NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

CLEVON WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In its decision below, the Eleventh Circuit held that the government tolls – *i.e.* suspends – the statute of limitations by filing an information in the district court, even when it fails to give a defendant any notice of this filing. The Eleventh Circuit also held that the word "institute" means that the filing of an information tolls the statute of limitations -- regardless of whether a person charged with a felony waived his right to prosecution by indictment. This latter ruling is consistent with holdings in three other Circuits, but it is at odds with this Court's interpretation of the word "institute" in *Jaben v. United States*, 381 U.S. 214 (1965). All the above rulings conflict with this Court's oft-repeated principle that statutes of limitations should be liberally interpreted in favor of repose. This Court should grant certiorari review to address the following question: does the filing of an information toll the statute of limitations, even when the defendant received no notice of this information, and did not waive prosecution by grand jury indictment?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Clevon Webster respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case No. 23-11526 on January 28, 2025, in *United States v. Clevon Webster* (A-0001), which affirmed the judgment of the United States District Court for the Southern District of Florida (A-0017).

OPINION BELOW

The published opinion of the Court of Appeals is reproduced at __F.4th __, 2025 WL 310535 (11th Cir. Jan. 28, 2025).

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

U.S. Constitution, amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .

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.

Fed. R. Crim P. 7(b):

> (b) **Waiving Indictment**. 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.

STATEMENT OF THE CASE

From March 2020 to November 2020, the coronavirus pandemic caused grand jury service to be suspended in the Southern District of Florida. A-0001. On May 26, 2020, the government filed an Information in the United States District Court for the Southern District of Florida which alleged that, during a period that ended on June 3, 2015, Webster conspired to commit access device fraud, possessed unauthorized access devices, and committed aggravated identity theft, in violation of 18 U.S.C. §§ 1029(b)(2), 1029(a)(3), and 1028A(a). A-0002. The government failed to serve Webster with a copy of the Information, or to otherwise give him notice of its filing. A-0002. Webster did not receive notice of the Information. A-0009. The government did not file a probable cause affidavit to seek Webster's arrest; accordingly no summons or arrest warrant was issued. *See* Fed. R. Crim. P. 9(a). No preliminary hearing was held. *See* Fed. R. Crim. P. 5. The district court simply "transferred the case to fugitive status." A-0003. No adversary proceedings occurred in Webster's case until after an indictment was filed. This Superseding Indictment returned by a grand jury and filed on January 21, 2021, three months after grand juries resumed convening in the Southern District of Florida. The Superseding Indictment charged Webster with the same felony offenses charged in the May 2020 information. A-0002.

Webster moved to dismiss the January 21, 2021 Superseding Indictment, claiming that it was barred by the statute of limitations, because it was returned more than five years after June 3, 2015, the latest date of Webster's alleged violation of the law. A-0003. The district court denied this motion, concluding that the filing of the Information within the

limitations period was enough to toll the statute of limitations. A-0003. Webster entered a conditional plea, pleading guilty to two counts of the Indictment while preserving his right to appeal the denial of his motion to dismiss. A-0003. The United States Court of Appeals for the Eleventh Circuit subsequently granted Webster's motion for release pending the outcome of his appeal.

In his appellate brief, Webster noted that "he never received notice of the filing of the Information [and] only became aware of the felony charges once the Superseding Indictment was filed." *United States v. Webster*, 2023 WL 4747949 at * 7 (July 14, 2023 Brief of Appellant). "This alone," Webster argued, "precludes treating the Information as a 'valid' basis for tolling the statute of limitations, since '[n]otice to the defendant is the central policy underlying the statute of limitations.'" *Id.* (quoting *United States v. Italiano*, 894 F.2d 1280, 1283 (11th Cir. 1990)).

In addition, Webster argued that "even assuming an information had been served on a defendant, it can only be treated as a valid basis for prosecution if, on its face, it is enough to call for trial of the charge on the merits." *Id.* (citation omitted). Webster noted that "the Department of Justice's own Criminal Resource Manual provides that the filing of an information does not *occur* until the defendant waives prosecution by Indictment pursuant to Fed. R. Crim. P. 7(b)." *Id.* (emphasis in original). Webster added that because he "did not waive his right to be prosecuted by a grand jury, the information was not enough to proceed toward trial." *Id.* Webster pointed out that "*no* adversarial proceedings occurred until *after* the superseding indictment was filed." *Id.* (emphasis in original).

