitations until a waiver occurred pursuant to Rule 7(b).).

Additionally, legislative history confirms that an information is "instituted" only when it is accompanied by a waiver of indictment, in compliance with Rule 7(b). In 1964, Congress amended § 3288 in response to the passage of Rule 7(b) "to correct a 'loophole' in the law which occurred when it became possible to charge [felonies] by information as well as indictment." *Charnay*, 537 F.2d at 353. The amendment was intended to "permit reindictment in similar cases where an information was filed after the defendant *waived in open court prosecution by indictment*." S. Rep. No. 88-1414, at 1 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3257-58 (emphasis added); *see also United States v. Clawson*, 104 F.3d 250, 251 (9th Cir. 1996) (stating the drafters gave an additional six months where the indictment or information was "filed *after defendant waived prosecution by indictment* . . ." (emphasis added)). Congress' intent reveals that an information noncompliant with Rule 7(b) is insufficient to employ § 3288's tolling provision.

Several district courts have confirmed the inadequacy of an un-waived information for the purposes of § 3288. In *United States v. Machado*, the court stated that "it defies logic and reason that the court may accept an information without waiver for the purpose of applying the statute of limitations, when the same document is 'meaningless' for the purposes of . . . prosecution." *Machado*,

2005 U.S. Dist. LEXIS 26255 at 6. Since an un-waived information is insufficient to toll the statute of limitations under § 3288, any subsequent indictment returned after the statute of limitations expires violates the statute of limitations. § 3288.

Filing an information without a waiver of indictment contravenes the very purpose of an information, and more fundamentally, the Fifth Amendment and Fed. R. Crim. P. 7, which further demonstrates why this court should decline to follow *Burdix-Dana*. Like in *Machado*, where the court refused to apply § 3288 because the defendant did not waive indictment, neither should this court apply § 3288 because Ms. Maximoff did not waive indictment either. Therefore, the information was not properly "instituted" to toll the statute of limitations. Furthermore, by the time the first sufficient charging document was returned, the statute of limitations had lapsed by fourteen months. The 2021 Indictment was not timely returned.

B. Even if the 2020 Information Were Properly Instituted, It Was Dismissed Before the Statute of Limitations Expired, Which Precludes if From § 3288's Savings Clause.

Courts must presume that Congress "says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). When interpreting legislation, the court's task is to "give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, the language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*,

507 U.S. 99, 104 (1993). The plain language of § 3288 stipulates that to employ the savings clause, the indictment or information must be dismissed "*after* the period prescribed by the applicable statute of limitations has expired . . ." § 3288 (emphasis added); *see United States v. McMillan*, 600 F.3d 434, 444 (5th Cir. 2010).

Accordingly, for the Government to be afforded the tolling provision, the 2020 Information must have been dismissed *after* the limitations period ended on July 24, 2020. However, the 2020 Information was dismissed on July 23, 2020, the day after it was filed and one day *before* the statute of limitations expired. Based on the timing of the dismissal alone, § 3288's tolling provision does not apply.

C. *The 2021 Indictment Was Not Timely Because the 2020 Information Was Not Dismissed Due to Legal Defect; Therefore, § 3288 Does Not Apply to Toll the Statute of Limitations.*

Section 3288 "does not permit the filing of a new indictment or information *where the reason for dismissal* was failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution." § 3288 (emphasis added).

The Supreme Court and at least three circuit courts have held that § 3288 was only intended to apply in situations where an original indictment or information was dismissed because it was technically insufficient to prosecute. In *United States v. Durkee Famous Foods, Inc.*, the Supreme Court held § 3288's

identical predecessor, § 587, was enacted to provide that a new indictment may be returned if "the first is found to be *defective* or *insufficient* for any cause" after the limitations period has run. *Durkee Famous Foods, Inc.*, 306 U.S. 68, 69 (1939) (emphasis added).

In *Charnay*, the Ninth Circuit held § 3288 was designed to apply to situations where a defendant is charged within the applicable statute of limitations, but whose indictment or information was dismissed due to (1) a legal defect in the charging document or (2) a defect with the operation of the grand jury that returned the indictment after it was too late to re-indict. *Charnay*, 537 F.2d at 355. For example, the "failure to allege the exact elements of the crime" in the original charging document. *Clawson*, 104 F.3d at 252 (holding that § 3288 applies where a defendant was charged within the statutory period with "the exact crime for which he could have been prosecuted had there not been defect in indictment")*; see also United States v. Strewl*, 163 F.2d 819, 820 (2nd Cir. 1947), cert. denied 332 U.S. 801 (1947) (holding that "[t]he purpose [of § 3288's predecessor] was to extend the statute of limitations, so that a person who had been indicted under an indictment *which, as it turned out, would not support a conviction*, should not escape because the fault was discovered too late to indict him again," (emphasis added)).

