No. 11-58

In the Supreme Court of the United States

IRA WILLIE GENTRY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly granted the government's application to suspend the running of the statute of limitations under 18 U.S.C. 3292.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 633 F.3d 788.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2011. A petition for rehearing was denied on April 11, 2011 (Pet. App. 39a.). The petition for a writ of certiorari was filed on July 11, 2011 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on nine counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; five counts of wire fraud, in

violation of 18 U.S.C. 1343 (Supp. III 2009); one count of tax evasion, in violation of 26 U.S.C. 7201; 11 counts of international concealment money laundering, in violation of 18 U.S.C. 1956(a)(2)(B)(i); three counts of concealment money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); three counts of transactional money laundering, in violation of 18 U.S.C. 1957(a) and (b); and one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. The district court sentenced petitioner to a term of imprisonment of 180 months, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-38a.

1. This case arises out of a "pump and dump" stock scheme in which petitioner and his co-defendant, Randy Jenkins, conspired to acquire millions of shares of stock in a corporation, artificially inflate its value through false public statements, sell the stock at a profit, and launder the proceeds. Pet. App. 2a; see *id.* at 4a-8a. In the early 1990s, petitioner formed Universal Dynamics, a company that analyzed the quality of circuit boards using vibration machines. *Id.* at 4a. In 1996, petitioner learned that attempts had been made to use infrared cameras to identify flaws in circuit boards but that the technology had proven unworkable for mass production. *Id.* at 5a. Petitioner claimed to have invented the technology and "proclaimed that it would revolutionize the industry." *Ibid.*

In 1997, Universal Dynamics merged with a shell corporation to become UniDyn Corporation, a publicly traded company. Pet. App. 5a-6a. Jenkins, a friend of petitioner's and a disbarred attorney with experience setting up offshore companies, established under his and petitioner's secret control a Bahamian corporation to which UniDyn issued nearly 15 million shares of stock.

Id. at 5a. Between 1997 and 2001, petitioner and Jenkins conspired to promote UniDyn and its allegedly revolutionary infrared camera technology through a variety of false public claims and SEC filings, notwithstanding their knowledge that the technology was not in fact commercially viable. *Id.* at 6a. Eventually, in 2000, petitioner and Jenkins opened a series of accounts under various aliases in brokerage houses in Canada. *Id.* at 7a. Between 2000 and 2002, they transferred UniDyn shares to these accounts and sold the stock at a net profit exceeding $6 million. *Ibid.* When the sales were complete, they wired the proceeds to a variety of bank accounts in the United States, converting a portion of the money into gold and other assets and using another portion to make UniDyn appear to be profitable. *Ibid.* Neither petitioner nor Jenkins reported income from these transactions on their 2000 tax returns. *Ibid.*

2. In 2001, the Internal Revenue Service (IRS) began investigating petitioner and Jenkins for tax fraud. Pet. App. 8a. Pursuant to a tax treaty with Canada, the IRS obtained documents implicating petitioner and Jenkins in a variety of federal crimes. *Ibid.* Under the terms of the treaty, however, the IRS could use the documents only for tax investigation purposes. *Ibid.* Accordingly, on March 16, 2005, the United States submitted an official request to the government of Canada under the Treaty on Mutual Legal Assistance in Criminal Matters (MLAT), U.S.-Can., Mar. 18, 1985, 24 I.L.M. 1092 (1985), requesting records from the Canadian brokerage houses that petitioner and Jenkins had used to liquidate the UniDyn stock. Pet. App. 8a.

On March 22, 2005, the United States filed an *ex parte* application with the United States District Court for the District of Arizona, before which a grand jury

had been impaneled, for an order suspending the statute of limitations under 18 U.S.C. 3292. Pet. App. 8a. In relevant part, Section 3292 provides:

> Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears * * * that such evidence is, or was, in such foreign country.

18 U.S.C. 3292(a)(1).[1] If the court makes the requisite findings, the limitations period shall be suspended beginning "on the date on which the official request is made" and ending "on the date on which the foreign court or authority takes final action on the request." 18 U.S.C. 3292(b).