Webster argued that the verb "instituted" in the statute of limitations, 18 U.S.C. § 3282(a), "is not synonymous with [the verb] filed." *United States v. Webster*, 2023 WL 7126579 at * 10 (Oct. 24, 2023 Reply Brief of Appellant) (citing *Jaben v. United States*, 381 U.S. 214 (1965)). Webster pointed out that *Jaben* rejected the government's argument that the mere filing of an initial charging document made a subsequent indictment timely. *Id*. Webster noted that a charging document "must be 'adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules.'" *Id*. (quoting *Jaben*, 381 U.S. at 220); *see id*. (stating that a criminal complaint must be sufficient to instigate "the next steps in the process") (quoting *Jaben*, 381 U.S. at 220).

The Eleventh Circuit affirmed the district court's denial of Webster's motion to dismiss. A-0001. Rejecting Webster's argument that the Information could not have tolled the statute of limitations because he did not receive notice of the Information, the opinion stated that "we have not held that *actual* notice is required to toll the statute of limitations." A-0009 (emphasis in original). The opinion pointed out that it is permissible for the government to file a sealed indictment even though the defendant is not arrested, and even though the indictment is not made public until after the end of the statutory limitations period.

The opinion also rejected Webster's argument that a waiverless information cannot toll the statute of limitations. The statute of limitation states:

> 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. § 3282(a) (quoted at A-0004). The opinion noted that this statute requires that an information be "instituted" within five years after the offense was committed. A-0005. From this text, the opinion concluded: "It is the information – not the prosecution – that must be 'instituted." A-0005. Citing dictionary definitions of the word "institute," and noting that § 3282(a) "distinguishes between a 'prosecut[ion]' and the 'institut[ion]' of an information, the opinion held that "[t]he government institutes or 'begins an action' by filing an information even if it cannot later maintain a prosecution." A-0006. The opinion further noted that "the language of the statute [does not] require a waiver [of indictment under Fed. R. Crim. P. 7(b)]." A-0007.

The opinion also noted that 18 U.S.C. § 3288 grants the government a six-month grace period to obtain a new indictment when a court dismisses a timely filed charging document outside the limitations period. A-0007. The opinion noted that Congress removed language that applied § 3288 to an information only if "the defendant waives in open court prosecution by indictment." A-0007. The opinion stated that this amendment "suggest[ed] that . . . Congress did not intend for a defendant's waiver of indictment to affect when the statute of limitations is tolled." A-0007.

The opinion rejected Webster's reliance on *United States v. Jaben*, 381 U.S. 214 (1965), pointing out that *Jaben* interpreted a different statute – one that extended the statute of limitations for nine months where "a complaint is instituted before a commissioner of the United States within [the statute of limitations]." *Id*. A-0008. The

opinion noted: "In *Jaben*, the government filed a complaint one day before the statute of limitations expired and obtained an indictment against the defendant outside the limitations period." A-0008 (citing *Jaben*, 381 U.S. at 216). The opinion recognized that *Jaben* held that "'to initiate the time extension,' the complaint 'must be sufficient to justify the next steps in the [criminal] process – those of notifying the defendant and bringing him before the Commissioner for a preliminary hearing.'" A-0008 (quoting *Jaben*, 381 U.S. at 220). But the opinion stated that *Jaben* was "inapposite, because it "considered a different statute of limitations and a criminal complaint." A-0008.

The opinion noted that its view that "an information is 'instituted' under § 3282(a) when it is filed" was consistent with *United States v. Burdix-Dana*, 149 F.3d 741, 743 (7th Cir. 1998) and *United States v. Briscoe*, 101 F. 4th 282, 292 (4th Cir. 2024). A-0008 . (The opinion's interpretation of § 3282(a) also accords with the Ninth Circuit's recent decision in *United States v. Abouammo*, 122 F.4th 1072, 1088 (9th Cir. 2024)).

The opinion recognized that this Court's caselaw counsels that criminal statutes of limitations should be "'liberally'" interpreted "'in favor of repose.'" A-0009 (quoting *United States v. Marion*, 404 U.S. 307, 322 n. 14 (1971)). However, the opinion "decline[d] to read into section 3282(a) a requirement that the government file a waiver of indictment to institute an information." A-0009. The opinion also declined to "condition the institution of an information on the defendant's receipt of actual notice." A-0009. The opinion held: "An information is instituted, and the statute of limitations is tolled for the charges the information alleges, when it is filed with the district court." A-0009. Consequently, because

the information was filed in May 2020, it tolled the five-year statute of limitations for Webster's June 3, 2020 conduct, and the January 2021 Superseding Indictment related back to the timely and still pending Information. A-0009.