The test to determine the sufficiency of an indictment is "whether it contains the elements of the offense intended to be charged, and sufficiently apprises the accused . . . ." *Hughes v. United States*, 114 F.2d 285, 288 (6th Cir. 1940); *see also Stumbo v. United States*, 90 F.2d 828 (1937).

Congress did not intend prosecutors to use § 3288 to circumvent the statute of limitations by purposefully filing a defective information. If an indictment requires notice to be sufficient, so should an information whether it is merely to toll the statute of limitations or to prosecute. Although the end result of § 3288 is an extension of the statute of limitations, the statute's intent is not to provide a safety valve when the Government failed to initiate prosecution in time.

In this case, the 2020 Information was not dismissed for either of the reasons provided in *Charnay*. *See Charnay*, 537 F.2d at 355. First, it was not dismissed due to an irregularity in the grand jury because there was no grand jury. Second, it was not dismissed because of a legal deficiency. On the contrary, it was dismissed at the sole request of the Government with no notice or explanation to Ms. Maximoff. Consequently, the state of limitations had expired by fourteen months by the time the Government arrested Ms. Maximoff and gave her notice that she was being prosecuted for an offense that had occurred beyond the statute of limitation. Never during the limitations period was Ms. Maximoff given notice that she may need to mount a defense against the federal government.

Since the 2020 Information was not dismissed due to a legal deficiency, § 3288 does not apply to toll the statute of limitations. Therefore, the 2021 Indictment was returned in violation of § 3298.

II. THIS COURT SHOULD DENY THE GOVERNMENT'S REQUEST FOR EQUITABLE TOLLING BECAUSE (1) EQUITABLE TOLLING CONTRADICTS STATUTORY INTENT AND UNFAIRLY PREJUDICES MS. MAXIMOFF, AND (2) THE GOVERNMENT CANNOT SATISFY THE HOLLAND TEST.

Equity requires "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (5th Pocket ed. 2016). Equitable tolling "pauses the running of, or 'tolls,' a statute of limitations," *Lozano v. Alvarez*, 572 U.S. 1, 10 (2014), "where its rigid application would create injustice," *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 2017 U.S. LEXIS 4062, ***22 (2017). There are two steps in the court's consideration of equitable tolling. First, "[t]he jurisdictional question (whether the court has power to decide if tolling is proper) . . . ." Then, "the merits question, (whether tolling is proper)." *Reyes Mata v. Lynch*, 576 U.S. 143, 150 (2015).

Equitable tolling is a fact-specific inquiry that begins with a "rebuttable presumption" that the court may consider its suitability for application. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). The rebutting party begins by addressing the question "[i]s there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S.

347, 350 (1997).

If the presumption prevails, the court will consider the *Holland* test which has two requirements for equitable tolling to be proper: (1) due diligence by the party seeking tolling and (2) extraordinary circumstances which prevented him from acting in a timely manner. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

No binding decisions have held that the statute at issue in this case, § 3298, is subject to equitable tolling. While some courts have tolled other criminal statutes of limitation in light of COVID-19, Congress denied the 2020 proposal for blanket tolling of criminal statutes of limitation. Abbe Lowell et al., *Problems With Federal Courts Tolling Statutes Of Limitations*, Law360 (May 7, 2020), https://www.law360.com/articles/1270318. This Court has not issued any blanket tolling orders since the start of the pandemic eighteen months ago. The burden of proof is on the party seeking equitable tolling. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010).

In this case, equitable tolling of § 3298 contradicts Congressional intent and unfairly prejudice Ms. Maximoff's defense. Even if § 3298 is subject to equitable tolling, the Government cannot employ it after failing to exercise reasonable diligence in pursuit of prosecution and failing to provide a causal link between its failure to timely file a legally sufficient pleading and the asserted extraordinary circumstance.

A. *This Court Should Not Apply Equitable Tolling Because Congress Did Not Intend for Equitable Tolling to Apply to § 3298 and Because it is Not Demanded by Sound Legal Principles or the Interest of Justice.*

Equitable tolling is a "question of statutory intent." *Lozano*, 572 U.S. at 10. Courts consider whether the party opposing tolling has induced the delay and whether sound legal principles and the interest of justice demand equitable tolling. *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. Ct. App. 2005). Many courts have denied equitable tolling because it would completely ignore an act of Congress that is "absolute in its terms," making application of the limitation period "unpredictable and indeterminant." *Rouse v. Lee,* 339 F. 3d 238, 256 (4th Cir. Ct. App. 2003).