In support of its March 2005 application, the government submitted a copy of the official MLAT request that the United States had transmitted to the government of Canada. Pet. App. 8a. The 16-page MLAT request described in detail petitioner's "pump and dump" scheme and the evidence expected to be obtained from specified Canadian brokerage houses. See *id.* at 57a-76a (MLAT request). The district court granted the application on the following day and issued an order suspending the

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[1] As used in Section 3292, the term "official request" means "a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country." 18 U.S.C. 3292(d).

statute of limitations effective March 16, 2005, the date on which the MLAT request had been made. *Id.* at 81a-82a. Subsequently, in June 2005, the government submitted a supplemental application under 18 U.S.C. 3292 with a sworn declaration from an IRS agent describing the evidence expected to be found in Canada. Pet. App. 8a-9a; see *id.* at 83a-88a. The district court again issued an order suspending the statute of limitations effective March 16, 2005.[2] *Id.* at 89a-90a. On April 12, 2006, Canada took final action on the MLAT request, supplying certified copies of the requested Canadian brokerage account records for corporations controlled by petitioner and Jenkins. *Id.* at 20a.

3. In May 2006, the grand jury returned a 59-count indictment charging petitioner and Jenkins with tax evasion, securities fraud, wire fraud, various forms of money laundering, and conspiracy to defraud the United States. Pet. App. 9a; see *id.* at 99a-171a. The defendants filed a motion to dismiss most of the counts in the indictment as time-barred. See 2:06-cr-00464 Docket entry Nos. 298 (D. Ariz. Dec. 28, 2007) (motion), and 299 (D. Ariz. Jan. 2, 2008) (notice of joinder by petitioner). The motion contended, *inter alia*, that the government's March 2005 application under Section 3292 was "legally insufficient" because the government had failed to include any "reliable" evidence in support of the applica-

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[2] Petitioner states (Pet. 9) that the government filed an additional "supplement" to its Section 3292 application in November 2005. That is incorrect. The government was informed in November 2005 by the grand jury clerk that the declaration of the IRS agent in the June 2005 application had been misplaced. The government accordingly submitted a replacement declaration. See Pet. App. 92a. The original copy of the June declaration was subsequently found and the November filing had no further relevance.

tion. *Id.* No. 298, at 2-3. The district court denied the motion, concluding that "all pending counts against [petitioner] were filed within the applicable statute of limitations." Pet. App. 47a.

After a 16-day jury trial, petitioner was convicted on nine counts of securities fraud, five counts of wire fraud, one count of tax evasion, 11 counts of international concealment money laundering, three counts of concealment money laundering, three counts of transactional money laundering, and one count of conspiracy. Pet. App. 9a.[3] Petitioner was sentenced to 180 months in prison; Jenkins received a sentence of 90 months.[4] *Id.* at 10a.

4. The court of appeals affirmed. Pet. App. 1a-38a. Petitioner's principal argument on appeal was that the district court had erred in suspending the statute of limitations under 18 U.S.C. 3292. See Pet. C.A Br. 21-28. The court of appeals rejected that argument and concluded that the indictment was timely. Pet. App. 10a-20a. The court agreed with petitioner that an application to suspend the limitations period under 18 U.S.C. 3292 must "present 'something with evidentiary value . . . tending to prove it is reasonably likely that evidence of the charged offenses is in a foreign country.'" Pet. App. 14a (quoting *United States* v. *Trainor*, 376 F.3d 1325, 1332-1334 (11th Cir. 2004)). The court found it unnecessary to decide whether the government's

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[3] The court of appeals' opinion incorrectly states that petitioner was convicted on six (rather than five) counts of wire fraud and four (rather than three) counts of transactional money laundering. Compare Pet. App. 9a with Pet. C.A. E.R. 1 (judgment). Petitioner was acquitted on one count of wire fraud and two counts of transactional money laundering. Pet. App. 9a.

[4] Jenkins has filed a petition for a writ of certiorari (No. 11-5007) presenting substantially the same question.