Judge Jordan concurred in the judgment, but wrote separately, expressing "misgivings" that the Eleventh Circuit's decision "leaves room for potential prosecutorial manipulation of the statute of limitations." A-0010, A-0015. Judge Jordan agreed with the majority that "for purposes of § 3282(a) an information is instituted when it is filed" – though noting district court opinions which had reached a contrary result based on a different interpretation of the term "instituted." A-0010, A-0012. Further, Judge Jordan recognized that *Jaben* "makes this question of statutory interpretation a closer call," because *Jaben* "might suggest that the mere filing of an accusatory document (like an information in a criminal case) does not automatically toll the statute of limitations under a statute like § 3282(a)." A-0012 (discussing *Jaben*, 381 U.S. 214). But Judge Jordan interpreted *Jaben* to hold that it is only when an information is "substantively insufficient" that it does not toll the statute of limitations. A-0012. Hence, *Jaben* was distinguishable, since Webster, according to Judge Jordan, merely contended that the Information was "*procedurally* ineffective because it was not accompanied by a waiver of indictment." A-0012 (emphasis added). A-0012.

However, Judge Jordan recognized that "[o]ur decision today leaves room for potential prosecutorial manipulation of the statute of limitations." A-0013. "If the timely filing of an information tolls the limitations period even without a waiver of indictment, the

government can file an information just before that period expires, *not provide the defendant any notice*, and then wait years . . . to obtain an indictment." *Id.* (emphasis added), Judge Jordan added: "because the filing of the information tolls the statute of limitations, the indictment will be timely even it if comes many years after the information and after what would have been the end of the normal limitations period." A-0013. Judge Jordan pointed out that "a defendant can only seek dismissal when he knows that an information has been filed against him. If the government does not provide notice of an information to the defendant . . . he will not know that he has the option of seeking dismissal." A-0016. Judge Jordan noted that "nothing" in 18 U.S.C. §§ 3288 and 3289 "can prevent the government from . . . tolling the statute of limitations for an indefinite period of time." A-0015. Judge Jordan concluded: "[T]o prevent any future manipulation of the statute of limitations by the government, and to avoid the possible problematic scenarios that might result from our decision, I suggest that Congress amend §§ 3288 and 3289 to provide a limited period of time in which the government can obtain an indictment following the filing of a timely information that is not accompanied by a waiver of indictment." A-0016.

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's interpretation of the five-year statute of limitation applicable to federal felonies, 18 U.S.C. § 3282(a), is contrary to this Court's well-established principle that statutes of limitations are to be liberally construed in favor of repose.

A. A statute of limitations period is not tolled when a defendant has not received notice of the institution of a criminal prosecution.

This Court has repeatedly stated that "criminal statutes of limitations are to be liberally interpreted in favor of repose." *United States v. Marion*, 404 U.S. 307, 322, n. 14 (1971) (citing *United States v. Habig*, 390 U.S. 222, 227 (1968)); *Toussie v. United States*, 397 U.S. 112, 115 (1970)*; Bridges v. United* States, 346 U.S. 209, 217 (1953); *United States v. Scharton*, 285 U.S. 518, 522 (1932).

This Court's liberal rule of construction in favor of repose follows from the recognition that statutes of limitations are "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." *Toussie*, 397 U.S. at 115. "The theory [underlying statutes of limitations] is that even if one has a just claim it is unjust not to put the adversary *on notice* to defend within the period of limitation." *Marion*, 404 U.S. at 322, n. 14 (emphasis added) (citation omitted).

> [S]tatutes of limitations represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may (during

> the limitation) . . . have lost their means of defence.' Public Schools v. Walker, 9 Wall. 282, 288, 19 L.Ed. 576 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.

Marion, 404 U.S. at 322.

The decision below conflicts with these well-established principles.

Under the *Webster* decision, as Judge Jordan recognized in his concurrence, "the government can file an information just before [the limitations] period expires, *not provide the defendant any notice*, and then wait years . . . to obtain an indictment." A-0013 (emphasis added). Judge Jordan noted that "a defendant can only seek dismissal when he knows that an information has been filed against him. If the government does not provide notice of an information to the defendant . . . he will not know that he has the option of seeking dismissal." A-0016 . Judge Jordan added that, under the *Webster* decision, "nothing" in 18 U.S.C. §§ 3288 and 3289 "can prevent the government from . . . tolling the statute of limitations for an indefinite period of time." A-0015.