In *Lozano,* the Supreme Court denied equitable tolling to a father who filed a request after expiration of the one-year statute of limitation for return of his child from the child's mother who had left the country. *Lozano*, 572 U.S. at 4. The father claimed equitable tolling because the mother had concealed the child's location, therefore preventing him from exercising his right to return of the child. *Id.* However, the Court denied equitable tolling because the statute of limitation was intended to prevent the uprooting of children who had become settled into a new home and applying equitable tolling would contravene that purpose. *Id.* at 11.

In *Irwin*, the Supreme Court denied equitable tolling when the plaintiff filed an Equal Employment Opportunity Commission complaint two weeks after the

deadline, reasoning that equitable tolling was not intended to apply to "garden variety claim[s] of excusable neglect." *Irwin*, 498 U.S. at 96. The statute's explicit prescription for filing "within thirty days" allowed equitable tolling. *Id.* at 95.

Like in *Lozano*, in which the Court denied equitable tolling because it contravened the purpose of the statute, so would equitable tolling here contravene the purpose of § 3298, which is to protect the rights of the accused. Forcing Ms. Maximoff to defend against events which allegedly occurred well over a decade ago directly contradicts the purpose of § 3298 which is already one of the more generous limits provided by Congress. Congress used firm limiting language, stating charges had to be filed "not later than 10 years after the commission of the offense." Congress could have allowed for flexibility by use of the phrase "following discovery" instead but did not.

Furthermore, Ms. Maximoff did not induce or trick the Government into delaying its filings. The Government discovered the alleged offense two years before the limitations period expired yet chose to pause the investigation for six months. The Government, not Ms. Maximoff, created the need to extend the limitations period. The Government then chose to wait until two days before the limitations period expired to act, and another fourteen months before filing the 2021 Indictment.

Like in *Irwin*, where simple excusable neglect in filing a complaint after the limitations period expired resulted in the denial of equitable tolling, so should the Government's mere excusable neglect in failing to timely investigate and timely file a sufficient information or indictment have the same result. It is unreasonable to allow the Government to pursue action fourteen months past expiration when such action was in its exclusive power to properly institute in a timely manner, and which it failed to accomplish.

Statutory intent and principles of justice do not permit the Government to receive equitable relief where it delayed its investigation and waited fourteen months to file a legally sufficient charging document. Therefore, this Court should deny equitable tolling.

B. Even If Equitable Tolling Is Available for the § 3298 Limitation, It Is Not Appropriate Because the Elements Of the Holland Test are Not Met.

The Supreme Court has held that equitable tolling is proper when (1) the petitioner demonstrates he has exercised due diligence in pursuing his claims and (2) that extraordinary circumstances prevented him from filing his petition in a timely manner. *Holland*, 560 U.S. at 649. The diligence required is "reasonable diligence." *Id.* at 653. The extraordinary circumstances must be both extraordinary and beyond the party's control, not just "garden variety" neglect. *Id.* at 651-52; *see Menominee Indian Tribe v. United States*, 2016 U.S. LEXIS 971 (2016). Moreover, the COVID-19 pandemic alone, without proof of "external obstacles

caused by COVID-19" directly impeding the party's inability to timely file, fail the extraordinary circumstance requirement. *Howard v. United States*, No. 4:20-CV-1632 JAR, 2021 U.S. Dist. LEXIS 22300, at *7 (E.D. Mo. Feb. 5, 2021).

In *Brown v. Davis*, the court allowed equitable tolling because the petitioner diligently pursued his rights, demonstrated extraordinary circumstances, and because no evidence was produced expressing that respondent would be prejudiced by tolling. *Brown v. Davis*, 482 F. Supp. 3d 1049, 1059 (E.D. Cal. 2020). The petitioner was convicted of multiple felonies and sentenced to death. *Id.* at 1051. The petitioner requested tolling prior to expiration of the limitations period, demonstrated unavoidable delay in obtaining federal habeas counsel despite evidence of his diligent efforts, and cited the ongoing pandemic as impeding his counsel's childcare options resulting in inability to timely file. *Id.* at 1052-56.

