No. _____

In the
Supreme Court of the United States

WILLIAM ALBERT HAYNES III, ET AL,
Petitioners,

v.

WORLD WRESTLING ENTERTAINMENT, INC.,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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February 17, 2021

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QUESTION PRESENTED

This case presents the Court with an opportunity to review the Second Circuit's implementation of a procedural Catch-22, based on *Hall v. Hall*, 138 S. Ct. 1118 (2018), that has deprived the Petitioners of their fundamental right to appeal adverse judgments against them. Specifically, the question presented is:

Did the Second Circuit err in ruling that it lacked jurisdiction to hear the Petitioners' appeals in three of seven consolidated cases, which were filed within 30 days after final judgment in the last of those cases, on the ground that the appeals were untimely under *Hall*, even though, more than a year before *Hall*, the Second Circuit had dismissed Petitioners' otherwise timely first attempted appeals because final judgment had not yet been entered in all of the consolidated cases?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The Petitioners—Consolidated Plaintiffs-Appellants below—are:

1. William Albert Haynes III
2. Russ McCullough, individually and on behalf of all others similarly situated, a/k/a Big Russ McCullough
3. Ryan Sakoda, individually and on behalf of all others similarly situated
4. Matthew Robert Wiese, individually and on behalf of all others similarly situated, a/k/a Luther Reigns
5. Cassandra Frazier, individually and on behalf of and as next of kin to her deceased husband, Nelson Lee Frazier Jr., a/k/a Mabel, a/k/a Viscera, a/k/a Big Daddy V, a/k/a King Mabel, and as personal representative of Estate of Nelson Lee Frazier Jr., Deceased

The Respondent—Consolidated Plaintiff-Defendant-Appellee below is World Wrestling Entertainment, Incorporated.

The other Consolidated—Plaintiffs-Appellants, Appellants, and Consolidated Plaintiffs below were:

1. Joseph M. Laurinaitis, a/k/a Road Warrior Animal
2. Evan Singleton
3. Vito LoGrasso
4. Shirley Fellows, on behalf of Estate of Timothy Alan Smith, a/k/a Rex King

5. Paul Orndorff, a/k/a Mr. Wonderful
6. Chris Pallies, a/k/a King Kong Bundy
7. Anthony Norris, a/k/a Ahmed Johnson
8. James Harris, a/k/a Kamala
9. Ken Patera
10. Barbara Marie Leydig Bernard Knighton, as co-representatives of Estate of Brian Knighton a/k/a Axl Rotten
11. Marty Jannetty
12. Terry Szopinski, a/k/a Warlord
13. Sione Havia Vailahi, a/k/a Barbarian
14. Terry Brunk, a/k/a Sabu
15. Barry Darsow, a/k/a Smash
16. Bill Eadie, a/k/a Ax
17. John Nord a/k/as Bezerker
18 Jonathan Hugger, a/k/a Johnny the Bull
19. James Brunzell a/k/a Jumpin' Jim
20. Susan Green a/k/a Sue Green
21. Angelo Mosca, a/k/a King Kong Mosca
22. James Manley, a/k/a Jim Powers
23. Michael Enos, a/k/a Mike, a/k/a Blake Beverly
24. Bruce "Butch" Reed, a/k/a The Natural
25. Sylain Grenier
26. Omar Mijares, a/k/a Omar Atlas
27. Don Leo Heaton, a/k/a Don Leo Jonathan
28. Troy Martin, a/k/a Shane Douglas
29. Marc Copani, a/k/a Muhammad Hassan
30. Mark Canterbury, a/k/a Henry Godwin
31. Victoria Otis, a/k/a Princess Victoria
32. Judy Hardee a/k/a Judy Martin
33. Tracy Smothers, a/k/a Freddie Joe Floyd
34. Michael R. Halac, a/k/a Mantaur
35. Rick Jones, a/k/a Black Bart
36. Ken Johnson, a/k/a Slick

37. George Gray, a/k/a One Man Gang
38. Ferrin Jesse Barr, a/k/a J.J. Funk
39. Rod Price
40. Donald Driggers
41. Rodney Begnaud, a/k/a Rodney Mack
42. Ronald Scott Heard, on behalf of Estate of Ronald Heard, a/k/a Outlaw Ron Bass
43. Boris Zhukov
44. David Silva a/k/a Silvano Sousa
45. John Jeter, a/k/a Johnny Jeter
46. Gayle Schecter, as personal representative of Estate of Jon Rechner, a/k/a Balls Mahoney
47. Ashley Massaro, a/k/a Ashley
48. Charles Wicks, a/k/a Chad Wicks
49. Perry Satullo, a/k/a Perry Saturn
50. Charles Bernard Scaggs, a/k/a Flash Funk
51. Carole M. Snuka, on behalf of Estate of James W. Snuka a/k/a Superfly
52. Kyros Law P.C.
53. Konstantine W. Kyros
54. Salvador Guerrero IV, a/k/a Chavo Guerrero Jr.
55. Chavo Guerrero Sr., a/k/a Chavo Classic
56. Bryan Emmett Clark Jr., a/k/a Adam Bomb
57. Dave Hebner
58. Earl Hebner
59. Carlene B. Moore-Begnaud, a/k/a Jazz
60. Mark Jindrak
61. Jon Heidenreich
62. Larry Oliver, a/k/a Crippler
63. Bobbi Billard
64. Lou Marconi
65. Kelli Fujiwara Sloan, on behalf of Estate of Harry Masayoshi Fujiwara a/k/a Mr. Fuji