Thus, the *Webster* decision allows the government to toll the statute of limitations for an "indefinite period of time" simply by filing an information – without notice to the defendant. A-0015. This interpretation reads notice to the defendant out of the statute of limitations, even though this notice is essential to its operation. *See Jaben*, 381 U.S. at 218 (holding that the mere filing of a complaint was insufficient to trigger a nine-month extension of the statute of limitations, because this filing alone does not "warn defendants of their rights."); *id*. (mere filing of a complaint is inadequate because "there is no provision

for *notifying the defendant that he has been charged and the period of limitations extended*.") (emphasis added). *Webster* in effect reads a tolling provision into the language of § 3282(a), when, in fact, no such language exists. *Cf. United States v. Plezia*, 115 F.4th 379, 390 (5th Cir. 2024) (rejecting the government's attempt to invoke the doctrine of "equitable tolling," because this doctrine finds no support "in the plain language of § 3282.") (citing *Marion*, 404 U.S. at 322).

Jaben's recognition that notice is essential to the operation of the statute of limitations is echoed in the Ninth Circuit's recent decision in *Abouammo* (a case that did not involve the lack of notice present in *Webster*). Though interpreting the statute of limitations in favor of the government, *Abouammo* cautioned that its interpretation preserved "safeguards" against "over-extension" of the statute of limitation – namely, an information "must" still entitle the defendant to a "prompt preliminary hearing," and must enable the defendant to "move to dismiss the information." 122 F. 4th at 1088. Similarly, the Fourth Circuit in *Briscoe*, though also ruling in favor of the government, recently stated that "[a] charging document comports with [the] purpose [of the statute of limitations] when it puts a defendant *on notice* of the crimes charged within the period designated by the statute." 101 F.4th at 293 (emphasis added). Like *Jaben*, *Abouammo* and *Briscoe* recognized that notice to the defendant – notice that enables defendants to defend against the charges – is essential to avoiding an impermissible over-extension of the statute of limitations. Indeed, the *Webster* opinion itself elsewhere recognized that "[n]otice to the defendant is the central policy underlying the statute[ ] of limitation." A-0009 (quoting

United States v. Italiano, 894 F.2d 1280, 1283 (11th Cir. 1990)). *Accord* Brief of Former Federal Prosecutors as Amici Curiae in *United States v. B.G.G.*, 11th Cir. Case No. 20-20172 (May 19, 2021), p. 1-2 (federal statutory tolling provisions apply "in the limited circumstances when a case has been properly instituted against a defendant within the limitations period [and] *the defendant has been duly put on notice of the charges*.") (emphasis added).

The Federal Rules of Criminal Procedure provide that a summons, or arrest warrant, will be issued, upon the government's submission of an affidavit of probable cause, to the defendant named in an indictment or information. Fed. R. Crim. P. 9(a) The Rules also provide that a defendant is entitled to a preliminary hearing. Fed. R. Crim. P. 5. Rules 9(a) and 5 confirm that a charging document is part of a process that puts a defendant on notice of charges. Here, however, no affidavit of probable cause was submitted, and no summons or arrest warrant was issued. No preliminary hearing occurred after the information was filed; a preliminary hearing only took place after the Superseding Indictment was filed. Unsurprisingly, in light of the complete absence of notice, *no* adversary proceedings occurred in Webster's case until after the January 21, 2021 return of the Superseding Indictment. Plainly, the filing of the Information did not begin criminal proceedings against Webster.

In his concurrence, Judge Jordan proposed remedying the opinion's over-extension of the statute of limitations by inviting Congress to amend other statutes, in order to limit the grace period the government is accorded to file charges outside the limitations period.

A-0016. But Judge Jordan's approach is at odds with this Court's principle that *existing* statutes of limitations "are to be liberally interpreted in favor of repose." *Marion*, 404 U.S. at 322, n. 17. Here, this principle required the government to put the defendant on notice of a criminal action within the statute of limitations. This Court's principle of statutory construction does not countenance writing the statute's time limitation out of existence by permitting the government to toll the statute "for an indefinite period of time." A-0015 (Jordan, J., concurring). *See* Petition for Writ of Certiorari in *Briscoe v. United States,* 2024 WL 4201887 at * 18 (No. 24-284) ("While the backdrop of the government's action was the pandemic this time, the government now has a blank check . . . for an extension of the statute in every case in its unfettered discretion.").

