No. 21-10165-RR

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

B.G.G.,
Defendant-Appellee.

On Appeal From the United States District Court
For the Southern District of Florida, No. 20-80063-CR
Honorable Donald M. Middlebrooks

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CATO INSTITUTE IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS
United States v. B.G.G.
Case No. 21-10165-RR

In compliance with Fed. R. App. P. 26.1 and 11th Cir. Rules 26.1 and 28-1, the undersigned counsel of record certifies that the list set forth below is a complete list of the persons and entities who have an interest in the outcome of this case.

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INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory

safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.[1]

All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The statute of limitations protects vital interests. It marks "a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced," *United States v. Marion*, 404 U.S. 307, 322 (1971), and it "encourag[es] law enforcement officials promptly to investigate suspected criminal activity," *Toussie v. United States*, 397 U.S. 112, 115 (1970). In keeping with these purposes, statutes of limitations must be "liberally interpreted in favor of repose." *Id*. (quotation omitted).

The government's proposed interpretation of 18 U.S.C. §§ 3282 and 3288--under which it obtains a six-month extension of the statute of limitations by filing a defective information the day before the statute runs and moving to dismiss it the day after--flouts the *Toussie* principle. That interpretation also violates the rule that courts will not interpret statutes in a way that produces an absurd result. The Seventh Circuit case on which the government principally relies--*United States v. Burdix-*

[1] Counsel for amici state that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Dana, 149 F.3d 741 (7th Cir. 1998)--overlooks both these principles and is poorly reasoned in other respects as well.

The government seeks to obtain through a tortured interpretation of §§ 3282 and 3288 an outcome that Congress refused to enact when the Department of Justice proposed it as legislation last year, at the outset of the coronavirus pandemic. The district court correctly rejected the government's approach. This Court should affirm.

ARGUMENT

The government has contrived a way to grant itself an automatic six-month extension of the statute of limitations in almost every federal criminal case. Although the government casts its tactic as a pandemic emergency measure, its interpretation of 18 U.S.C. §§ 3282 and 3288 has no limits; it will apply in every case, pandemic or no pandemic. Because the statute of limitations provides a crucial bulwark against government overreaching, we submit this brief to highlight the errors in the government's approach and to urge the Court to affirm the district court's dismissal with prejudice.

I. BASIC PRINCIPLES OF STATUTORY INTERPRETATION BAR THE GOVERNMENT'S APPROACH.

Appellee argues persuasively that the plain meaning of "instituted" in § 3282 requires that an information be effective to initiate a prosecution--that it either charge a misdemeanor or charge a felony after the defendant waives indictment "in open

court and after being advised of the nature of the charge." Fed. R. Crim. P. 7(b); *see* Answer Brief of the Appellee B.G.G. ("App. Br.") at 14-15. Even if the term were ambiguous, however, two canons of interpretation require this construction.

A. Statutes of Limitations Must Be Interpreted in Favor of Repose.

First, under decisions from the Supreme Court and this Court stretching back decades, statutes of limitations in criminal cases must be "liberally interpreted in favor of repose." *Toussie v. United States*, 397 U.S. 112, 115 (1970) (quotation omitted); *see, e.g., United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *United States v. Scharton*, 285 U.S. 518, 522 (1932). As this Court has stated the principle, "When doubt exists about the statute of limitations in a criminal case, the limitations period should be construed in favor of the defendant." *United States v. Gilbert*, 136 F.3d 1451, 1454 (11th Cir. 1998) (citing *United States v. Habig*, 390 U.S. 222, 226-27 (1968)).

This principle flows directly from the central purposes of statutes of limitations: "to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions"; "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time"; "to minimize the danger of official punishment because of acts in the far-distant past"; and to "encourag[e] law enforcement officials promptly to investigate

suspected criminal activity." *Toussie*, 397 U.S. at 114-15; *see, e.g., Marion*, 404 U.S. at 322 (statutes of limitations "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").

This Court has applied the *Toussie* principle repeatedly to read statutes of limitations in favor of repose. In *Gilbert*, for example, the defendant was convicted of bankruptcy fraud under 18 U.S.C. § 152. On appeal, this Court construed 18 U.S.C. § 3284, which provides that the statute of limitations in a bankruptcy fraud case "shall not begin to run until . . . final discharge [from bankruptcy] or denial of discharge." Before final discharge could be granted or denied in *Gilbert*, the bankruptcy was converted from Chapter 11 (where discharge is possible) to Chapter 7 (where a corporate debtor cannot be discharged). The government argued that because discharge or denial of discharge was no longer possible, the statute of limitations would never begin to run.

This Court rejected the government's argument. Reading § 3284 in favor of repose, it held that an event that has the "same effect as denial of discharge"--such as conversion from Chapter 11 to Chapter 7--started the running of the statute. *Gilbert*, 136 F.3d at 1454-55; *see, e.g., United States v. Rojas*, 718 F.3d 1317, 1319-20 (11th Cir. 2013) (prosecution barred by statute of limitations; court invokes

Toussie rule of interpretation); *United States v. Ratcliff*, 245 F.3d 1246, 1252-56 (11th Cir. 2001) (same).

Interpreting "instituted" to require an information that is effective to start the criminal process favors repose and accords with the *Toussie* principle. Interpreting that term as the government prefers--and conferring on the government the ability to grant itself a six-month extension of the statute of limitations in virtually every criminal case--runs directly counter to *Toussie*.

B. Statutes Must Be Interpreted To Avoid Absurd Results.

A second rule of statutory interpretation leads to the same conclusion. Courts have long held that "statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *In re Chapman*, 166 U.S. 661, 667 (1897); *see, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided" in construing statutes); *United States v. Ballinger*, 395 F.3d 1218, 1237 (11th Cir. 2005) (applying *Chapman* principle). The requirement that statutes be construed to avoid absurd results overcomes even the plain meaning of statutory terms. As this Court put the point, "There is, of course, a well-established absurdity exception to the plain meaning doctrine." *Miccosukee Tribe v. South Everglades Restoration Alliance*, 304 F.3d 1076, 1086 (11th Cir. 2002); *see, e.g., Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006) ("When applying the plain and ordinary

meaning of statutory language produces a result that is not just unwise but is clearly absurd, another principle comes into the picture. That principle is the venerable one that statutory language should not be applied literally if doing so would produce an absurd result.") (quotation omitted).[2]

The government's interpretation of "instituted" produces exactly the absurd result these cases forbid. Under the government's reading, the prosecution would get an automatic six-month extension of the statute of limitations merely by filing a document titled "information" purporting to charge felonies--even though, without the defendant's waiver of the right to indictment in open court, such a document cannot initiate a prosecution. If Congress had meant to give the government an automatic six-month extension of the statute of limitations, it would have said so. It would not have established a system where the government files a meaningless document purporting to charge felonies, moves immediately to dismiss it, and upon entry of the dismissal order, obtains a six-month extension. Congress may not always legislate in the most straightforward way, but a court should reject the conclusion that Congress meant to require the government, the court, and the defendant to engage in a meaningless and wasteful ritual, merely to reach a result

[2] The government contends that "instituted" in § 3282 plainly encompasses the filing of an information that cannot initiate a prosecution. Appellee convincingly demonstrates that the government's plain meaning argument is wrong. But even if the government were correct, the absurdity canon would bar the interpretation it urges.

that Congress could have accomplished directly. *See Jaben v. United States*, 381 U.S. 214, 219 (1965) (rejecting government interpretation of "instituted" in tax statute of limitations in part because Congress could have accomplished the result the government sought "simply by making the normal statute of limitations six years and nine months").

Further absurdities lurk in the government's interpretation, as this case illustrates. For the government's use of §§ 3282 and 3288 to work, the information must be filed before the statute of limitations has run, but close enough to the deadline that the defendant has no opportunity to obtain dismissal before the limitations date. The need to thread this needle flows from the language of § 3288. That statute provides a six-month extension *only* when (1) the indictment or information is dismissed "after the period prescribed by the applicable statute of limitations has expired," and (2) the reason for the dismissal was not "the failure to file the indictment or information within the period prescribed by the statute of limitations." 18 U.S.C. § 3288. Both conditions must be met for the six-month extension to apply.

In other words, if the government files the information too far in advance of the limitations date, the defendant can rush to court and obtain dismissal before "the applicable statute of limitations has expired." If the government waits to file the information until after the limitations date, the reason for the dismissal will be the

"failure to file the . . . information within the period prescribed by the statute of limitations." In either case, § 3288 will not apply, and the government will not get the benefit of the six-month extension.

To navigate between the Scylla of a too early filing and the Charybdis of a too late filing, the government must resort to the kind of ruse it used in this case. The government filed the information against B.G.G. a few days before the statute of limitations ran, but it did not serve the information on him or otherwise notify him that it had been filed. It waited until 6:33 p.m. on the day the statute of limitations ran to serve the information, ensuring that B.G.G. could not obtain dismissal in the five hours and 27 minutes remaining before the statute expired. Two days later, after the statute of limitations had run, the government itself moved to dismiss the information.[3]

If B.G.G. had somehow succeeded in obtaining dismissal of the information in the brief interval before the statute of limitations expired, the government would likely have turned to 18 U.S.C. § 3289. That statute provides a six-month extension of the statute of limitations, under conditions similar to those in § 3288, when an indictment or information is dismissed within six months of the expiration of the

[3] In some other cases, the government has waited for the defendant to move to dismiss the information. The outcome is the same--the information is dismissed, usually without opposition from the government--but by delaying the dismissal the government obtains an even longer extension of the statute of limitations.

statute. To our knowledge, the government has never sought to invoke § 3289 in connection with an unconsented information purporting to charge a felony, and no court has construed the statute under those circumstances.[4] If courts begin allowing the government to use § 3289 in conjunction with an unconsented information, however, that will lead to other forms of gamesmanship. The government will delay filing the information until less than six months remain before the statute of limitations expires, and the defense will look for ways to thwart the government's maneuver. Courts will have to decide whether they must accede to the government's tactics.

The absurdity canon rests on the premise that, regardless of the language it chooses, Congress does not intend its legislation to produce absurd results. *See, e.g., Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (absurd result "makes it unreasonable to believe that the legislator intended to include the particular act"); *Sorrells v. United States*, 287 U.S. 435, 446-48 (1932) (same); *Patel v. United States AG*, 917 F.3d 1319, 1330 (11th Cir. 2019) ("Our job when interpreting statutes is to faithfully effectuate legislative intent, and we assume that Congress would not intend truly absurd results."); *see also Gilbert*, 136 F.3d at 1454 (government's

[4] This may explain why the government used subterfuge in this case to ensure that the dismissal occurred after the statute of limitations had run and then relied on § 3288, rather than openly filing the information weeks or months in advance of the limitations date and relying on § 3289.

interpretation of 18 U.S.C. § 3284 "would place the offense of concealment of assets in the same category as capital offenses, the extraordinary offenses for which no limitation exists. We cannot agree that Congress intended that result."). It is hard to imagine a more absurd result than the cat-and-mouse game the government's proposed interpretation of §§ 3282 and 3288 will produce. Congress surely did not intend to create a statutory scheme where the government sneaks into court to file an obviously defective information too late for the defendant to obtain dismissal before the statute of limitations expires. Nor did Congress intend to create a scheme where the government deliberately delays filing an obviously defective information until it is within the six-month horizon in § 3289, for the sole purpose of adding six months to the statute of limitations. The absurdity canon exists to preclude precisely this kind of nonsense.

II. THIS COURT SHOULD NOT FOLLOW THE SEVENTH CIRCUIT'S POORLY REASONED DECISION IN *BURDIX-DANA*.

The government relies heavily on the Seventh Circuit's decision in *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998). Brief for the United States in Support of Government Appeal Under Seal ("G. Br.") at 30-31, 39. Most district court decisions adopting the government's view have done likewise. For several reasons, however, *Burdix-Dana* is poorly reasoned and unpersuasive.

First, the Seventh Circuit ignored the plain meaning of the term "instituted." Instead, it equated that term with "filed," even though Congress surely would have

chosen "filed" if that had been its intent. Second, the *Burdix-Dana* court violated the principle that criminal statutes of limitations must be liberally construed in favor of repose. The court never mentioned that principle. It noted that "the statutory language does not compel" the reading of § 3282(a) that the defense urged (and that B.G.G. urges here), 149 F.3d at 743, but that observation (in addition to being wrong) has it backward. Given the Supreme Court's mandate to construe statutes of limitations liberally in favor of repose, the Seventh Circuit should have adopted the meaning of "instituted" that the defense advanced, unless the statutory language compelled *the government's* reading--which it does not.

Third, the *Burdix-Dana* court relegated *Jaben* to a footnote, ignored the analysis in that case, and simply declared without explanation that "[t]he considerations that led the Court to its conclusion in *Jaben* were specific to the statute under review, and therefore the case is distinguishable from the one we currently address." *Id*. at 742 n.1. As appellee demonstrates, however, the analysis of the tax statute of limitations (26 U.S.C. § 6531) in *Jaben* fits neatly with § 3282 and squarely supports the interpretation that B.G.G. urges. App. Br. 15-17.

Finally, the Seventh Circuit acknowledged that "by equating 'instituted' with 'filed' and then applying 18 U.S.C. § 3288, we have allowed 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."

149 F.3d at 743. The court downplayed the absurd result its interpretation produced, however, because the defendant does not have to "rest[] on her rights" and could instead move for dismissal of the information. *Id*. But that ignores the obvious fact that even if the defendant obtains dismissal the day the information is filed, the government will still have obtained an automatic six-month extension of the limitations period under § 3288 merely by filing an information on which the district court is powerless to act. As we have addressed above, that is an absurd reading of § 3282 and one Congress could not have intended.

For these reasons, *Burdix-Dana* was wrongly decided, as were the district court cases that have followed it. The district court was correct to reject the Seventh Circuit's reasoning.

III. CONGRESS' REJECTION OF THE TOLLING LEGISLATION PROPOSED BY THE DEPARTMENT OF JUSTICE WEIGHS AGAINST THE GOVERNMENT'S INTERPRETATION.

The government acknowledges that, early in the coronavirus pandemic, the Department of Justice asked Congress to enact legislation that, among other provisions, would suspend or toll statutes of limitations during emergencies. G. Br. 35-36.[5] A proposed 28 U.S.C. § 1660--applicable "in the event of a natural disaster, civil disobedience, or other emergency situation requiring the full or partial closure

[5] The legislation proposed by DOJ can be found at https://int.nyt.com/data/documenthelper/6835-combed-doj-coronavirus-legisla/06734bbf99a9e0b65249/optimized/full.pdf#page=1.

of courts or other circumstances inhibiting the ability of litigants to comply with deadlines" imposed by statutes or rules of procedure--would have authorized "the chief judge of any trial court of the United States that has been affected" to "delay, toll, or otherwise grant relief from" all statutory deadlines, including "otherwise applicable statutes of limitation." A proposed 18 U.S.C. § 3302, titled "Emergency Suspension of Limitations," would have suspended the statute of limitations for all federal crimes during the period of any national emergency and for one year afterward, upon a finding by the Chief Justice "that emergency conditions will materially affect the functioning of the federal courts."

The government suggests that Congress refused to enact DOJ's proposed legislation "because it knew that existing law--including 18 U.S.C. §§ 3282 and 3288 as properly interpreted by the overwhelming majority of courts--held that the filing of an information tolled the statute of limitations and adequately protected the public interest as well as the Government and defendants." G. Br. 35. But this argument is self-defeating; if the "existing law" were as the government maintains, DOJ would have had little reason to propose the legislation. It is fair to infer that DOJ proposed the legislation because it knew its interpretation of §§ 3282 and 3288 would never withstand careful analysis.

The government also ignores the withering condemnation from across the political spectrum that greeted DOJ's proposed legislation. Senator Mike Lee (R-

Utah) tweeted, "OVER MY DEAD BODY." Senate Minority Leader Chuck Schumer (D-N.Y.) tweeted, "Two Words: Hell No." Rep. Alexandria Ocasio-Cortez (D-N.Y.) tweeted "Absolutely not," and Doug Stafford, chief strategist for Senator Rand Paul (R-Ky.), agreed. Reps. Justin Amash (I-Mich.) and Earl Blumenauer (D-Ore.) likewise condemned the DOJ proposals.[6] These bipartisan reactions hardly suggest that Congress thought existing law already provided the relief DOJ sought. They suggest instead that legislators thought DOJ was exploiting the pandemic to chip away at the vital protections statutes of limitations afford.

CONCLUSION

The government's proposed interpretation of §§ 3282 and 3288 amounts to little more than a trick, a play on words. It is the sort of too-clever-by-half approach that this Court squarely rejected in *Gilbert*. The district court correctly refused to endorse the government's ruse. This Court should affirm.

[6] For accounts of the DOJ proposals and the congressional reaction, see, *e.g.*, Riley Beggin, *DOJ asks Congress for broad new powers amid Covid-19. Schumer says, "Hell no."*, Vox.com, Mar. 22, 2020, https://www.vox.com/policy-and-politics/2020/3/22/21189937/coronavirus-department-justice-doj-powers; Rebecca Falconer, *DOJ emergency powers report raises ire among conservatives and liberals*, Axios.com, Mar. 22, 2020, https://www.axios.com/report-doj-seeks-emergency-powers-criticized-9703e85b-cc22-4899-a17c-1deefa378cdf.html.

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Case No. 21-10165-RR

I certify that pursuant to Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3577 words.

/s/ John D. Cline
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