March 2005 application satisfied that standard, however, because the government's June 2005 supplemental application, which included a sworn declaration from an IRS agent, "clearly was adequate." *Ibid.*

The court of appeals next rejected petitioner's argument that the district court was required to dismiss any count in the indictment for which the limitations period expired before the June 2005 application. Pet. App. 15a-17a. The court explained that Section 3292 "plainly contemplates that the starting point for tolling the limitations period is the official request for evidence, not the date the [Section] 3292 motion is made or granted." *Id.* at 15a-16a (quoting *United States* v. *Bischel*, 61 F.3d 1429, 1434 (9th Cir. 1995)) (emphasis omitted). The only timing requirements for a Section 3292 application, the court explained, are "(1) that the official request for evidence in a foreign country be made before the statute of limitations expires and (2) that the application for suspension be submitted to the district court before the indictment is filed." *Id.* at 16a. The court acknowledged that "there is disagreement among the circuits on this issue," *ibid.* (citing *United States* v. *Kozeny*, 541 F.3d 166 (2d Cir. 2008)), but noted that its own precedent foreclosed petitioner's argument, *ibid.*

The court also rejected petitioner's suggestion that this Court's decision in *Stogner* v. *California*, 539 U.S. 607 (2003), which held that the Ex Post Facto Clause barred a state legislature from extending the limitations period for an offense after its expiration, overruled circuit precedent construing Section 3292. Pet. App. 16a n.2. The court explained that the Ex Post Facto Clause is a constraint on legislative, not judicial, action and that Section 3292 was enacted well before petitioner committed his crimes. *Ibid.* "Because the March 16 MLAT

request was submitted before the statutes of limitations had run on any counts," the court concluded, the district court "did not err in suspending the statute of limitations, effective March 16, 2005, for all counts." *Id.* at 17a.[5]

ARGUMENT

Petitioner renews his contention that the government's filings were insufficient to suspend the limitations period, as provided by 18 U.S.C. 3292, because the period had expired before the government sought suspension. That claim lacks merit. Although petitioner identifies a narrow disagreement between the Second and Ninth Circuits concerning the timing of an application under Section 3292, this case does not squarely implicate that disagreement. Further review is not warranted.

1. Petitioner urges the Court to grant review of the question whether a district court may grant a motion to suspend the statute of limitations under Section 3292 "after the statute of limitations has already expired." Pet i. That question is not squarely presented by this case. The United States filed an application under Section 3292 to suspend the limitations period on March 22, 2005, before any applicable limitations period had expired. Pet. App. 8a; see *id.* at 51a-80a.[6] The application

[5] The court of appeals also rejected various other arguments that petitioner pressed on appeal, including challenges to the sufficiency of the evidence and to his sentence. See Pet. App. 20a-38a. Petitioner does not seek this Court's review of those determinations.

[6] According to petitioner, the date of the earliest offense alleged in the indictment was April 13, 2000. See Pet. C.A. Br. 22 (list of counts brought against petitioner, sorted by date of offense). The earliest date on which the limitations period would have expired for any count was thus April 13, 2005, five years later. See 18 U.S.C. 3282(a).

included a copy of the 16-page MLAT request that the United States had sent to the government of Canada less than a week earlier, on March 16, 2005. *Id.* at 8a; see *id.* at 57a-76a. Based on that showing, the district court entered an order suspending the running of the statute of limitations as of the date of the MLAT request. See *id.* at 81a; cf. 18 U.S.C. 3292(b). Because it is uncontested that the government's March 2005 application under Section 3292 was filed before any relevant statute of limitations expired, the question on which petitioner seeks review is not presented.