To support its (startling) view that notice to the defendant is not required to toll the statute of limitations, the opinion pointed out that when a sealed indictment is filed, the indictment is not made public until after the end of the statutory limitations period. A-0009. But the rule on sealing indictments, invoked by the opinion, authorizes a federal magistrate, after an *indictment* is returned by a grand jury, to "direct that the indictment be kept secret until the defendant is in custody or has been released pending trial." Fed. R. Crim. P. 6(e)(4) (emphasis added). This rule does not refer to an *information*. Webster is unaware of a rule that authorizes keeping an information under seal.

Moreover, when the Rule 6(e)(4) sealing procedure is invoked for legitimate law enforcement purposes, and has the side-effect of tolling the statute of limitations, this tolling, as the Second Circuit stated in *United States v. Watson*, operates as "a narrow exception"

to the statute of limitations. 690 F.2d 15, 16 (2d Cir. 1979) (clarifying prior opinion). This "narrow exception" was not invoked here, and is inapplicable here. The sealing of an indictment requires the government to show that this sealing is "in the public interest," or is required "for sound reasons of policy." *United States v. Edwards*, 777 F.2d 644, 648 (11th Cir. 1985). For example, it is legitimate to seal an indictment "to protect the identity, security and testimony of the witnesses." *United States v. Ellis*, 622 F.3d 784, 793 (7th Cir. 2010). But it would be neither in the public interest, nor sound policy, for the government to be authorized to seal an indictment merely for the purpose of tolling the statute of limitations.

In sum, *Webster*'s interpretation of the statute of limitations allows the government to extend a statute of limitations indefinitely, and thus accords a defendant *no repose*. This conflicts with this Court's principle that statutes of limitations are to be liberally interpreted in favor of repose.

B. Without a waiver of the right to indictment by grand jury, the statute of limitations for felony charges is not tolled by the mere filing of an information.

To charge a person with a felony, the government is required to go before a grand jury and to secure an indictment. *See* U.S. Const. Amend. V. The government can also institute a felony prosecution by information, but only "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*." Fed. R. Crim. P. 7(b) (emphasis added). Here, when the

government filed the Information, it did not seek or obtain Webster's waiver of prosecution by indictment. A-0002.

In *Webster*, the Eleventh Circuit – like the Fourth, Seventh, and Ninth Circuits in like cases[1] – relied on the meaning of the verb "institute" in the text of the statute of limitations to conclude that the filing of an information, without a waiver of prosecution by indictment, tolls the limitations period. This statute provides:

> 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.

A-0004 (quoting 18 U.S.C. § 3282(a)) (emphasis added in *Webster*). *Webster* stated that the statutory text "does not condition the institution of the information on the government's ability to proceed with a prosecution [in accord with the grand jury requirement of the Fifth Amendment]." A-0004. This interpretation, which interprets the statute of limitations to allow tolling by the mere filing of an information without a defendant's waiver of the right to be charged by a grand jury, conflicts with this Court's principle that statute of limitations are to be liberally interpreted in favor of repose.

Webster found that "institute" means to "begin" an action, and is therefore distinct from "maintain[ng]" an action, or from the "prosecut[ion]" of an action. A-0005. From this difference in meaning, *Webster* inferred that "the statute contemplates that 'an information

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[1] *See Burdix-Dana*, 149 F.3d at 743;. *Briscoe*, 101 F. 4th at 292; *Abouammo*, 122 F.4th at 1088.

is instituted' *before* the government proceeds with a 'prosecut[ion]'." A-0006 (emphasis in original). "Because filing an information establishes it as an operative legal document and begins an action, an information is 'instituted' when *filed*." A-0006 (emphasis added).

It is puzzling that once *Webster* found that to "institute" means to "begin" an action, it did not acknowledge that the Information, here, did not "begin" an action, since *no* adversary proceedings took place after the information was filed. The district court docket shows that adversary proceedings only began once Webster became aware of the case, after the Superseding Indictment was filed.

More generally, *Webster*'s interpretation of the word "institute" conflicts with this Court's precedent.

