

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

UNITED STATES OF AMERICA

CASE NO. 1:21-cr-36

v.

WANDA MAXIMOFF

THE DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION
TO DISMISS

/s/120D

120D

Attorneys for the Defendant

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT..... 4

 I. THE GOVERNMENT’S INDICTMENT AGAINST WANDA MAXIMOFF WAS NOT TIMELY RETURNED IN VIEW OF §§ 3288 AND 3298. 4

 A. The Indictment Filed Against Ms. Maximoff Is Outside the Proper Statute of Limitations. 5

 B. The Institution of an Information Under § 3298 is the Equivalent of Prosecution By Information..... 8

 II. THE GOVERNMENT IS NOT ENTITLED TO EQUITABLE TOLLING BECAUSE THERE WAS NO EXTRAORDINARY CIRCUMSTANCE JUSTIFYING THE VIOLATION OF MS. MAXIMOFF’S RIGHT TO A FAIR TRIAL. 11

 A. The Government Failed to Diligently Pursue Its Rights Before the COVID-19 Pandemic..... 13

 B. Allowing Equitable Tolling of the Criminal Statute of Limitations Would Violate Ms. Maximoff’s Right to a Fair Trial. 14

 C. Equitable Tolling is Inconsistent with the Statutory Intent of 18 U.S.C. §§ 3288 and 3298..... 16

CONCLUSION 18

TABLE OF AUTHORITIES

Supreme Court Cases

<i>Brown v. Walker</i> , 161 U.S. 591 (1896)	16
<i>Irwin v. Dep’t of Veterans Affs.</i> , 498 U.S. 89 (1990)	12, 16
<i>Lozano v. Montoya Alvarez</i> , 572 U.S. 1 (2014)	12, 13, 17
<i>Menominee Indian Tribe of Wisconsin v. United States</i> , 577 U.S. 250 (2016).....	11, 12
<i>Ord. of R.R. Telegraphers v. Ry. Express Agency</i> , 321 U.S. 342 (1944)	15
<i>Stogner v. California</i> , 539 U.S. 607 (2003)	12, 16
<i>Toussie v. United States</i> , 397 U.S. 112 (1970).....	6, 10, 12, 13
<i>United States v. Marion</i> , 404 U.S. 307 (1971)	15, 16
<i>United States v. Miller</i> , 471 U.S. 130 (1985)	5, 7

United States Court of Appeals Cases

<i>Donald v. Pruitt</i> , 853 F. App’x 230 (10th Cir. 2021).....	13, 14
<i>United States v. Atiyeh</i> , 402 F.3d 354 (3d Cir. 2005).....	12
<i>United States v. Burdix-Dana</i> , 149 F.3d 741 (7th Cir. 1998).....	8, 9
<i>United States v. Gilbert</i> , 136 F.3d 1451 (11th Cir. 1998)	11
<i>United States v. Levine</i> , 658 F.2d 113 (3d Cir.1981)	15
<i>United States v. McIntosh</i> , 704 F.3d 894 (11th Cir. 2013).....	5, 7
<i>United States v. Midgley</i> , 142 F.3d 174 (3d Cir. 1998).....	12
<i>United States v. Podde</i> , 105 F.3d 813 (2d Cir. 1997).....	15

United States District Court Cases

<i>United States v. Arrington</i> , No. 8:13CR146, 2013 WL 5963140 (D. Neb. Nov. 7, 2013)17	
---	--

Constitutional Provisions

U.S. Const. amend. V	7
----------------------------	---

Federal Statutes

18 U.S.C. § 3298	5, 6, 8
8 U.S.C. § 1324	5
Fed. R. Crim. 48(a).....	10
Fed. R. Crim. 7(a).....	7
Fed. R. Crim. 7(b).....	8

Other Authorities

Brief For Amici Curiae National Ass’n of Criminal Defense Lawyers and the CATO Institute in Support of Appellee and Urging Affirmance, <i>United States v. B.G.G.</i> , (April 21, 2021) (No. 21-10165-RR).....	17
---	----