Petitioner argued below that the government's March 2005 application was insufficient under Section 3292 because it "did not satisfy the evidentiary requirements" of Section 3292(a)(1). Pet. App. 11a. The court of appeals held that, under Ninth Circuit precedent, it had no need to decide that question because the government's June 2005 supplemental application, which included a sworn declaration from an IRS agent, "clearly was adequate" to suspend the limitations period retroactively as of the date of the MLAT request. *Id.* at 14a; see *id.* at 14a-15a (citing 18 U.S.C. 3292(b) and *United States* v. *Bischel*, 61 F.3d 1429, 1434 (9th Cir. 1995)). Petitioner acknowledges that the court of appeals decided the question presented in the petition only because the court "did not decide" (Pet. 12) whether the government's March 2005 application was sufficient to suspend the limitations period.

In fact, the March 2005 application independently satisfied the requirements of Section 3292 and the district court properly entered an order suspending the limitations period on that basis. See Pet. App. 81a. Petitioner's contention that the district court's order was "a nullity and of no effect" because the government's appli-

cation was "unsworn," Pet. C.A. Br. 24, is without merit. Nothing in the text of Section 3292 requires a "sworn" application or even adverts to particular forms of proof. The statute requires only that the government's application must "indicat[e] that evidence of an offense is in a foreign country," and it provides that the district court shall suspend the running of the statute of limitations "if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country." 18 U.S.C. 3292(a)(1).

The government's March 2005 application provided ample basis for the court to make that finding here. The application explained that evidence of federal offenses committed by petitioner was located in Canada and that the United States had made an official request for such evidence to the government of Canada. See Pet. App. 53a. The application was signed by an Assistant United States Attorney. *Id.* at 54a. In support of the application, the government attached a copy of the official 16-page MLAT request that the United States had transmitted to the government of Canada. See *id.* at 57a-76a. The MLAT request, which bore the signature of the Deputy Director of the Office of International Affairs at the Department of Justice, see *id.* at 76a, described petitioner's fraudulent "pump and dump" scheme in detail, see *id.* at 58a-62a ("Facts"), and listed specific evidence that the United States believed to exist in Canada and the factual basis for that belief, see *id.* at 62a-67a. Among other details, the MLAT request identified, by date, 12 specific bank transactions in which UniDyn stock had been transferred to identified Canadian brokerage houses by corporations associated with petition-

er. See *id.* at 63a-64a. It also identified five specific transactions in which funds were transferred from those Canadian brokerage houses to bank accounts in the United States controlled by petitioner and Jenkins. See *id.* at 65a-66a. The MLAT request further explained that information corroborating petitioner's use of Canadian brokerage houses had been obtained from UniDyn's stock transfer agent in Utah; from an investigator with the Ontario Securities Commission; and from several other witnesses, including a confidential informant whose interaction with petitioner was captured on video. See *id.* at 62a, 64a, 67a & n.11.

The March 2005 application thus documented in detail the factual basis for the government's belief that evidence of petitioner's crimes would be found in Canada.[7] An MLAT request is a formal treaty request from the United States to a foreign government for assistance in a criminal matter, and both countries understand that the document is intended to be relied upon. The government's March 2005 application provided the district court ample basis on which to find, by a preponderance of the evidence, that "an official request ha[d] been made" for evidence in a foreign country and that "it rea-

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[7] This case is therefore unlike *United States* v. *Trainor*, 376 F.3d 1325 (11th Cir. 2004), on which petitioner relied in the court of appeals, see Pet. C.A. Br. 24. In *Trainor*, the court held that the government's application under Section 3292 was insufficient because it "described in the most general terms, in the span of only a paragraph," the basis for the government's belief that relevant evidence would be found in a foreign country. 376 F.3d at 1333. Here, by contrast, the government provided the district court with a copy of the detailed, 16-page MLAT request submitted by the United States to Canada describing petitioner's unlawful scheme and identifying specific transactions involving specific Canadian brokerage houses linked to petitioner's unlawful activities.

sonably appear[ed] * * * that such evidence is, or was, in such foreign country." 18 U.S.C. 3292(a)(1).

Even if the question presented otherwise warranted review, therefore, this case would not provide the Court an opportunity to address it. It is uncontested that the government filed its March 2005 application under Section 3292 before the limitations period for any of petitioner's offenses expired. Based on that application, the district court properly suspended the running of the limitations period as of the date of the MLAT request.[8] Pet. App. 8a; see 18 U.S.C. 3292(b). Contrary to petitioner's argument (Pet. 3), there is no reason to think that the Second Circuit or any other court of appeals would have reached a different result on the same facts.

