No. 24-284

In the Supreme Court of the United States

ANDRE RICARDO BRISCOE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITIONER

JEFFREY T. GREEN
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L Street, NW
Washington, DC 20036

AMY MASON SAHARIA
Counsel of Record
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5847
asaharia@wc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Other Authorities—cont'd:

In the Supreme Court of the United States

No. 24-284

ANDRE RICARDO BRISCOE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF AMICUS 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

* Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

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 U.S. 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.

NACDL has a particular interest in ensuring that federal prosecutors adhere to the limitations period carefully specified by Congress for federal felony offenses. NACDL submits this brief to express its concern that the decision below, and identical decisions by other courts, will allow prosecutors unilaterally to extend the statute of limitations in every criminal case without congressional authorization.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the government's urging, the court of appeals adopted below a dangerous interpretation of 18 U.S.C. § 3282(a). Under that statute, the government cannot prosecute an individual "unless the indictment is found or the information is instituted" within five years of the offense. The Fifth Amendment to the United States Constitution requires an indictment to prosecute a felony offense. Rule 7 of the Federal Rules of Criminal Procedure implements the Fifth Amendment's indictment guarantee by authorizing prosecution by information in felony cases only with the defendant's consent. Notwithstanding these undisputed principles, the Fourth Circuit held below that the government "institute[s]" an information, and thus satisfies the statute of limitations,

merely by filing on the docket an information signed by a prosecutor, even without the defendant's consent. The Court should grant certiorari and reverse that deeply misguided decision.

The decision below misconstrues 18 U.S.C. § 3282(a)'s text, which requires federal prosecutors to secure a grand-jury indictment or "institute[]" an information within five years of a non-capital felony offense. Only a *valid* information—one to which the defendant consents—is capable of "institut[ing]" a federal felony prosecution under the Federal Rules of Criminal Procedure and the Fifth Amendment. The Fourth Circuit thus erred by reading § 3282(a) to mean that filing an *invalid* information over a defendant's objection—while unable to serve the primary function of a charging document (*i.e.*, beginning a prosecution)—nevertheless qualifies as "institut[ing]" an information under § 3282(a). The Fourth Circuit's reading conflicts with the plain text, but even if the text were ambiguous, the constitutional-avoidance canon, the canon in favor of repose, and the canon against absurdity all require reading the statute in petitioner's favor.

The decision below is impossible to square with this Court's interpretation of a materially similar statute in *Jaben v. United States*, 381 U.S. 214 (1964). There, this Court held that, for a "complaint" under Federal Rule of Criminal Procedure 3 to be "instituted" for purposes of a different statute of limitations, the complaint "must be adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules." *Id.* at 220. The information in this case flunks that test. A straightforward application of *Jaben* supports petitioner's position.

The consequences of the decision below are staggering. The decision creates a gargantuan loophole in § 3282(a)'s bright-line five-year limitations period by permitting federal prosecutors unilaterally to extend the limitations period in any federal felony case merely by signing and filing an invalid information charging a defendant with significant criminal offenses. When the Department of Justice asked Congress to toll federal statutes of limitations early in the COVID-19 pandemic, Congress loudly rejected that proposal. The decision below permits prosecutors to evade Congress' policy choice, and encourages gamesmanship regarding federal statutes of limitations—undermining the principles of predictability, promptness, diligence, and finality that animate statutes of limitations.

ARGUMENT

I. The Decision Below Is Wrong.

A. The Fourth Circuit's Reading of 18 U.S.C. § 3282(a) Flouts the Statutory Text.

The Fourth Circuit misread § 3282(a)'s plain text. Even assuming that the Fourth Circuit's reading was one of multiple possible meanings that the statutory text *could* bear, that reading also runs afoul of no less than three bedrock canons of statutory interpretation.

1. The statutory text unambiguously requires a valid information to satisfy the statute of limitations.

Section 3282(a) establishes a five-year limitations period for non-capital federal crimes as follows:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless

> the indictment is found or the information is instituted within five years.

The question presented is whether the government "institute[s]" an information for purposes of the statute of limitations in a felony case by filing an information without the defendant's consent.

The statutory text unambiguously answers that question in petitioner's favor. Construing this provision must necessarily commence with its plain text. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016). The relevant text—"the information is instituted"—originates in § 32 of the Act of Congress of April 30, 1790. Congress provided in relevant part in that statute that no person "shall . . . be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or *information* for the same shall be found or *instituted* within two years from the time of committing the offence." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 337 (1805) (emphases added).

In 1790, to "institute" meant "[t]o fix; to establish; to appoint; to enact; to settle; [or] to prescribe" something. *Institute*, Johnson's Dictionary of the English Language (1773); *see also Torres v. Madrid*, 592 U.S. 306, 313 (2021) (citing Johnson's 1773 Dictionary as evidence of the meaning of terms "at the founding"). The same is true now. Under modern parlance, to "institute" something means "to originate and get established" or "to set going." *Institute*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014); *see also Institute*, Oxford English Dictionary ("To set up, establish, found, ordain; to introduce, bring into

use or practice.")[1]; *Institute*, Black's Law Dictionary (12th ed. 2024) ("To begin or start; commence <institute legal proceedings against the manufacturer>."); *Gollust v. Mendell*, 501 U.S. 115, 124 (1991) (similar definitions).

Absent a waiver of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure, an information purporting to charge a felony does not "establish," "originate," or "set going" anything. Such an information is a legal nullity. Under Rule 7(a), "[a]n offense . . . *must* be prosecuted by an indictment if it is punishable . . . by imprisonment for more than one year." Fed. R. Crim. P. 7(a)(1) (emphasis added). A felony defendant cannot be arraigned on an information without waiver. *See* Fed. R. Crim. P. 10 adv. comm. notes to 2002 amendment. As a result, such a document does not commence any criminal proceedings. An information is "instituted" only when it is effective to "establish" or "originate" a federal criminal case; and it is effective to do so only when it either charges a misdemeanor or charges a felony and is accompanied by a waiver of indictment. *See* Fed. R. Crim. P. 7(a)(2), 7(b), 58(b)(1).

The broader statutory scheme confirms this reading. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). As the petition highlights, in other statute-of-limitations provisions in the same chapter of Title 18, Congress used the words "information is filed." Pet. 18-19; *see* 18 U.S.C. § 3293 ("No person shall be prosecuted, tried, or punished for a violation of, or conspiracy

---

[1] https://www.oed.com/dictionary/institute_v?tab=meaning_and_use (last visited Sept. 20, 2024).

to violate [various laws relating to financial institutions] . . . unless the indictment is returned or the information is filed within 10 years after the commission of the offense."); *id.* § 3294 ("No person shall be prosecuted, tried, or punished for a violation of or conspiracy to violate section 668 [regarding the theft of major artwork] unless the indictment is returned or the information is filed within 20 years after the commission of the offense."); *id.* § 3300 ("No person may be prosecuted, tried, or punished for a violation of section 2442 [regarding the recruitment or use of child soldiers] unless the indictment or the information is filed not later than 10 years after the commission of the offense.").

For present purposes, the Court need not decide whether the filing of an unconsented-to, invalid information would satisfy those statutes or would violate the Fifth Amendment right to a grand-jury indictment. *See infra* Part I.A.2. The key point here is that § 3282(a) uses "instituted," whereas similar statutory provisions use "filed." Reading "instituted" to mean "filed" would violate the fundamental canon that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (second alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

2. Even if § 3282(a) were ambiguous, canons of construction require reading the statute in petitioner's favor.

At best, the meaning of "instituted" in § 3282(a) is ambiguous. In that case, three fundamental canons of construction require reading the statute to foreclose the reading adopted by the Fourth Circuit below.

a. First, constitutional-avoidance principles point against the Fourth Circuit's interpretation. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and . . . an alternative interpretation of the statute is 'fairly possible,'" federal jurists "are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932), and citing *Ashwander v. TVA*, 297 U.S. 288, 341, 345-48 (1936) (Brandeis, J., concurring)). This Court requires federal courts to "construe statutes 'to avoid not only the conclusion that they are unconstitutional, but also grave doubts upon that score'" whenever a reasonable alternative construction exists. *United States v. Palomar-Santiago*, 593 U.S. 321, 328-29 (2021) (cleaned up) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

Reading § 3282(a) to permit the government to satisfy the statute of limitations by filing an unconsented-to (and thus invalid) information would effectively allow the government to commence a felony prosecution by way of information. But when "[t]he crime charged . . . is a felony . . . the Fifth Amendment requires that prosecution be begun by indictment." *Stirone v. United States*, 361 U.S. 212, 215 (1960). Rule 7 "gives effect" to this constitutional requirement. Fed. R. Crim. P. 7 adv. comm. notes to 1944 adoption. Under Rule 7(a)(1), any offense that "is punishable . . . by imprisonment for more than one year"—*i.e.*, all federal felonies, *see* 18 U.S.C. § 3559(a)—"*must* be prosecuted by an indictment," Fed. R. Crim. P. 7(a)(1) (emphasis added). Rule 7(b), in turn, reflects the voluntarily waivable nature of many constitutional rights by providing a mechanism that allows the government to prosecute federal felonies by way of criminal information, despite the lack of a grand-jury indictment, with the defendant's consent:

> An offense punishable by imprisonment for more than one year may be prosecuted by information if 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.

Because Rule 7 implements the Fifth Amendment's indictment guarantee, strict compliance with the Rule is mandatory. In *Smith v. United States*, 360 U.S. 1 (1959), the government purported to charge a capital offense by information after obtaining a waiver of indictment. Under Rule 7(a) as it then stood, a capital offense could only be prosecuted by indictment; a defendant charged with a capital offense could not waive indictment. Because Rule 7(a) did not permit the district court to proceed by information, even with a waiver, this Court concluded that "the United States Attorney did not have authority to file an information in this case and the waivers made by petitioner were not binding and did not confer power on the convicting court to hear the case." *Id.* at 10.

The same principle holds true here. The government could not commence a valid prosecution of petitioner by filing an unconsented-to information. Such a prosecution would have violated both the Fifth Amendment and Rule 7. The Fourth Circuit expressly acknowledged below that the government was required under Rule 7(b) "to timely indict" Briscoe because "his crimes were punishable by imprisonment for more than one year" and he "did not waive prosecution by indictment." Pet.App.10a. Yet, under the decision below, an invalid information that all agree could not constitutionally commence a prosecution nonetheless was held to satisfy the five-year statute of

limitations under § 3282(a)—and thus effectively to commence a criminal proceeding. The constitutional implications of that holding are striking.

b. Second, decades of this Court's precedent teach that statutes of limitations in federal criminal cases must be "liberally interpreted in favor of repose." *Toussie v. United States*, 397 U.S. 112, 115 (1970) (citation omitted); *see also, e.g., United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *United States v. Scharton*, 285 U.S. 518, 522 (1932). That interpretative principle implements Congress' policy choice, reflected in § 3282(a), that "the statute of limitations should not be extended '[e]xcept as otherwise expressly provided by law.'" *Toussie*, 397 U.S. at 115.

The interpretation adopted below undermines repose, by allowing the government to extend the five-year limitations period unilaterally merely by filing an information without a defendant's consent. Application of the canon in favor of repose requires rejecting the Fourth Circuit's interpretation.

The court of appeals defended its decision by reasoning that its reading of § 3282(a) "comports with [the statute's] purpose." Pet.App.13a. According to that court, the purpose of the statute of limitations is to put a defendant on notice, and an unconsented-to information "comports with that purpose when it puts a defendant on notice of the crimes charged within the period designated by the statute." Pet.App.13a. That reasoning gravely misunderstands—and undermines—the myriad *other* purposes of statutes of limitations.

As this Court has recognized, statutes of limitations advance multiple important legislative priorities. They "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 115. They achieve this goal in a bright-line way "by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced," which in turn "provide[s] predictability" for both criminal defendants and federal prosecutors. *Marion*, 404 U.S. at 322. And, among other purposes, they produce "the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie*, 397 U.S. at 114-15.

The filing of an unconsented-to (and thus invalid) information advances none of these purposes. This tactic undermines predictability. Because an unconsented-to information is ineffective to commence a prosecution, a defendant cannot predict five years after completion of the offense whether he will face prosecution. At most, he knows only that the prosecutors wish to indict him. Whether the prosecutors will convince a grand jury to indict him, after the statute of limitations has run, is another matter altogether. And it should go without saying that allowing prosecutors unilaterally to buy themselves an extension of the limitations period by filing an invalid information *discourages* prompt investigation of criminal activity.

The Fourth Circuit's interpretation is directly contrary to the principle requiring statutes of limitations to be interpreted in favor of repose. In light of this principle, the only permissible interpretation of § 3282(a) is that, to qualify as an "instituted" information in a federal felony case, an information must be *independently* capable of beginning the criminal process. If not, it cannot be used to avoid repose under § 3282(a) (as happened here).

c. Finally, the government's reading of § 3282(a) violates the principle that "statutes should receive a sensible construction" that "effectuate[s] the legislative intention, and, if possible . . . avoid[s] an unjust or an absurd conclusion." *In re Chapman*, 166 U.S. 661, 667 (1897); *see also, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided" in construing statutes). The absurdity canon reflects the common-sense notion that, regardless of the language it chooses when it enacts a statute, Congress never intends its legislation to produce absurd results. *See*, *e.g.*, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (an interpretation that requires an 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).

Congress surely does not intend for the language "information is instituted" to create a truck-sized loophole to permit federal prosecutors unilaterally to extend the applicable limitations period by filing an information containing charges that were "*required*" to be brought via a "timely indict[ment]." Pet.App.10a. If Congress intended that result, it would have simply enacted a longer statute of limitations, or would have given the Executive the power to extend the statute by putting the defendant on notice of the contemplated charges by way of an invalid information. The notion that Congress intended to accomplish those results with the language "information is instituted" defies common sense. After all, Congress "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

* * *

Together, these interpretive principles point to a single reasonable interpretation of 18 U.S.C. § 3282(a), one

that protects a defendant's Fifth Amendment indictment right, favors repose, and avoids granting prosecutors the unilateral power to extend the statute of limitations.

B. The Decision Below Conflicts with This Court's Interpretation of a Materially Similar Statute in *Jaben v. United States*.

The Fourth's Circuit's contrary reading of § 3282(a) inescapably conflicts with this Court's reading of a materially similar statute in *Jaben v. United States*, 381 U.S. 214 (1964). The statute at issue in *Jaben* (Internal Revenue Code § 6531 (1954)) "require[d] the Government to obtain an indictment for [the offense of willfully attempting to evade federal income taxes] within six years of the date of its commission." *Id.* at 215. The statute, however, contained the following exception:

> Where a complaint *is instituted* before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States.

Id. at 215-16 (emphasis added).

The question presented in *Jaben* was whether the filing of a complaint under Federal Rule of Criminal Procedure 3 satisfied this exception even if the complaint was inadequate to justify the defendant's arrest and detention under Rules 4 and 5 because it lacked probable cause. *Id.* at 217. The Court observed that the government's position "ignore[d] the further steps in the complaint procedure required by Rules 4 and 5." *Id.* In so doing, the government's interpretation "deprive[d] the institution of the complaint before the Commissioner of

any independent meaning which might rationally have led Congress to fasten upon it as the method for initiating the nine-month extension." *Id.* at 218. The Court further noted that, under the government's view, the statutory exception "provides no safeguard whatever to prevent the Government from filing a complaint at a time when it does not have its case made, and then using the nine-month period to make it." *Id.* at 220.

Given these obvious flaws in the government's reading of the statute, the Court held that "[t]he better view of § 6531 is that the complaint, to initiate the time extension, *must be adequate to begin effectively* the criminal process prescribed by the Federal Criminal Rules." *Id.* (emphasis added). This Court then went on to explain that, to be "adequate," a complaint under § 6531 "must be": (1) "sufficient to justify the next steps in the process—[*i.e.*,] those of notifying the defendant and bringing him before the Commissioner for a preliminary hearing"; and (2) "the government must proceed through the further steps of the complaint procedure by affording the defendant a preliminary hearing." *Id.* The Court explained that its interpretation of the phrase "complaint is instituted" properly "reflect[ed]" the statute's "purpose by ensuring that[,] within a reasonable time following the filing of the complaint, either the Commissioner will decide whether there is sufficient cause to bind the defendant over for grand jury action, or the grand jury itself will have decided whether or not to indict." *Id.*

The problems with the government's position in *Jaben* are just as glaring here. Just as in *Jaben*, the government interprets § 3282(a) by ignoring the rules (and, indeed, constitutional provisions) that govern criminal informations. In so doing, the government "deprives the

institution of the [information] of any independent meaning which might rationally have led Congress to fasten upon it" as the mechanism for satisfying the statute of limitations. *Id.* at 218. Congress did not rationally specify that the mere filing of an information that cannot validly commence a criminal felony prosecution nonetheless satisfies the statute of limitations.

So too, the government's interpretation of § 3282(a) "provides no safeguard whatever to prevent the Government from filing [an information] at a time when it does not have its case made," and then making its case to a grand jury after the statute of limitations has run. *Id.* In that situation, the government will argue, as it did here, that the untimely grand-jury indictment relates back to its timely but invalid information. *See* Pet.App.11a-12a. By this two-step process, it will have accomplished what it could not accomplish before the statute of limitations had run.

The only sensible interpretation of "instituted" in § 3282(a) is the same interpretation this Court adopted in *Jaben*: an information is "instituted" only when it is "adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules." 381 U.S. at 220. It is undisputed that the information filed in this case does not meet that standard.

II. The Decision Below Will Incentivize Gamesmanship by Prosecutors To Circumvent the Statutes of Limitations Enacted by Congress.

If the decision below is allowed to stand, future federal prosecutors will treat the statute of limitations enacted by Congress as a mere suggestion.

1. In our divided system of government, Congress is the entity that specifies the statute of limitations for federal criminal offenses. And Congress is the entity that creates exceptions to the statute of limitations. As the Fifth Circuit explained just last month in rejecting the government's argument for equitable tolling of the statute of limitations during the COVID-19 pandemic under § 3282(a), Congress knows full well how to "expressly provide[] for the extension or tolling of criminal statutes of limitations." *United States v. Plezia*, --- F.4th ----, 2024 WL 2894911 at *7 (5th Cir. 2024). Congress has done so, for example, "for the government to obtain evidence of an offense from a foreign country, during wartime, and during periods where a fugitive flees from justice, among other occurrences." *Id.* (citations omitted). By contrast, that list of exceptions does not include "any word from Congress providing that a global health crisis suspends a criminal statute of limitations." *Id.*

The decision below infringes Congress' prerogative to set criminal statutes of limitations. In the early days of the COVID-19 pandemic, the Department of Justice asked Congress to pass legislation that could have rendered the original indictment in this case timely. For example, the Department proposed that Congress amend Chapter 111, Title 28 of the United States Code by adding 28 U.S.C. § 1660, which would have permitted "the chief judge of any trial court in the United States" to "delay, toll, or otherwise grant relief from" (among other things) "otherwise applicable statutes of limitation" in the event of "a natural disaster, civil disobedience, or other emergency situation[s] requiring the full or partial closure of the courts or other circumstances inhibiting the ability of litigants to comply with deadlines imposed by statutes or by the rules of procedure applicable in the courts of the

United States."[2] The Department's proposal included the following draft provision:

> (b) CRIMINAL CASES AND CIVIL ENFORCEMENT ACTIONS—In setting new time limits under this section for criminal cases and civil enforcement actions brought by the government, the court shall consider the government's ability to investigate, litigate and process defendants during and beyond the emergency situation.

DOJ Legislative Proposal 7.

In its proposal, the Department explained that—although courts could "be expected to give consideration to the difficulties faced by all litigants" when deciding whether and how to exercise their new powers under the proposed legislation—it specifically "designed" § 1660(b) "to ensure that . . . court[s] also give appropriate consideration to the unique needs that may be imposed on the federal government in responding to the types of emergencies that could result in the need to seek to invoke the authority provided in section 1660." *Id.* at 8.

The Department's proposal met with bipartisan condemnation. Republican Senator Mike Lee responded,

---

[2] The full text of this proposed legislation can be found here: https://int.nyt.com/data/documenthelper/6835-combed-doj-coronavirus-legisla/06734bbf99a9e0b65249/optimized/full.pdf#page=1. [hereinafter "DOJ Legislative Proposal"].

"OVER MY DEAD BODY," while Democrat Senate Minority Leader Chuck Schumer responded, "Hell No."[3] Congress rejected the Executive Branch proposal.

The Department apparently turned to the gambit of filing invalid informations over defendants' objections after Congress rejected its plea to extend the statute of limitations.[4] The decision below sanctions this gambit, giving unelected prosecutors the power to extend the statute of limitations unilaterally even after Congress has said no.

The decision below eliminates the need to convince a grand jury within the five-year limitations period enacted by Congress. If the government has not yet put together a case that will convince a grand jury to indict by the end of the five-year period, the government can simply type

---

[3] 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 (Mar. 22, 2020), https://www.vox.com/policy-andpolitics/2020/3/22/21189937/coronavirus-department-justice-doj-powers; Rebecca Falconer, DOJ emergency powers report raises ire among conservatives and liberals, Axios (Mar. 22, 2020), https://www.axios.com/report-doj-seeksemergency-powers-criticized-9703e85b-cc22-4899-a17c-1deefa378cdf.html.

[4] As one example, DOJ asked Congress to extend the statute of limitations on certain anti-trust prosecutions. *See* Leah Nylen & Betsy Swan, DOJ wants more time on merger reviews, price-fixing cases because of pandemic, Politico (Mar. 21, 2020), https://www.politico.com/news/2020/03/21/doj-merger-reviews-coronavirus-140669. After failing to receive its desired extension, the government purported to charge Glenmark Pharmaceuticals in an invalid information in June 2020. *See* Notice of Objection to Proceeding by Criminal Information at 1, *United States v. Glenmark Pharmaceuticals Inc., USA*, No. 2:20-cr-200 (E.D. Pa. July 3, 2020), ECF No. 8 (objecting "to the government's attempt to bypass the grand jury process and proceed by criminal information in a felony criminal case").

up an information on the last day of the five-year period, sign it, and file it on CM/ECF, without any action by a grand jury or other neutral decisionmaker. And voilà: by that simple expedient, the government has now bought itself additional time to put together its case to obtain an indictment. That cannot be right.

2. Although this case arose during the COVID-19 pandemic, the consequences of the decision below extend far beyond the pandemic. Nothing in the decision below limits the Fourth Circuit's holding to the pandemic context in particular or to extraordinary circumstances more generally.

The Fourth Circuit decision followed in the footsteps of an earlier decision of the Seventh Circuit, *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998). In *Burdix-Dana*, the Seventh Circuit rejected the position petitioner advances here—and, by extension, the near-identical position adopted by this Court in *Jaben*—without finding any extraordinary circumstances at all. *Id.* at 742. The government in that case filed an information charging the defendant with a felony offense without her consent; it later obtained a grand-jury indictment charging the same offense after the statute of limitations had run. *Id.* The Seventh Circuit's opinion identifies no reason at all, whether extraordinary or otherwise, for the government's delay.

The Seventh Circuit acknowledged that "the government could not have held Burdix–Dana to answer for a felony solely on the basis of the information." *Id.* at 743. Nonetheless, it held that the government's filing of the unconsented-to information satisfied § 3282(a) because "Rule 7(b) does not forbid filing an information without a waiver," but rather "it simply establishes that prosecution may not proceed without a valid waiver." *Id.* at 742 (citing

United States v. Cooper, 956 F.2d 960, 962 (10th Cir. 1992)). Under the Seventh Circuit's reasoning, in every single case the government may extend the time in which to indict a defendant by filing an information without her consent.

To be sure, emergencies arise from time to time. Computers crash. Hurricanes or blizzards strike. Prosecutors get sick. These contingencies, and the bright-line nature of the statute of limitations, are why prudent prosecutors investigate and charge criminal activity promptly.

Just like any statute of limitations, § 3282(a) incentivizes federal prosecutors to obtain grand-jury indictments as soon as they can (or, at a minimum, to begin engaging the necessary legal machinery early enough to enable them to do so within five years). When prosecutors fail to begin a valid prosecution within five years, be it due to their own decisionmaking or to circumstances beyond their control, § 3282(a) provides exactly one result: prosecution is barred. If the Executive wishes to change this rule, it must ask Congress to do so by legislation. The Executive cannot change the rules that govern its conduct by itself.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JEFFREY T. GREEN
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L Street, NW
Washington, DC 20036

AMY MASON SAHARIA
Counsel of Record
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5847
asaharia@wc.com

Counsel for Amicus Curiae

SEPTEMBER 20, 2024