Riley Beggin, VOX, *DOJ asks Congress for broad new powers amid Covid-19. Schumer says, “Hell no.”* (Mar 22, 2020, 2:00pm EDT) 18

INTRODUCTION

This matter arises out of Ms. Maximoff's Motion to Dismiss the Government's charges filed against her because the statute of limitations has expired under 18 U.S.C. § 3298. Ms. Maximoff further argues that the Government is not entitled to equitable tolling of the statute limitations because it would violate her right to a fair trial. The Government alleges the statute of limitations has not expired, relying on 18 U.S.C. § 3288, and in the alternative, argues that it is entitled to equitable tolling of the proper statute of limitations.

Ms. Maximoff respectfully asks this Court to grant her Motion to Dismiss because the statute of limitations has expired, and the Government is not entitled to the equitable tolling of the statute of limitations.

STATEMENT OF FACTS

Wanda Maximoff is a hardworking and intelligent attorney passionate about helping the clients she represents. Ms. Maximoff obtained her bachelor's degree from Stetson International University in 2003, graduating with honors. Decl. Monica Rambeau 1, Sept. 24, 2021. Ms. Maximoff began attending law school in 2005, graduating at the top of her class in 2008. Decl. Rambeau at 2. In addition to her commitment to work, Ms. Maximoff is a loving mother to her twin boys. Decl. Rambeau at 2. Ms. Maximoff prioritizes her family, and she continues to take care of her former guardian, Monica

Rambeau, by paying her medical bills and living expenses. Decl. Rambeau at 2–3. Aside from her professional and familial obligations, Ms. Maximoff also donates a significant portion of her income to international orphanages, foster care programs, and other charities. Decl. Rambeau at 3.

Ms. Maximoff was indicted by the Grand Jury on September 21, 2021 and charged with one count of conspiracy in violation of 8 U.S.C. § 1342 (a)(1)(A)(iv) and (v). Indictment Wanda Maximoff at 2–3, Sept. 21, 2021. The Government alleges that between May 31, 2007, and July 24, 2010, Ms. Maximoff conspired to induce and encourage aliens to continue living in the United States for the purpose of commercial advantage or private financial gain while knowing that such encouragement violates the law. Initial Appearance Tr. 4:29–34, Sept. 23, 2021. Ms. Maximoff faces a ten-year maximum term of imprisonment, a three-year maximum term of supervised release, a special assessment, and a \$250,000 fine for her alleged offense. Initial Appearance Tr. at 4:35–37.

Jimmy Woo, Special Agent with the United States Department of Homeland Security, first discovered evidence to support the Government’s Indictment of Ms. Maximoff in 2018. Aff. Jimmy Woo ¶ 5, Jul. 22, 2020. On May 4, 2018, Agent Woo conducted an interview with S.P., who confirmed that she entered the country unlawfully in 2008 and that she and her husband, H.P., purchased forged immigration documents from a woman named “Scarlet.” Aff. Woo ¶ 7. In August of 2018, Agent Woo received a call from H.P., informing Agent Woo that he had retained immigration attorney Agatha

Harkness in 2008 to assist him in applying for lawful temporary residence status in the United States. Aff. Woo ¶ 9. H.P. explained to Agent Woo that Ms. Harkness had introduced him and his wife to a law clerk named Maximoff, who Ms. Harkness described as “great with paperwork.” Aff. Woo ¶ 10. Ms. Harkness then put H.P. in contact with “Scarlet,” who helped him, as well as other people in his neighborhood, obtain fraudulent immigration paperwork until 2010. Aff. Woo ¶ 9, 13.