First, in order for a charging document to be, as *Webster* put it, "an operative legal document," this document "must be adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules." *Jaben*, 381 U.S. at 220. A charging document "must be actually capable of commencing a federal criminal case [and] if unaccompanied by a waiver of indictment [an information] cannot commence a criminal case." *United States v. Gatz*, 704 F. Supp. 3d 1317 (S.D. Fla. 2023); *see United States v. B.G.G.*, 53 F.4th 1353, 1374 (11th Cir. 2022) (Wilson, J., dissenting) (noting approvingly the district court's conclusion that the filing of an information, without a defendant's consent to be charged with felonies by information, is "a legal nullity and insufficient to 'institute' a prosecution under section 3282.").[2]

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[2] *Accord United States v. Sharma*, 2016 WL 2926365 (S.D. Tex. May 19, 2016); *United States v. Machado*, 2005 WL 2886213 (D. Mass. Nov. 3, 2005).

Since its first enactment in 1790, the text of the federal statute of limitations "prohibited the prosecution of any person for a non-capital offense *unless the prosecutor established its foundational charging document before the limitations period expired*." *United States v. De la Torre*, 2022 WL 20538953 (S.D. Fla. Oct. 21, 2022) (Report and Recommendation of Magistrate Judge, adopted by the District Court) (emphasis in original). Consequently, without a defendant's consent to go forward without an indictment, an information is not a foundational charging document for a criminal felony prosecution. *Id*. *Accord Gatz*, 704 F. Supp. 3d at 1328 ("The idea that an ineffective information could be instituted to toll the limitations period, but not to prosecute the accused, could not have been a consideration at the statute's inception [in 1790]."); Department of Justice Criminal Resource Manual,[3] § 206 (the filing of an information does not occur until the defendant waives prosecution by Indictment pursuant to Fed. R. Crim. P. 7(b)."

Thus, even accepting *Webster*'s interpretation of the verb "institute" as referring to "an operative legal document [that] begins an action," A-0006, a waiverless information must be a *non*-operative legal document, since, for felony prosecutions, "a waiverless information cannot be used to prosecute a defendant." *Gatz*, 704 F. Supp. 3d at 1325.

Webster relied on the fact that the text of § 3282(a) uses both the terms "prosecute" and "institute" and inferred that these two terms therefore have different meanings. A-0005. But, to the contrary, the text's reference to the *prosecution* of a criminal case informs the

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[3] Department of Justice Criminal Resource Manual, § 206: https://www.justice.gov/archives/jm/criminal-resourcemanual-206-when-information-may-be-used.

meaning of the *institution* of the information. The term "prosecuted" indicates that the statute is not concerned with the mere filing of documents, but with whether the documents are adequate to commence a criminal prosecution.

Webster also relied on Congress' amendment of a separate statute, 18 U.S.C. § 3288, to remove language regarding waiver of the right to prosecution by indictment. A00007. But, though this statute establishes a six-month grace period for extending the statute of limitations after the dismissal of an information or indictment, this extension does not permit the filing of a new indictment in cases where "the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations." 18 U.S.C. § 3288. The interpretation of § 3282(a) is unaffected by Congress' amendment of a separate statute, like § 3288, especially since § 3288 has no effect if the government fails to comply with § 3282(a).

Webster held that "an information is 'instituted' when *filed*." A-0006 (emphasis added). But the verbs "institute" and "file" are not synonymous. *See De la Torre*, 2022 WL 20538953, at * 4 ("When the Crimes Act of 1790 became law [with a statute of limitations similarly-worded as § 3282] to 'institute' meant '[t]o fix; to establish; to appoint; to enact; to settle; to prescribe.' Notably absent from this contemporaneous definition is the verb 'file.'").

Webster's holding that to "institute" is synonymous with to "file" is inconsistent with *Jaben*'s rejection of the government's argument that, under a statute which provided for an extension of the statute of limitations when a "complaint is [timely] instituted," an

indictment was timely "if the complaint *filed* with the Commissioner was valid." 381 U.S. at 216 (emphasis added). As discussed above, *Jaben* required more than a mere filing – it held that the complaint "must be sufficient to justify the next steps in the [criminal] process – those of notifying the defendant and bringing him before the Commissioner for a preliminary hearing." *Id*. at 220 (citing Fed. R. Crim. P. 5).