2. In any event, the court of appeals correctly held that, under the plain language of Section 3292, the indictment was timely based on the government's June 2005 supplemental application alone. Pet. App. 15a-17a. The only statutory requirement for the timeliness of an

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[8] Indeed, even if petitioner were correct that the March 2005 application was inadequate because it was "unsworn," Pet. C.A. Br. 24, it may well be that any defect was cured by the government's June 2005 supplemental application, which included a sworn declaration from an IRS agent. Pet. App. 83a-88a. Just as a superseding indictment that does not broaden the charges against a defendant relates back to the original indictment for limitations purposes, see, *e.g.*, *United States* v. *McMillan*, 600 F.3d 434, 444 (5th Cir.), cert. denied, 131 S. Ct. 504 (2010); *United States* v. *Salmonese*, 352 F.3d 608, 622 (2d Cir. 2003), the June 20 supplemental application in this case may have related back to the original application. Cf. Fed. R. Civ. P. 15(c) (an amended pleading will relate back to the date of the original pleading when the amendment asserts a claim or defense arising out of the same transaction identified in the original pleading). For this reason as well, this case would not provide a suitable vehicle for resolving the question presented.

application under Section 3292(a)(1) is that it must be "filed before return of an indictment." 18 U.S.C. 3292(a)(1). In this case, the government filed its supplemental application on June 20, 2005, almost a year before petitioner's indictment in May 2006. See Pet. App. 8a-9a. Based on that application, the district court entered a second order retroactively suspending the statute of limitations as of March 16, 2005, the date of the MLAT request. *Id.* at 9a; see 18 U.S.C. 3292(b) ("[A] period of suspension under this section shall begin on the date on which the official request is made."). Nothing more was required.

Petitioner argues (Pet. 21-26) that an application under Section 3292 must be filed before the statute of limitations would otherwise expire and that, consequently, ten of the counts on which he was convicted were time-barred. See Pet. 8 & n.2. Petitioner relies on *United States* v. *Kozeny*, 541 F.3d 166 (2d Cir. 2008), which held that Section 3292 "requires that an application to suspend the running of the statute of limitations be filed before the limitations period has expired." *Id.* at 174. That conclusion, however, disregards the plain language of Section 3292, which "itself specifies the only relevant time the application must be made: 'before return of an indictment.'" Pet. App. 16a (citation omitted). If Congress had intended to require the government to file an application before the limitations period otherwise expired, it could easily have so provided. Instead, Congress specified that an application under the statute is timely if it is filed before the indictment is returned, as the government's supplemental application

was here. 18 U.S.C. 3292(a)(1). The court of appeals properly refused to require what Congress did not.[9]

Indeed, it is apparent from the text of the statute that Congress intended suspension orders under Section 3292 to have retroactive effect. The statute requires the district court to find that an official request for evidence "has been made" as a prerequisite to suspending the limitations period, 18 U.S.C. 3292(a)(1), and it allows the court up to 30 days in which to act on the application, 18 U.S.C. 3292(a)(2). Yet it also specifies that "a period of suspension under this section shall begin on the date on which the official request [for evidence] is made." 18 U.S.C. 3292(b). Congress therefore clearly contemplated that suspension orders under Section 3292 would operate retroactively—in effect, reviving the portion of the limitations period between the date of the official request for evidence and the date of the district court's order under Section 3292.

Petitioner argues that, by authorizing a district court to "suspend" the "running" of a limitations period, Congress must have intended that no extension may be granted under Section 3292 if the government's application is filed after the date on which the limitations period would otherwise have "run." Pet. 21-22 (citing *Kozeny*, 541 F.3d at 172). But that argument disregards

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[9] The Second Circuit in *Kozeny* believed that the statutory phrase "before return of an indictment" actually "impl[ies] a time frame before the statute of limitations has run," emphasizing that "[i]n the normal course of a criminal prosecution" an indictment must be returned before the limitations period expires. 541 F.3d at 173; see Pet. 26. Section 3292, however, is expressly concerned with application of the statute of limitations. Particularly in the context of such a statute, there is every reason to think that, if Congress had meant to say "before expiration of the statute of limitations," it would have done so.