Upon further investigation, Agent Woo discovered that Ms. Harkness retired from practicing law in 2015 and relocated to Salem, Massachusetts. Aff. Woo ¶ 14. However, Agent Woo was unable to locate Ms. Harkness’s whereabouts. Aff. Woo ¶ 15. Agent Woo tabled this investigation in light of an undercover task force assignment from August 15, 2018, through February 14, 2019. Aff. Woo ¶ 17. The last interview Agent Woo conducted, in furtherance of the Government’s investigation of Ms. Maximoff, occurred on October 28, 2019. Aff. Woo ¶ 30. Agent Woo concluded that 15 of Ms. Maximoff’s alleged former clients were either deported or deceased, making them unavailable to testify at any trial. Aff. Woo ¶ 31.

Ms. Maximoff moved to dismiss the Indictment because it was returned in violation of the statute of limitations pursuant to 18 U.S.C. § 3298. Initial Appearance Tr. 4:45–47. The Government opposes Ms. Maximoff’s motion to dismiss, arguing that the Indictment does not violate the statute of limitations. Initial Appearance Tr. 5:64–65. However, an Information that is materially identical to the Indictment, was filed against Ms. Maximoff on July 22, 2020, and an order was signed dismissing that Information

without prejudice. Initial Appearance Tr. 5:56–60. The Government argues that it was forced to file the Information because the Grand Jury was suspended due to COVID-19 and when the Court lifted the suspension, it sought the Indictment by the grand jury within six months pursuant to, and in compliance with, 18 U.S.C. § 3288. Initial Appearance Tr. 5:60–65. The Government further argues that it is entitled to equitable tolling of the statute of limitations because of the COVID-19 pandemic. Initial Appearance Tr. 5:66–69.

Ms. Maximoff asserts that pursuant to § 3298, the statute of limitations for an Indictment or Information to be instituted against her for the alleged offense is ten years, which expired on July 24, 2020. Initial Appearance Tr. 4:48–5:52. Ms. Maximoff further argues that pursuant to Federal Rules of Criminal Procedure 7, she did not waive her constitutional right to an Indictment for the alleged offense. Initial Appearance Tr. 5:71–72. Until the arrest of Ms. Maximoff on September 23, 2021, she had no knowledge that she committed an offense, and as such, the Information the Government relies on to toll the statute of limitations, pursuant to § 3288, is null and void. Initial Appearance Tr. 6:74–78. Additionally, Ms. Maximoff argues that equitable tolling does not allow the Government to file an Indictment after the applicable statute of limitations has lapsed. Initial Appearance Tr. 6:76–78.

ARGUMENT

I. THE GOVERNMENT’S INDICTMENT AGAINST WANDA MAXIMOFF WAS NOT TIMELY RETURNED IN VIEW OF §§ 3288 AND 3298.

An alleged criminal defendant has the constitutional right to an indictment by a grand jury for the capital offenses they are charged with. *U.S. v. Miller*, 471 U.S. 130, 138 (1985). Federal Rule of Criminal Procedure 7 codified the constitutional right to an indictment by a grand jury and necessitates an indictment by a grand jury prior to prosecution unless waived by the defendant for prosecution by information. *U.S. v. McIntosh*, 704 F.3d 894 (11th Cir. 2013). Section 3298 provides that for an offense in violation of 8 U.S.C. § 1324, no person shall be prosecuted unless the information is instituted, or the indictment is found no later than ten years after the alleged offense is committed. 18 U.S.C. § 3298; 8 U.S.C. § 1324.

Ms. Maximoff's Motion to Dismiss should be granted because the charges the Government filed against her were untimely and outside the proper statute of limitations. The Government filed its Indictment against Ms. Maximoff on September 21, 2021, over a year after its expiration on July 24, 2020. Additionally, the Government erroneously relies on an Information it filed on July 22, 2020, which the court dismissed on July 23, 2020, to toll the statute of limitations. The Information is null and void as it violated Ms. Maximoff's constitutional right to an indictment by a grand jury because she never waived her right to an indictment by a grand jury for a prosecution by information.

A. The Indictment Filed Against Ms. Maximoff Is Outside the Proper Statute of Limitations.

The statute of limitations in criminal proceedings protects a defendant's right to a fair trial and cannot become a mere formality that can be circumvented through erroneous

statutory interpretation. A defendant obtains a layer of protection from an unfair trial because the statute of limitations “encourage[es] law enforcement officials promptly to investigate suspected criminal activity.” *Toussie v. U.S.*, 397 U.S. 112, 115 (1970). Failing to adhere to the proper statute of limitations or circumventing the process through legal backdoors will lead to the violation of a criminal defendant’s constitutional rights.

The Government alleges that Ms. Maximoff conspired to induce and encourage aliens to continue their residency in the United States despite knowing that their residence would be in violation of 8 U.S.C. § 1324(a)(1)(A)(iv). Accordingly, Ms. Maximoff seeks to dismiss the charge pursuant to 18 U.S.C. § 3298 because her charge is outside the proper ten-year statute of limitations. The plain language of § 3298 makes clear that, “no person shall be prosecuted, tried or punished for any noncapital-offense or conspiracy to commit a non-capital offense [...] unless the indictment is found or the information is instituted not later than 10 years after the commission of the offense.” 18 U.S.C. § 3298. Since the statute of limitations expired on July 24, 2020, and the Government filed its Indictment on September 21, 2021, the Indictment is improper and must be dismissed.

During the Initial Appearance, the Government argued that pursuant to § 3288, the subsequent Indictment filed was within the statute of limitations because it was filed within six calendar months of the date in which the grand jury reconvened and following the dismissal of a materially similar Information against Ms. Maximoff. The Government relied on the Information it filed against Ms. Maximoff on July 22, 2020, which was

dismissed the next day. While the Government did properly institute an Indictment against Ms. Maximoff within six calendar months of the date in which the grand jury reconvened, the Government cannot toll the statute of limitations pursuant to § 3288 because the Information it relies on is null and void.

Pursuant to 8 U.S.C. § 1324, Ms. Maximoff faces up to ten years of imprisonment for the alleged offense. Since Ms. Maximoff's alleged offense is punishable by more than one year of imprisonment, she must be prosecuted by indictment. Fed. R. Crim. 7(a). Although Ms. Maximoff is entitled to a prosecution by indictment for her alleged offense, she can waive that right for a prosecution by information so long as she does so in open court after being advised of her rights and the nature of her charge. Fed. R. Crim. 7(a). Without any waiver provided by Ms. Maximoff, the Government filed an information against her and now attempts to rely on that Information to toll the statute of limitations. The Federal Rules of Criminal Procedure require an indictment, unless waived, for the prosecution of a case. *U.S. v. McIntosh*, 704 F.3d 894, 904 (11th Cir. 2013) (referencing Fed. R. Crim. 7(a)). At no point did Ms. Maximoff waive her right to an indictment for a prosecution by information and the Government's reliance on a legally invalid Information would violate her constitutional right to an indictment by a grand jury. *U.S. v. Miller*, 471 U.S. 130, 138 (1985); U.S. Const. amend. V.

The Government erroneously relies on an Information it filed against Ms. Maximoff to toll the statute of limitations. Since the Information the Government filed is

null and void, the Government cannot rely on it to bring the current Indictment against Ms. Maximoff within the proper statute of limitations.

B. The Institution of an Information Under § 3298 is the Equivalent of Prosecution By Information.

Section 3298 requires the “institution” of an information within ten years of the commission of an INA offense. 18 U.S.C. § 3298. Federal Rule of Criminal Procedure 7(b) requires the waiver of an alleged defendant for a prosecution by information. Fed. R. Crim. 7(b). Institution for purposes of § 3298 and prosecution for purposes of Federal Rules of Criminal Procedure 7(b) are equivalent. Failing to equate “institution” and prosecution will lead to undesired consequences. Furthermore, the Government did not merely “institute” an information against Ms. Maximoff to toll the statute of limitations, rather, the Government attempted to prosecute Ms. Maximoff with the Information it filed against her.

In *U.S. v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998), the defendant appealed the court’s denial of her motion to dismiss. The Government charged the defendant with filing a false claim upon the United States Treasury Department in violation of 18 U.S.C. § 287. *Id.* On appeal, the defendant argued that the information the Government filed was not “instituted” for purposes of 18 U.S.C. § 3282 because she had not waived her right to an indictment by a grand jury. *Id.* The defendant relied on Federal Rule of Criminal Procedure 7(b), which requires the defendant’s prosecution by indictment unless waived for prosecution by information. *Id.* Despite recognizing the multifarious ramifications in

not equating “institution” with prosecution, the court held that the Government’s information was proper for tolling the statute of limitations. *Id* at 743. The court reasoned that the Government filing an information against the defendant absent their waiver is proper to toll the statute of limitations pursuant to § 3282 because the statute only requires the “institution” of an information. *Id* at 741. The court further reasoned that the information is proper and did not violate the defendant’s right to an indictment because the information served only as an institution of an information against the defendant and not for the prosecution of the defendant. *Id.* at 741.

The Government did not simply seek to institute an Information against Ms. Maximoff but instead sought to prosecute her with the Information it filed on July 22, 2020. Like the Government in *Burdix-Dana*, the Government here attempts to rely on the Information it filed absent Ms. Maximoff’s waiver to toll the statute of limitations for her current prosecution by indictment by a grand jury. The Government relies on the Information and argues for its legitimacy because the purpose of the Information was not to prosecute Ms. Maximoff, but rather to toll the statute of limitations pursuant to 18 U.S.C. § 3288. While the Government may attempt to rely on the reasoning outlined in the court’s holding in *Burdix-Dana*, the Government here clearly attempted to prosecute Ms. Maximoff by an Information absent her waiver. The Government dismissed its initial Information filed against Ms. Maximoff on July 22, 2020 and did so pursuant to Federal Rule of Criminal Procedure 48(a). Federal Rule of Criminal Procedure 48(a) clearly states that the government may dismiss an information with leave of court but “may not

dismiss the prosecution during trial without the defendant's consent." Fed. R. Crim. 48(a). The Government concedes that an Information is a prosecution for purposes of their dismissal but ignores the fact that Ms. Maximoff has not waived her right to an indictment by a grand jury for a prosecution by information. Furthermore, the Government relied on the Information for purposes of tolling the statute of limitations despite the Information's clear violation of Ms. Maximoff's constitutional rights.

Irrespective of the Government's clear violation of Ms. Maximoff's constitutional rights, failing to equate prosecution by information and "institution" of information has many undesired consequences. Rather than addressing the inevitable ramifications of its holding, the court in *Burdix-Dana* chose to ignore the impact of its decision and left the issues for Congress to resolve. Failing to equate prosecution and "institution" will lead to all criminal statutes of limitation becoming moot because the Government would have the liberty to strategically toll the time-limit. Secondly, failing to equate prosecution and "institution" will normalize the violation of an alleged criminal defendant's constitutional right to an indictment by a grand jury. This Court has the power to avoid the undesirable consequences of the Seventh Circuit's holding by equating prosecution by an information with "institution" of an information.

Additionally, the court in *Burdix-Dana* fails to adhere to established precedent provided by the Supreme Court. In *Toussie*, the Supreme Court pronounced that any issues related to statutes of limitation in criminal cases must be "liberally interpreted in favor of repose." 97 U.S. at 115. Rather than adhere to this mandatory authority, the

Seventh Circuit in *Burdix-Dana* establishes a precedent that encourages depriving criminal defendants of their constitutionally enumerated rights. Furthermore, in criminal cases where there is doubt as to the statute of limitations, “the limitations period should be construed in favor of the defendant.” *U.S. v. Gilbert*, 136 F.3d 1451, 1454 (11th Cir. 1998) (citing *U.S. v. Habig*, 390 U.S. 222, 226–27 (1968)). The Seventh Circuit in *Burdix-Dana*, declined to comply with this requirement, choosing instead to construe the statute of limitations in favor of the Government.