In *Holland*, the Court remanded for consideration of the extraordinary circumstance requirement because the district court incorrectly imposed too strict a standard on the diligent pursuit requirement. *Holland*, 560 U.S. at 653. The petitioner wrote numerous unanswered letters to his attorney, contacted the courts and the Florida Bar to report ineffective counsel and to request a new attorney, and even filed a *pro se* habeas petition the very day he discovered the limitations period had expired. Combined, his actions constituted diligent pursuit. *Id.*

Alternatively, in *Menominee Indian Tribe v. United States*, the Supreme

Court denied equitable tolling because the litigant did not demonstrate extraordinary circumstances. *Menominee Indian Tribe*, 2016 U.S. LEXIS at ***3. The need for equitable tolling in *Menominee* was caused by the litigant's misunderstanding of law. *Id.* at 11. The Court reasoned that the litigant "had unilateral authority to present its claims in a timely manner" and any "mistaken reliance" on another case or mistaken belief did not constitute extraordinary circumstances. *Id.*

Here, the Government builds its case on an already crumbing foundation: an expired statute of limitations. Unlike *Brown*, which involved a one-year statute of limitation for a subsequent filing, this case involves a ten-year limitation for instituting the entire criminal prosecution. Additionally, *Brown* involved the expansion of a citizen's right, whereas this case involves the expansion of the Government's rights. Congress enacts statutes of limitations to protect the rights of the accused, not the government. It's unlikely that Congress intended the government to use the statute to expand its own rights at the expense of the accused.

Further, unlike *Brown*, in which the petitioner demonstrated direct causation for untimeliness because of his inability to secure counsel and then counsel's inability to find adequate childcare, the Government merely asserts a blanket excuse of COVID-19. The Government claims it was forced to file the insufficient

2020 Information due to COVID-19 but does not provide a concrete reason as to how COVID-19 prevented a sufficient and timely charging document. Instead, the Government vaguely blames the COVID-19 jury suspension, however, COVID-19 is not a blanket excuse. Congress has made many provisions for COVID-19 through legislation but has made no blanket law tolling criminal statutes of limitation.

Lastly, in *Brown*, the petitioner's diligent efforts included a request for prospective tolling, unlike here where the Government attempted to bypass the requirements for charging documents with the expectation that this Court would grant equitable tolling simply because of the pandemic. The Government had many tools at its disposal to properly institute this action, including filing an information with the required waiver of indictment or a timely indictment, or by requesting a preliminary hearing. Instead, it now attempts to rescue its untimely 2021 Indictment after the fact, forcing Ms. Maximoff to defend against eleven-year-old charges. Like in *Menominee*, where the court denied equitable tolling because the litigant "had unilateral authority to present its claims in a timely manner" and failed to do so, the Government in this case also has the only authority to pursue criminal charges in a timely manner and yet, it did not. Equitable tolling is not appropriate when the party requesting tolling caused the need for it.

Unlike *Holland*, in which the petitioner diligently pursued his rights, the Government's pursuit of prosecution was not diligent. The Government began its investigation in May 2018, declaring Maximoff as its sole suspect in February 2019, and wrapping up the case in October 2019. After Agent Woo identified Ms. Maximoff, the Government waited seventeen months to file the 2020 Information and another two years and seven months before obtaining an arrest warrant. During this time, Ms. Maximoff was never appraised of the investigation being conducted against her. She had no opportunity to mount a defense. Granting equitable tolling will allow the Government to exploit the pandemic to harass Ms. Maximoff long after limitations period has expired.

The Government failed to exercise reasonable diligence and has not offered any evidence establishing the required causation connecting COVID-19 directly to its inability to timely file. Therefore, this Court should grant Defendant's Motion to Dismiss and deny the Prosecution's request for equitable tolling.

CONCLUSION

In drafting §§ 3288, 3298 and Rule 7(b), Congress said what it meant and meant what it said. The 2020 Information must have been accompanied by a waiver to comply with what Rule 7(b) said. Because it did not, the 2020 Information was not properly "instituted" before the expiration of the statute of limitations. Consequently, the limitations period did not toll and the fourteen-

month late 2021 Indictment was not timely returned.

Further, considering statutory intent, the prejudicial effect of equitable tolling, and the Government's inability to satisfy the *Holland* test, it is inappropriate to strip the unambiguous constitutional protections afforded to an accused through § 3298 by granting equitable relief to the party who caused the delay. Accordingly, the Defendant respectfully requests that this Court grant Defendant's motion to dismiss and deny the Government's request for equitable tolling.

Respectfully submitted,

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