Webster found that *Jaben* was "inapposite," because the statute in *Jaben* involved a Commissioner's function to determine "that probable cause exists," and "to warn defendants of their rights," whereas "Section 3282(a) does not contain these features." A-0008. This assertion places undue weight on the fact that *Jaben* dealt with a different statute. The difference in the statutory context does not, without more, change the fact that, like § 3282(a), the statute in *Jaben* used the same word "institute." *See Gatz*, 704 F. Supp. 3d at 1324. *Jaben* held that "institute" means "to begin effectively the criminal process prescribed by the Federal Criminal Rules." 381 U.S. at 220. *Jaben*'s interpretation rested on the need to avoid (1) reducing the charging process to mere "formalities" and (2) granting the government "greater time" to file charges than provided the time limit of the statute of limitations. *Id*. at 219. These same concerns apply with equal force here.

Beyond noting that *Jaben* dealt with a different statute, *Webster* gave no reason for giving the word "institute" a different meaning in § 3282(a). Yet, statute of limitations are liberally interpreted in favor of repose. *Marion*, 404 U.S. at 322, n. 14. Consistent with this principle, *Jaben* interpreted the word "institute" to refer, for purposes of tolling a statute of limitations, to the filing a document that is "adequate to begin effectively the criminal

process prescribed by the Federal Criminal Rules." 381 U.S. at 220. To give the word "institute" a different meaning – to interpret "institute" to now mean that the mere filing of a charging document suffices to toll the statute, and to rule *Jaben* "inapposite," *i.e.*, to *not* interpret the statute liberally in favor of repose – *Webster* needed to give a compelling reason for distinguishing *Jaben*. *Webster*, in effect, gave no reason at all.

In his *Webster* concurrence, Judge Jordan recognized that *Jaben* "makes this question of statutory interpretation a closer call." A-0012. Judge Jordan attempted to give a reason for distinguishing *Jaben*'s interpretation of the term "is instituted": his concurrence argued that *Jaben* is "best understood as holding [only] that a substantively insufficient charging document will not 'institute' a proceeding that tolls the limitations period [because *Jaben*] went on to address whether the complaint filed by the government in that case established probable cause." A-0013. Judge Jordan's concurrence treated the absence of a waiver of indictment in *Webster* as merely being "procedurally ineffective," and claimed that this "procedural"defect did not meet *Jaben*'s requirement that a charging document be "substantively" defective. A-0013. Webster disagrees.

First, even accepting that *Jaben* left room for a distinction between "procedural" and "substantive" defects in charging documents – the *Jaben* opinion nowhere uses these terms -- Judge Jordan treated a charging document's possible failure to establish "probable cause" as "substantively insufficient," but viewed the absence of a waiver of indictment as "procedurally ineffective." A-0013. This difference is not a valid basis for distinguishing *Jaben*. Just as the doctrine of "probable cause" derives from the text of the Fourth

Amendment, *see* U.S. Const. amend IV, the requirement of indictment by grand jury derives from the text of the Fifth Amendment. *See* U.S. Const. amend V. The difference between substance and procedure, here, is unavailing, since both *Jaben* and the present case involve rights secured by the Constitution. A charging document that does not meet the requirements of the Fifth Amendment's grand jury requirement is as "substantively insufficient" as one that does not satisfy the "probable cause" test of the Fourth Amendment.

Second, Judge Jordan's analysis relied on what *Jaben* "went on to address" after the opinion had already resolved the meaning of the term "is instituted." A-0013. Judge Jordan found that *Jaben*'s subsequent discussion of whether the government had established probable cause meant that *Jaben* held that only a "substantively insufficient" charging document does not toll the statute of limitations. A-0013. But *Jaben* would have had no need to consider whether the government established "probable cause" had the opinion not already decided that the term "is instituted" meant that the mere filing of a complaint does not toll a statute of limitations. 381 U.S. at 220 (holding that the complaint "must be adequate" to notify a defendant of the charges, and to bring him before a commissioner for a preliminary hearing).

As a final matter, turning to public policy, it is possible that the Eleventh Circuit may have been swayed by the fact that the government was not to blame for violating the statute of limitations, as it was the suspension of grand juries on account of the coronavirus pandemic that prevented the government from obtaining an indictment by grand jury in the

final months before the expiration of the five-year limitations period. Yet, during the COVID-19 pandemic, Congress rejected the request of the Department of Justice to extend the 5-year statute of limitations on the ground that many grand juries around the country were suspended. *Gatz*, 704 F. Supp. 3d at 1331-32. Congress' policy decision should be respected. The statute of limitations should not be re-interpreted to create room for, in Judge Jordan's words, "potential prosecutorial manipulation." A-0013.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX