No. _____

In the
Supreme Court of the United States

JORDAN M. JUCUTAN
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Wartime Suspension of Limitations Act permit a prosecution, otherwise time-barred, for offenses not involving fraud against the United States?

Does the Wartime Suspension of Limitations Act permit a prosecution, otherwise time-barred, for offenses based on their relation to the "global war on terror?"

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is unpublished, but is available on Westlaw at 2018 WL 6445749, and appears as Appendix A to this Petition. The decision of the District Court for the Northern Mariana Islands is unpublished. It appears as Appendix B to this Petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit decided this case December 10, 2018. A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals on January 16, 2019. The order denying the petition appears at Appendix C to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1028A:

> (a)(1) Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years[.]").
>
> . . .
>
> (c) For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of —
>
> . . .
>
> (5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud)

18 U.S.C. § 1343[1]:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses,

[1] This provision is contained in chapter 63 of title 18, U.S. Code.

> representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. . . .

18 U.S.C. § 3282(a)

> 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 next after such offense shall have been committed.

18 U.S.C. § 3287:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.
>
> . . .

STATEMENT OF THE CASE

Statement of Material Facts

Between 2005 and 2012, certain branches of the United States military entered into arrangements with private companies, whereby the companies would assist the military in the process of recruitment. One such company was Document and Packaging Brokers, Inc. (Docupak), which administered a Recruiting Assistance Program (called G-RAP) for the National Guard, and another (called AR-RAP) for the Army Reserve.

To carry out these programs, Docupak hired freelancing servicemen (called Recruiting Assistants, or RA's) for the purpose of encouraging others to enlist. Docupak paid its RA's a $1000 bonus for each person whom the RA successfully persuaded to enlist, plus another $1000 if the recruit went on to attend basic training. An RA would claim his bonus by entering the recruit's identification information onto Docupak's website.

Accusations quickly arose that RA's were claiming and collecting bonuses for the enlistment of people whom they had not actually recruited – *e.g.*, persons who had joined the military for reasons of their own, unrelated to any efforts of the RA to recruit them. Much litigation ensued, including many criminal prosecutions.[2] This case arises out of one such prosecution.

Jordan M. Jucutan, an Army Reservist, worked as an RA for Docupak. From 2007 to 2009, he claimed bonuses for several recruits, including the four at issue in this case, individuals known by the initials E.S., J.L., D.G., and R.G. Most of Jucutan's claims were made in 2007. The last, for R.G., was made on June 6, 2009.

Jucutan was charged in this case with attempting to defraud Docupak by making these claims. He was charged with four counts of wire fraud, in violation of 18 U.S.C. § 1343, for having sent interstate wire signals for the purpose of executing a scheme to defraud; and four counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A, for having used other persons' identification documents in connection with that scheme.

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[2] *See, e.g.*, United States v. Melendez-Gonzalez, 892 F.3d 9 (1st Cir. 2018), *aff'g* United States v. Costas-Torres, 255 F. Supp. 3d 322 (D.P.R. 2017); United States v. Osborne, 886 F.3d 604 (6th Cir. 2018), *rev'g* 180 F. Supp. 3d 507 (M.D. Tenn. 2016); ; United States v. Constantino, 2016 WL 1170940 (D. Guam 2016); United States v. Aponte-Garcia, 2016 WL 7373882 (D.P.R. 2016); United States v. Rivera-Rodriguez, 2016 WL 3774200 (D.P.R. 2016); United States v. Rodriguez-Colon, 2016 WL 3080778 (D.P.R. 2016); United States v. Reppart, 2015 WL 6437192 (N.D. Ohio 2015).

The indictment was not handed down, however, until December 10, 2015, which was more than six years after the last act charged. Since both crimes charged bear a statutory limitations period of five years, pursuant to 18 U.S.C. § 3282, the prosecution would ordinarily have been time-barred. The Government contended, however, that the limitations period was tolled by the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287. The district court agreed, as did the Ninth Circuit, by a 2-1 vote. *See* Memorandum, Appendix A.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court for the Northern Mariana Islands had jurisdiction pursuant to 18 U.S.C. § 3231 (granting district courts jurisdiction over "all offenses against the laws of the United States"), by way of 48 U.S.C. §§ 1821-22 (establishing the District Court for the Northern Mariana Islands, and providing that it "shall have the jurisdiction of a district court of the United States").

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in this matter because the Ninth Circuit's decision upends a policy of repose with respect to criminal limitations that this Court has long endorsed as "fundamental to our society and our criminal law;" and replaces it with a policy of prolonged and indefinite criminal liability that wrongly and unnecessarily parallels the equally prolonged and indefinite "global war on terror." *See generally* Sup. Ct. R. 10(c) (writ may be granted when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court").

The decision, moreover, is in direct conflict with a recent decision of the Tenth Circuit on the same subject. *See* Sup. Ct. R. 10(a) (writ may be granted when "a United States court of

appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

The Fundamental Policy of Repose

This Court has long held that criminal statutes of limitation are to be construed liberally, so as to favor repose:

> The purpose of a statute of limitations is 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. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose.'"

Toussie v. United States, 397 U.S. 112, 114-15 (1970) (*quoting* United States v. Habig, 390 U.S. 222, 227 (1968); United States v. Scharton, 285 U.S. 518, 522 (1932)). *See also, e.g.*, United States v. Marion, 404 U.S. 307, 323 fn. 14 (1971) ("The Court has indicated that criminal statutes of limitation are to be liberally interpreted in favor of repose."). By the same logic, *exceptions* to statutes of limitation, such as the WSLA, are construed strictly, so that the overall rule of construction is always in favor of repose:

> The Wartime Suspension of Limitations Act creates an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law. [It is] therefore to be narrowly construed.

Bridges v. United States, 346 U.S. 209, 215-16 (1953). As the Bridges Court noted, this policy has explicit congressional sanction,[3] and it has been upheld by this Court as recently as 2015.

[3] *See* 18 U.S.C. § 3282(a) ("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 next after such offense shall have been committed.") (emphasis added)

See Kellogg Brown & Root Services, Inc. v. U.S. *ex rel.* Carter, 135 S. Ct. 1970, 1978 (2015) ("We have said that the WSLA should be 'narrowly construed' and 'interpreted in favor of repose.'") (*quoting* Bridges).

By Suspending Limitations for Offenses Not Involving Fraud Against the United States, the Ninth Circuit's Decision Conflicts with Those of this Court and the Tenth Circuit.

The Ninth Circuit's decision in this case conflicts with that longstanding and fundamental policy. First, it conflicts with Bridges' holding that the WSLA is limited to offenses having *fraud against the United States* as an essential statutory element – an element which none of the offenses in this case have.[4] In doing so, moreover, it creates a sharp inter-circuit split between the Ninth and Tenth Circuits, with the Tenth Circuit recently refusing to apply the WSLA to the same kind of offense the Ninth faced in this case – *i.e.*, to fraud against a non-federal victim.[5]

Bridges, following the rule of narrowly construing exceptions to statutes of limitation, held that the application of the WSLA is "limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential element of the offense charged." Bridges, *supra*, 346 U.S. at 221. In other words, not only must such fraud be an essential element of the offense as it was committed (or allegedly committed) under the facts of the particular case, it must be an essential element as the offense as it is defined by statute. *See id.* at 222-23 ("It is the *statutory definition* of the offense that determines whether or not the statute of limitations comes within the Suspension Act.") (emphasis added).[6] Thus, for example, if a given statutory offense

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[4] *See* Sup. Ct. R. 10(c) ("a United States court of appeals has . . . decided an important federal question in a way that conflicts with relevant decisions of this Court").

[5] *See* Sup. Ct. R. 10(a) ("a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

[6] It should be noted that the broad language of Bridges applies on its face to the entire WSLA, notwithstanding the apparently disjunctive language of the statutory text. *Cf.* United States v. Wells Fargo Bank, N.A., 972 F.Supp.2d 593, 611 (S.D.N.Y. 2013) (Although its plain

"is complete without proof of fraud," then fraud is not an "essential element" of that offense, and a prosecution for that offense is therefore not subject to the WSLA, even if, as a factual matter, "fraud often accompanies it," and even if fraud was actually committed in the case and alleged in the indictment. *See id.* at 222 ("The insertion in the indictment of the words 'procured by fraud' does not change the offense charged.").

The Tenth Circuit recently addressed the question whether this same Bridges analysis applies, not only to the existence of a fraud, but also to the identity of the intended victim – *i.e.*, whether the WSLA applies only when it is an essential element of the offense that the United States was the intended victim of the fraud. In United States v. DeLia, 906 F.3d 1212 (10th Cir. 2018), a physician had been convicted of healthcare fraud, in violation of 18 U.S.C. § 1347, in connection with certain prescriptions billed to the Oklahoma state Medicaid program. In other words, as the Tenth Circuit pointed out, the acts "involved fraud against a state agency, not the federal government or a federal agency." DeLia, *supra*, 906 F.3d at 1220. The prosecution having commenced after the expiration of the applicable limitations period, the issue arose whether it was time-barred. The Government argued that the limitations period had been extended by the WSLA, but the Tenth Circuit disagreed. It began by quoting Bridges:

> Offenses involving fraud covered by the Suspension Act are "limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offense charged."

DeLia, *supra*, 906 F.3d at 1218 (*quoting* Bridges, *supra*, 346 U.S. at 221). Not only was no such fraud alleged in the case, none was required under the statute:

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text suggests that the Act applies to all frauds, *the Supreme Court has held otherwise*. Under Bridges, the WSLA *only* applies to offenses: (1) of "a pecuniary nature or of a nature concerning property[;]" (2) "in which defrauding or attempting to defraud the United States is an essential ingredient of the offense charged[.]") (*quoting* Bridges) (emphasis added, citations omitted).

> [T]he charged offense – healthcare fraud – contains no element requiring proof that DeLia defrauded the federal government. Instead, § 1347 requires proof that DeLia defrauded a "health care benefit program."

DeLia, *supra*, 906 F.3d at 1219–20. *See also id.* at 1220 ("Nothing required the jury to find that DeLia had defrauded the federal government or a federal agency."). Since there had been no statutory requirement of fraud *on the United States*, then, the Tenth Circuit held, the WSLA could not apply, regardless of whether some other entity – even one with close financial ties to the federal government – may have been defrauded:

> We conclude that the Suspension Act does not apply to the charged offense. Interpreting the Suspension Act to extend beyond offenses against the federal government and its agencies would be inconsistent with the narrow construction we must give the statute and wouldn't serve the statute's purpose – providing the federal government with additional time to discover and prosecute offenses against it during wartime.

DeLia, *supra*, 906 F.3d at 1221.

The Tenth Circuit pointed out that, if the Government had wanted to charge DeLia with a federal-specific fraud, and thus apply the WSLA, then, instead of charging him with generic health care fraud under 18 U.S.C. § 1347, which punishes a scheme "to defraud *any* health care benefit program," *id.* (emphasis added), it could instead have charged him under 42 U.S.C. § 1320a-7b, "[a] separate criminal statute," which "addresses fraud against a *federal* healthcare program." DeLia, 906 F.3d at 1219 fn.8 (emphasis added). Since it chose the generic statute over the federal-specific one, the limitations period was not suspended by the WSLA.

The Ninth Circuit reached the opposite result in this case. Neither of the offenses charged against Jucutan requires proof of fraud on the United States. One of them, wire fraud,

requires a "scheme or artifice to defraud" *someone*, but not necessarily the United States.[7] The other, aggravated identity theft, does not require either fraud *or* a federal victim, but only the unlawful use of another person's "means of identification" in the course of committing another one of an enumerated list of crimes, some of which require fraud and/or a federal victim, while others do not.[8] Thus, if the underlying offense (here, wire fraud) does not require fraud against the United States, then neither does the identity theft in conjunction with which it was committed. Indeed, fraud on the United States was not even alleged in this case. The "scheme or artifice to defraud" alleged in the indictment was "a scheme to defraud Docupak" – a private company. As in DeLia, potential fraud charges existed that require a federal victim as an essential element of the offense, such 18 U.S.C. § 287 (false, fictitious or fraudulent claims against United States)[9] or 18 U.S.C. § 371 (conspiracy to defraud United States).[10] But these were not charged against Jucutan. On the contrary, fraud on the United States was specifically *denied* by the Government. *See* Appellee's Brief, 2018 WL 1902198, at 10 fn.4 ("[T]he Government agrees [that] this case does not involve fraud against the United States.").

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7 *See* 18 U.S.C. § 1343 (penalizing the interstate transmission of messages by wire "for the purpose of executing" a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises").

8 *See* 18 U.S.C. § 1028A(a)(1) ("any felony violation enumerated in subsection (c)"). *See generally* 18 U.S.C. § 1028A(c) (enumerating various crimes).

9 "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title."

10 "If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

The Court should therefore grant the writ of certiorari in order to resolve the conflict between the Ninth and Tenth Circuits, represented by this case and DeLia, respectively, as to whether the WSLA suspends limitations even for offenses in which a fraud is alleged, but the alleged victim of the fraud is *not* the United States. A grant of the writ would not only resolve this conflict, it would provide the Court with an opportunity to vindicate its longstanding policy of construing criminal statutes of limitation in favor of repose.

By Suspending Limitations for the Duration of the "Global War on Terror," the Ninth Circuit Inverts the Traditional Construction of Statutes of Limitation in Favor of Repose.

The Ninth Circuit's decision endangers the continuing vitality of the fundamental policy of repose in another way that independently warrants the Court's attention. It represents a process in which the "global war on terror" has inverted the traditional construction of statutes related to limitation of criminal prosecutions.[11] Instead of the traditional construction in favor of repose, the WSLA is now actually being construed in favor of *exceptions* to repose.

The third prong of the WSLA – the part of the Act that the Ninth Circuit directly applied in this case – requires, as a condition of suspension of limitations in the absence of a declared war, that an offense have been committed in connection with a "contract, subcontract, or purchase order" that is itself "directly connected with or related to" a "specific authorization for the use of the Armed Forces" enacted by Congress. *See* 18 U.S.C. § 3287. However, the Ninth Circuit failed to identify any "specific authorization for the use of the Armed Forces" as its basis for applying the Act. It mentioned two such authorizations – one authorizing the use of Armed Force against those responsible for the September 11, 2001, attacks, and the other authorizing

[11] *See* Sup. Ct. R. 10(c) ("a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

their use against Iraq[12] – but it declined to specify which of the two it was relying on. Instead, it accepted Docupak's, and the Government's, reliance on the so-called "global war on terror," a term it implicitly treated as synonymous with the two resolutions together:

> The Army Reserve implemented AR-RAP to "transition[] from a stand-by reserve to an operational reserve," in light of remaining "challenges for *the Global War on Terror* (GWOT) and for manning the [Army Reserve]." Through AR-RAP, the Army Reserve hired more personnel to meet their "end-strength" goals as *the global war on terror* draw reservists into active operations. *Thus*, the district court correctly concluded that AR-RAP has a direct connection with or relationship to the use of the Armed Forces pursuant to the [September 11 Authorization] *or* the [Iraq Authorization] to combat international terrorism.

Appendix A at 3-4 (emphasis added, brackets and quotation marks by the court).

In fact, the term "global war on terror" is broader than either resolution.[13] In its original sense, invoked by President Bush shortly after the September 11 attacks, it is metaphor for anti-terrorist activities of all kinds:

> How will we fight and win this war? We will direct every resource at our command – every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war – to the disruption and to the defeat of the global terror network.

The White House, Office of the Press Secretary, *Address to a Joint Session of Congress and the American People* (Sept. 20, 2001).[14] In this sense, it is indeed global, targeting terrorists of

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[12] *See* Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) (hereinafter "September 11 Authorization"); and the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498 (Oct. 11, 2002) (hereinafter "Iraq Authorization").

[13] *Cf.* Exhibit A, dissent at 2 ("The majority implies that the [two authorizations] broadly authorize the use of the Armed Forces to 'combat international terrorism.' Neither authorization is so capacious."). Furthermore, notwithstanding the majority's enigmatic footnote regarding "waiver," the government had the "burden of showing that the Act applies." *Id*. at 4.

[14] This address is found at https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010920-8.html.

various, even conflicting, ideologies, ranging over an area from Colombia to Ireland to Japan.[15] Even in a strictly military sense, the term has been used to describe a wide variety of operations spread across dozens of countries. For example, in a 2004 report to Congress pursuant to the War Powers Resolution, President Bush included, under the rubric "Global War on Terrorism," not only military activities "in Afghanistan against al-Qaida terrorists and their Taliban supporters," but others as far afield as Georgia, Kenya, Ethiopia, Yemen, Eritrea, and Djibouti, all undertaken "[i]n furtherance of the U.S. worldwide efforts against terrorists who pose a continuing and imminent threat to the United States, our friends and allies, and our forces abroad[.]"[16] By the time of a similar report by President Obama in 2015, the scope of such operations had expanded to include actions in Iraq, Syria, Turkey, Somalia, Libya, Niger and Cameroon.[17] The latest such report, issued by President Trump late last year, lists Afghanistan, Iraq, Syria, the "Arabian Peninsula Region" (Yemen and Saudi Arabia), Jordan, Lebanon, Turkey, the "East Africa Region" (Somalia, Kenya and Djibouti), Libya, the "Lake Chad Basin and Sahel Region" (Niger, Cameroon, Chad and Nigeria), Cuba, and the Philippines.[18]

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[15] *See, e.g.*, E.O. 13224, 6 Fed. Reg. 49079 (Sept. 23, 2001) (authorizing Secretary of State to designate foreign terrorist organizations); U.S. Department of State, *Individuals and Entities Designated by the State Department Under E.O. 13224*, at https://www.state.gov/j/ct/rls/other/des/143210.htm (list of such organizations).

[16] *See* The White House, Office of the Press Secretary, *Presidential Letter* (Mar. 20, 2004), at https://georgewbush-whitehouse.archives.gov/news/releases/2004/03/20040322-3.html.

[17] *See* The White House, Office of the Press Secretary, *Letter from the President – War Powers Resolution* (Dec. 11, 2015), at https://obamawhitehouse.archives.gov/the-press-office/2015/12/11/letter-president-war-powers-resolution.

[18] *See* The White House, *Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate* (Dec. 7, 2018), at https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-5/.

How much of this "global war" is covered by either of the two congressional authorizations relied on by the Ninth Circuit is unclear and often disputed. For example, it is disputed whether any existing authorization permits the use of the armed forces against the Islamic State in Iraq and Syria (ISIS), an organization that did not even exist when the authorizations were passed.[19] Similarly, actions in the Yemen civil war have recently been denounced by both houses of Congress, in separate resolutions that would "direct[] the President to remove United States Armed Forces from hostilities in or affecting the Republic of Yemen, except United States Armed Forces engaged in operations directed at al-Qaeda or associated forces[.]" *See* S. J. Res. 54 (115th Cong., 2nd Sess.), Dec. 13, 2018; H. J. Res. 37 (116th Cong., 1st Sess.), Feb. 14, 2019. Other actions in that country as are characterized as "hostilities . . . that have not been authorized by Congress." *See id.* By adopting the view that the "global war on terror" is itself a sufficient predicate for the suspension of limitations under the WSLA, the Ninth Circuit has effectively accepted the executive's broad view of its own powers, as expressed in practice, and has adopted that broad view as its own construction of the WSLA, in place of this Court's rule of construction in favor of repose – and this in spite of congressional requirements that, to have the effect of suspending limitations, any authorization of military force must be "specific" and the authorization's connection to an underlying contract "direct," and that any exceptions to the regular five-year limitations period must be "explicit."[20] *But see* Toussie,

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19 *See generally* Charles Stimson & Hugh Danilack, *The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS*, The Heritage Foundation (Apr. 17, 2017), at https://www.heritage.org/defense/report/the-case-law-concerning-the-2001-authorization-use-military-force-and-its.

20 *See* 18 U.S.C. § 3287(3) ("specific," "direct"), 18 U.S.C. § 3282(a) ("explicit"). Notably, the restrictive terms "specifically" and "directly" appear in the WSLA with reference to "authorization[s] for the use of the Armed Forces" under the War Powers Resolution, but not with reference to actual declared wars, suggesting that Congress was well aware of the

supra, 397 U.S. at 121 ("[Q]uestions of limitations are fundamentally matters of legislative not administrative decision[.]").

Reliance on a generic, all-encompassing, "global war on terror" also masks the possibility that the AR-RAP program may have been directly connected with one authorization but not the other. The whole point of the program, after all, was to boost manpower in the Reserves by replacing reservists called up into active duty; and the necessity of doing so was most likely the direct and specific result of the conflict in Iraq. This is evident both as a matter of timing[21] and as a matter of sheer numbers: by the time of the offenses charged against Jucutan, there were more than 160,000 troops in Iraq, and less than 40,000 in Afghanistan.[22] The AR-RAP program, therefore, may well have been directly connected with the Iraq conflict but not with any other, thus with the Iraq Authorization but not the September 11 Authorization. This question becomes especially important when considering whether the period of suspension of limitation had *concluded*. On August 31, 2010, the President formally announced "that the American combat mission in Iraq has ended."[23] This announcement marked the end of "Operation Iraqi Freedom,"

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executive's tendency toward expansiveness in its interpretation of "authorizations," and wished to guard against that tendency creeping into the context of criminal statutes of limitation.

[21] The AR-RAP program began in 2005, after the Iraq conflict was underway, not in 2002, when the only operations were those pursuant to the September 11 Authorization.

[22] *See* Jason Davies, *American Forces in Afghanistan and Iraq*, https://www.jasondavies.com/american-forces-in-afghanistan-and-iraq/ (graphic combination of data originally found at N.Y. Times, *American Forces in Afghanistan and Iraq* (June 22, 2011), http://archive.nytimes.com/www.nytimes.com/interactive/2011/06/22/world/asia/american-forces-in-afghanistan-and-iraq.html?hp).

[23] *See* The White House, Office of the Press Secretary, *Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq* (August 31, 2010), at https://obamawhitehouse.archives.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq ("I am announcing that the American combat mission in Iraq has ended."). *See generally* Barbara S. Torreon, *U.S. Periods of War and Dates of Recent*

the military operation undertaken pursuant to the Iraq Authorization.[24] If this announcement is considered a "proclamation" within the meaning of the WSLA – and it certainly should be, if the term "proclamation" is construed liberally in favor of repose[25] – and if it is considered to terminate the hostilities that were specifically authorized by Congress in 2002 – as again it certainly should be[26] – then the five-year limitations period began to run again on the date it was made, meaning that prosecutions for offenses directly related to the Iraq Authorization were finally time-barred as of August 31, 2015 – almost four months *before* Jucutan's indictment on December 10, 2015. Combat operations in Afghanistan, by contrast, continued until at least December 2014, *see* Torreon, *supra*, at 7, meaning that prosecutions for offenses directly related

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Conflicts, Congressional Research Service (2018) at 9, https://fas.org/sgp/crs/natsec/RS21405.pdf.

[24] *See id.*

[25] Some courts have recently construed "proclamation" to mean only a proclamation published in the Federal Register under 44 U.S.C. §1505(a)(1). *See*, *e.g.*, United States v. Frediani, 790 F.3d 1196, 1200–01 (11th Cir. 2015); United States v. Pfluger, 685 F.3d 481, 485 (5th Cir. 2012). Yet even these courts acknowledge that this reading can lead to strange results. *See*, *e.g.*, Pfluger at 485 (noting that, under this rule, even the *first* Gulf War (1990-91) is still ongoing).

This reading is not compelled by the text, since the term "proclamation, with notice to Congress" is surely capable of including a spoken address as well as a publication. This reading also conflicts with Lee v. Madigan, 358 U.S. 228 (1959), wherein the Court held that a criminal prosecution had been improperly brought by court martial for a crime committed "in time of peace." The Lee Court recognized that the United States was still "at war" when the crime was committed in 1949, since peace was not formally proclaimed by the President until 1952. However, it held that even the same words may mean different things in different contexts, and determined that, in the criminal context, "[s]tatutory language is construed to conform as near as may be to traditional guarantees that protect the rights of the citizen." *Id*. at 235.

[26] Although some troops remained in Iraq after the President's announcement, they were now on "a different mission: advising and assisting Iraq's Security Forces, supporting Iraqi troops in targeted counterterrorism missions, and protecting our civilians." *See Remarks by the President*, *supra*; Torreon, *supra*. The "targeted antiterrorism missions" may be within the scope of the September 11 Authorization, but nothing in the new mission ("Operation New Dawn") falls clearly within the scope of the 2002 Iraq Authorization. Certainly, "advising and assisting" the new Iraqi government is a distinctly different matter from battling the old one.

to the September 11 Authorization would probably not be time-barred until December 2019 at the earliest. The importance of identifying a clear and direct connection to a particular authorization is therefore apparent for prosecutions, like this one, that were commenced after August 2015. Indeed, the importance of doing so will only increase after December 2019, when a good argument will be available to defendants that hostilities have terminated more than five years previously as to *both* congressionally authorized uses of the armed forces. Any analysis of these important issues, however, was precluded by the Ninth Circuit's peremptory acceptance of a generic "global war on terror" as justification for the suspension of limitations.