Congress's explicit instruction that any period of suspension "shall begin on the date on which the official request [for foreign evidence] is made." 18 U.S.C. 3292(b). An order under Section 3292 retroactively "suspend[s] the running of the statute of limitations" as of that date, whether or not the limitations period is *still* running at the time the court acts on the government's application. 18 U.S.C. 3292(a)(1); see *Bischel*, 61 F.3d at 1432. The court of appeals accordingly explained that, under the statutory scheme, the government must make its official request for evidence in a foreign country before the limitations period would otherwise expire. Pet. App. 16a. There is no dispute that the government did so here. See *id.* at 17a.

In sum, the court of appeals correctly held that the government's June 2005 supplemental application "suspend[ed] the statute of limitations, effective March 16, 2005, for all counts." Pet. App. 17a. This Court's review is not warranted.

3. Petitioner's remaining arguments are likewise without merit. Petitioner relies (Pet. 23) on this Court's decision in *Stogner* v. *California*, 539 U.S. 607 (2003), which held invalid a California statute that retroactively resurrected criminal offenses for which the limitations period had expired before the enactment of the statute. See *id.* at 632-633 ("We conclude that a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution."). Here, by contrast, the limitations period for petitioner's offenses was extended pursuant to pre-existing law. As the court of appeals explained, the Ex Post Facto Clause is a limitation on legislative, not judicial, power. Pet. App. 16a n.2. Section 3292 was enacted in 1984, long

before the conduct for which petitioner was convicted. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1218(a), 98 Stat. 2167. Accordingly, federal law at the time of petitioner's conduct not only provided a five-year statute of limitations for his non-tax offenses, 18 U.S.C. 3282(a), but also permitted that limitations period to be extended for up to three years upon application by the United States "indicating that evidence of an offense [was] in a foreign country." 18 U.S.C. 3292(a)(1) and (c). The district court's order granting such an application here implicates none of the concerns raised by the California statute in *Stogner*.

Petitioner also invokes the rule of lenity (Pet. 28-29) and the principle that limitations periods for criminal statutes are to be construed in favor of repose (Pet. 28). Neither interpretative rule applies here, however, because there is no "grievous ambiguity" in Section 3292. *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998); see also *United States* v. *Habig*, 390 U.S. 222, 226-227 (1968). The plain language of Section 3292 provides that a district court "shall suspend" the relevant statute of limitations "begin[ning] on the date on which the official request [for evidence in a foreign country] is made," provided that the government files an application "before return of an indictment" and the district court makes the requisite findings. 18 U.S.C. 3292(a)(1) and (b). That is exactly what happened here.

4. Finally, review is additionally unwarranted at this time because the question presented does not frequently arise. As the Second Circuit noted in the same decision on which petitioner relies, "[f]ederal court interpretations of 18 U.S.C. § 3292 are sparse." *Kozeny*, 541 F.3d at 170. In the 25 years that the statute has been in effect, only two courts of appeals have passed on the prop-

er timing of an application under Section 3292, and a third has commented on the question in dicta.[10] The issue arises infrequently because the government generally submits applications under Section 3292 before the applicable statute of limitations expires—as, indeed, it did in this case. See pp. 8-12, *supra*. Indeed, as petitioner notes (Pet. 20 n.6), federal prosecutors are specifically trained to do so. Absent evidence that the question presented arises with greater regularity, this Court's intervention is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] See *United States* v. *Hoffecker*, 530 F.3d 137, 163 n.4 (3d Cir.) (declining to decide the question but noting, on behalf of two judges, that "under section 3292 there is no express requirement that the application to suspend the statute of limitations must be made before the statute has run"), cert. denied, 129 S. Ct. 652 (2008).