This Court should follow the established precedent from the Supreme Court and avoid the inevitable consequences of the holding in *Burdix-Dana*, by equating prosecution by information and “institution” of an information. Being that Ms. Maximoff never waived her right to an indictment by a grand jury for a prosecution by information, this Court should find that the Government’s Indictment is outside the statute of limitations because the Information the Government relies on to toll the statute of limitations is null and void.

II. THE GOVERNMENT IS NOT ENTITLED TO EQUITABLE TOLLING BECAUSE THERE WAS NO EXTRAORDINARY CIRCUMSTANCE JUSTIFYING THE VIOLATION OF MS. MAXIMOFF’S RIGHT TO A FAIR TRIAL.

The common law doctrine of equitable tolling provides that certain extraordinary circumstances warrant the pausing of a statute of limitations. *Menominee Indian Tribe of Wisconsin v. U.S.*, 577 U.S. 250, 255 (2016). Equitable tolling has often been applied to civil cases, but some courts have applied the doctrine to criminal statutes of limitation.

U.S. v. Midgley, 142 F.3d 174, 178 (3d Cir. 1998); *U.S. v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005). For a litigant to be entitled to equitable tolling of a statute, they must establish “(1) that [they have] been pursuing [their] rights diligently, and (2) that some extraordinary circumstance stood in [their] way and prevented timely filing.” *Menominee Indian Tribe of Wisconsin*, 577 U.S. at 255 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

The purpose of any criminal statute of limitations is to safeguard the accused’s right to a fair trial by protecting them “against charges when the basic facts may have become obscured by the passage of time.” *Toussie*, 397 U.S. at 114. The Court explained that a statute of limitations “reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict.” *Stogner v. California*, 539 U.S. 607, 615 (2003). The danger of exposing criminal defendants to charges based on acts from the distant past has led federal courts to apply equitable tolling “sparingly.” *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 96 (1990). Additionally, courts apply equitable tolling to statutes of limitation only if tolling is consistent with the statute. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11 (2014). Specifically, statutes of limitation should not be tolled “unless the explicit language of the substantive criminal statute compels such a conclusion.” *Toussie*, 397 U.S. at 115.

The Government is not entitled to equitable tolling of the statute of limitations because it failed to diligently pursue its rights against Ms. Maximoff before the COVID-19 pandemic. This Court should not grant tolling of the criminal statute of limitations because the charges brought against Ms. Maximoff are stale, so multiple crucial

witnesses are unavailable to testify at trial. Furthermore, equitable tolling does not apply in this case because it would be inconsistent with the statutory intent of 18 U.S.C. §§ 3288 and 3298.

A. The Government Failed to Diligently Pursue Its Rights Before the COVID-19 Pandemic.

The Government is not entitled to equitable tolling of the statute of limitations because its untimely filing of the Information was not the result of any extraordinary circumstance. The Court explained that for a litigant to be entitled to equitable tolling the circumstances that caused a litigant's delay must be "both extraordinary *and* beyond its control." *Menominee Indian Tribe of Wisconsin*, 577 U.S. 250 at 257. Furthermore, this prosecutorial time limit should have the effect of encouraging law enforcement to expeditiously investigate alleged criminal activity. *Toussie*, 397 U.S. at 115.

In this case, the Government is not entitled to equitable tolling because they did not diligently pursue their rights in the ten-year window proscribed by the statute of limitations. In *Donald v. Pruitt*, 853 F. App'x 230, 231–32 (10th Cir. 2021), the petitioner filed a writ of habeas corpus in May of 2020, three months after the statute of limitations had expired. The petitioner argued that he was entitled to equitable tolling because COVID-19 had made the prison law library less accessible, preventing him from filing his petition on time. *Id.* at 233. The Tenth Circuit Court of Appeals held that the petitioner was not entitled to equitable tolling because he failed to diligently pursue his rights within the proscribed statute of limitations. *Id.* at 234. The court reasoned that "the COVID-19 pandemic does not automatically warrant equitable tolling for any petitioner

who seeks it on that basis.” *Id.* at 234. The court highlighted that the petitioner should have diligently pursued his rights before the COVID-19 restrictions were implemented. *Id.*

Like the petitioner in *Donald*, the Government failed to diligently pursue its rights against Ms. Maximoff. The Government first discovered evidence of probable cause supporting its Indictment of Ms. Maximoff in 2018. Despite having supporting evidence to pursue the Government’s rights, Agent Woo tabled the investigation from August 15, 2018, through February 14, 2019. Additionally, Agent Woo conducted the last of the Government’s investigation in October of 2019 but delayed pursuing charges against Ms. Maximoff for an additional nine months.

This Court should not grant equitable tolling of 18 U.S.C. §§ 3288 or 3298 because the statutes of limitation are supposed to encourage law enforcement to investigate criminal activity promptly, and the Government failed to pursue its rights diligently. The Government delayed the investigation of Ms. Maximoff for six months, so if this Court grants equitable tolling to the Government, statutes of limitations would not have the effect of encouraging prompt investigations. Furthermore, the pandemic did not cause the Government to delay pursuing its rights because the Government chose to delay seeking charges against Ms. Maximoff for nine months after it completed its investigation in October of 2019.

B. Allowing Equitable Tolling of the Criminal Statute of Limitations Would Violate Ms. Maximoff’s Right to a Fair Trial.

The charges against Ms. Maximoff are stale, so her ability to present an adequate defense is hindered by the unavailability of significant witnesses. Criminal statutes of limitation exist primarily to protect the rights of defendants. *U.S. v. Podde*, 105 F.3d 813, 819 (2d Cir. 1997). Their purpose is to mark “a limit beyond which there is an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.” *U.S. v. Marion*, 404 U.S. 307, 322 (1971). The theory behind this limitation is that “even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Ord. of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944). The Third Circuit Court of Appeals held that “[l]imitations statutes ... are intended to foreclose the potential for *inaccuracy* and *unfairness* that stale evidence and dull memories may occasion in an unduly delayed trial.” *U.S. v. Levine*, 658 F.2d 113, 127 (3d Cir.1981) (emphasis in original).

The Government notified Ms. Maximoff of the charges against her on September 23, 2021, over a year after the expiration of the statute of limitations. The passage of time has diminished Ms. Maximoff’s ability to present an adequate defense; specifically, 16 witnesses, including Agatha Harkness, are no longer available to testify at trial. The Supreme Court echoed this consideration, asserting that “[s]tatutes of limitation... are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Ord. of R.R. Telegraphers*, 321 U.S. at 348–49. Statutes of limitation are designed to protect against the hardships that Ms. Maximoff now faces.

These “statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.” *Marion*, 404 U.S. at 322 (citation, brackets, and internal quotation marks omitted).

Additionally, equitable tolling of criminal statutes erodes the protection guaranteed by the Fifth Amendment. The Court in *Brown v. Walker*, 161 U.S. 591, 597–98 (1896), held that the Fifth Amendment’s privilege against self-incrimination does not apply after the relevant statute of limitations has expired. In *Stogner*, the Court clarified that this rule in *Brown* “may suggest that the expiration of a statute of limitations is irrevocable, for otherwise the passage of time would not have eliminated fear of prosecution.” *Stogner*, 539 U.S. at 620. Therefore, equitable tolling of a criminal statute of limitations may undermine a defendant’s Fifth Amendment right.