The ultimate result of accepting such a justification is that statutes of limitation will cease to be bright lines, and will instead take on the amorphous and interminable character of the "war on terror" itself. Perhaps, in these times, it is necessary that war be so. Under the Court's longstanding "policy of repose," however, the same should never be true of criminal liability. The Court should act now to prevent it from becoming so, by undertaking review of this case.

The Ninth Circuit's Approach Endangers the Policy of Repose Generally.

The Ninth Circuit's construction of the WSLA against repose in this case was not limited to the two issues discussed above – *i.e.*, disregarding the Bridges requirement of fraud against the United States, and loosely construing the requirement of a "specific authorization for the use of the Armed Forces." On the contrary, the Ninth Circuit also loosely construed every other operative term in the third prong of the statute. That prong, as noted, requires a "contract, subcontract, or purchase order" that is "directly connected with or related to" the specific authorization for the use of the Armed Forces. *See* 18 U.S.C. § 3287. The Ninth Circuit,

however, did not rely on any particular "contract,"[27] nor did it strictly require any "direct" connection between the contract and any authorization of force, even one as non-specific as the "global war on terror."[28] Loose construction of a few points has apparently engendered a tendency toward loose construction of the WSLA across the board, endangering the integrity of the whole concept of construction in favor of repose.

As already noted, construction in favor of repose is "fundamental to our society and our criminal law." Bridges, *supra*, 346 U.S. at 216. Limitations should therefore not be extended unless the applicable statutory language "*compels* such a conclusion." Toussie, *supra*, 397 U.S.

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[27] It alluded to at least three potential "contracts, subcontracts, or purchase orders" relating to the AR-RAP program: 1) a contract between Docupak and the Army Reserve; 2) a contract between Docupak and the National Guard; and 3) the task orders (i.e., purchase orders) used by the Army Reserve to request funding. *See* Appendix A at 2. It never identified which of these it relied on to meet the statutory requirement, and the first two were never introduced into evidence, leaving their terms, even their existence, uncertain – a remarkable omission that has apparently become common in prosecutions of this type. *See, e.g.*, Osborne, *supra*, 886 F.3d at 613 ("[W]e note that the government did not produce the actual contract governing the relationship between the ANG and Docupak for the relevant time period involved.").

In its actual application of the statutory requirements, the Ninth Circuit used the AR-RAP program itself in place of *any* contract establishing, defining, or regulating it. *See, e.g.*, Appendix A at 2-3 ("The government also sufficiently demonstrated that AR-RAP was 'directly connected with or related to' the United States' use of the Armed Forces[.]"); *id*. at 3-4 ("[T]he district court correctly concluded that AR-RAP had a direct connection with or relationship to the use of the Armed Forces[.]").

[28] The Ninth Circuit assumed, without analysis, that such a relation existed, but did so in reliance on facts showing only, at most, a relation, not a direct one. "Direct," at least when strictly construed in favor of repose, means without an intermediate step. *See, e.g.*, Tooling, Manufacturing and Technologies Assn. v. Hartford Fire Ins. Co., 693 F.3d 665, 673 (6th Cir. 2012) ("[i]mmediate; proximate; by the shortest course; without circuity; operating by an immediate connection or relation, instead of operating through a medium") (*quoting* BLACK'S LAW DICTIONARY (6th ed. 1990)). As noted, the goal and purpose of the program was at least one step removed from the "war" itself: reservists were recruited to take the place, *in* the Reserves, of others reservists who had been called up *out* of the Reserves into active duty in "war." *See* Appendix A at 3 (AR-RAP enabled the Reserve to "hire[] more personnel to meet their 'end-strength' goals as the global war on terror draw reservists into active operations"). Given this intermediate step, the program can bear only an indirect relation to the "war."

at 115 (emphasis added). Even where questions of war and peace are involved, counseling deference to the political branches as to the conduct and duration of the war itself, statutory language implicating criminal prosecution is nevertheless "construed to conform as near as may be to traditional guarantees that protect the rights of the citizen." Lee, *supra*, 358 U.S. at 235. The Ninth Circuit's construction of the WSLA in this case endangers all of these fundamental considerations, and should be reviewed on writ of certiorari, in order that the Court's precedents may be upheld, and the traditional guarantees they protect not be eroded.

CONCLUSION

For the foregoing reasons, Petitioner submits that the writ of certiorari should be granted.

Respectfully submitted.

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