This Court should not grant equitable tolling of criminal statutes of limitation because these statutes are designed to provide predictability of when the right to a fair trial has been prejudiced by the passing of time. The possibility of prejudicing a criminal defendant’s right to a fair trial and eroding the protections of the Fifth Amendment explain why the Supreme Court has encouraged lower courts to apply equitable tolling “sparingly.” *Irwin*, 498 U.S. 89, 96 (1990). If this case were to proceed to trial, Ms. Maximoff would not be able to present an adequate defense due to the unavailability of significant witnesses.

C. Equitable Tolling is Inconsistent with the Statutory Intent of 18 U.S.C. §§ 3288 and 3298.

Equitable tolling of a criminal statute of limitation is only applicable when tolling is consistent with the statute. *Lozano*, 572 U.S. at 11. The Court specified that the doctrine must be consistent with the relevant statute because it “effectively extends an otherwise discrete limitations period set by Congress,” so “whether tolling is available is fundamentally a question of statutory intent.” *Id.* at 10. The exclusive authority to toll statutes of limitation rests with Congress because just as “Congress was empowered to define the crime, including the statute of limitations, it was empowered to provide for tolling of the statute of limitations.” *U.S. v. Arrington*, No. 8:13CR146, 2013 WL 5963140, at *7 (D. Neb. Nov. 7, 2013).

Congress’ rejection of the tolling legislation proposed by the Department of Justice shows that §§ 3288 and 3298 do not provide for tolling due to the pandemic. In March of 2020, the Department of Justice (“DOJ”) proposed legislation to Congress that sought to pause the statute of limitations for all federal crimes during the period of any national emergency and up to one year afterward.¹ One of the statutes proposed would have given the federal judge any court the power to toll all statutory deadlines, including statutes of limitation in the event of an emergency situation where the courts are fully or partially closed.² It can be inferred from this proposed legislation that the DOJ knew that the pandemic could not legally justify equitable tolling of § 3288 nor § 3298. The

¹ Brief For Amici Curiae National Ass’n of Criminal Defense Lawyers and the CATO Institute in Support of Appellee and Urging Affirmance at 13–14, *United States v. B.G.G.*, <https://www.nacdl.org/getattachment/764dba8e-7636-4061-a0d7-b5c645a12c12/united-states-v-bgg-brief.pdf> (April 21, 2021) (No. 21-10165-RR)

² *Id.*

bipartisan reactions to this suggested legislation further support this inference.³

Republican Senator Mike Lee, Senate Minority Leader Chuck Schumer, and Rep.

Alexandria Ocasio-Cortez expressed disapproval in response to the proposed statutes.⁴ If these legislators believed that current statutes allow equitable tolling during a pandemic, their reactions would seem misplaced. Instead, it is more likely that these representatives saw the DOJ's proposal as one that would exploit the pandemic and destroy the protections afforded by statutes of limitation.

Ultimately, Congress is solely responsible for enacting legislation that provides for the tolling of statutes of limitation. The bipartisan rejection of this proposed legislation clarifies that equitable tolling of statutes of limitation is unjustified during a pandemic.

CONCLUSION

Ms. Maximoff respectfully requests that this Court should grant Ms. Maximoff's Motion to Dismiss as the statute of limitations expired well before the Government sought an indictment. Furthermore, the Government is not entitled to equitable tolling because it failed to show that it diligently pursued its rights and that some extraordinary circumstance prevented it from filing proper charges against Ms. Maximoff within the proper statute of limitations.

Respectfully submitted,

³ Riley Beggin, VOX, *DOJ asks Congress for broad new powers amid Covid-19. Schumer says, "Hell no."* (Mar 22, 2020, 2:00pm EDT) <https://www.vox.com/policy-and-politics/2020/3/22/21189937/coronavirus-department-justice-doj-powers>

⁴ *Id.*

/s/120D
120D

Attorneys for the Defendant