The other Consolidated—Defendant-Appellees and Consolidated Defendants below were:

1. Vincent K. McMahon, individually and as the Trustee of the Vincent K. McMahon Irrevocable Trust U/T/A dtd. June 24, 2004, as the Trustee of the Vincent K. McMahon 2008, and as Special Trustee of the Vincent K. McMahon 2013 Irrev. Trust U/A dtd. December 5, 2013, and as Trust
2. Robert Windham a/k/a Blackjack Mulligan
3. Thomas Billington a/k/a Dynamite Kid
4. James Ware a/k/a Koko B. Ware
5. Oreal Perras a/k/a Ivan Koloff

LIST OF ALL RELATED PROCEEDINGS

1. United States District Court for the District of Connecticut:

   A. *Haynes v. World Wrestling Entertainment, Inc.*, No. 3:15-cv-1156 (VLB), judgment entered March 21, 2016
   B. *McCullough v. World Wrestling Entertainment, Inc.*, No. 3:15-cv-1074 (VLB), judgment entered March 21, 2016
   C. *Frazier v. World Wrestling Entertainment, Inc.*, No. 3:15-cv-1305 (VLB), judgment entered November 10, 2016
   D. *Singleton v. World Wrestling Entertainment, Inc.*, No. 3:15-cv-425 (VLB), judgment entered March 28, 2018
   E. *Laurinaitis v. World Wrestling Entertainment, Inc.*, No. 3:16-cv-1209 (VLB), judgment entered September 17, 2018

F. *World Wrestling Entertainment, Inc. v. Windham et al.*, No. 3:15-cv-994 (VLB), judgment entered September 17, 2018

G. *James v. World Wrestling Entertainment, Inc.*, No. 3:15-cv-1229 (VLB), judgment entered November 10, 2016

2. United States Court of Appeals for the Second Circuit:

A. *McCullough et al. v. World Wrestling Entertainment, Inc.*, Nos. 16-1231 (L), 16-1237 (Con), appeals dismissed September 27, 2016

B. *Haynes et al. v. World Wrestling Entertainment, Inc.*, Nos. 18-3278 (L), 18-3322 (Con), 18-3325 (Con), 18-3326 (Con), 18-3327 (Con), 18-3328 (Con), 18-3330 (Con), appeals dismissed and judgment entered September 9, 2020

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The Second Circuit's summary order (App. 1-18) appears at 827 F. App'x 3 (2d Cir. 2020). The Second Circuit's earlier opinion (App. 95-103) is published at 838 F.3d 210 (2d Cir. 2016). The district court's memorandum of decision (App. 104-181) entering judgment in two of the cases at issue is published at 172 F. Supp. 3d 528 (D. Conn. 2016). The district court's memorandum of decision (App. 64-94) entering judgment in the third case at issue appears at 2016 WL 6662673 (D. Conn. Nov. 10, 2016).

JURISDICTION

The Second Circuit entered judgment on September 9, 2020. The Second Circuit's order denying rehearing and rehearing en banc was entered on October 15, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The pertinent text of the following statute and rules involved in this case are set out in the Appendix (App. 184-188):

1. 28 U.S.C. § 2107
2. Fed. R. App. P. 4
3. Fed. R. App. P. 26
4. Fed. R. Civ. P. 58
5. Fed. R. Civ. P. 60

STATEMENT OF THE CASE

This matter involves seven cases consolidated in the United States District Court for the District of Connecticut (the "district court"). Each of the cases was brought against World Wrestling Entertainment, Inc. ("WWE"), by one or more former WWE wrestlers. The plaintiffs all alleged that as a result of physical trauma they experienced while performing for WWE, they suffered neurological damage resulting in diseases such as chronic traumatic encephalopathy, as well as other significant physical and mental-health impairments. All of the cases were consolidated in the district court based on disputed forum-selection clauses in the wrestlers' contracts with WWE.

The cases filed by William Albert Haynes III in October 2014 and by Russ McCullough, Ryan Sakoda, and Matthew Robert Wiese (collectively referred to as "McCullough") in April 2015 were putative class actions in which the matter in controversy exceeded $5 million and involved a class member who was a citizen of a State different from any defendant, thus giving rise to federal jurisdiction in the district court under 28 U.S.C. § 1332(d)(2)(A). On March 21, 2016, the district court granted motions to dismiss the plaintiffs' actions in *Haynes* and *McCullough* for failure to state a claim upon which relief can be granted. (App. 181.) The plaintiffs timely appealed the district court's decision to the Second Circuit.

On September 27, 2016, the Second Circuit dismissed the *Haynes* and *McCullough* appeals on the basis of its decision in *Hageman v. City Investing Co.*, 851 F.2d 69 (2d Cir. 1988), which held that "when there

is a judgment in a consolidated case that does not dispose of all claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification." *Id.* at 71. Finding nothing in the appeals to overcome that strong presumption that the judgments were not yet appealable, the Second Circuit dismissed the appeals "without prejudice to renewal of these appeals upon entry of a final judgment in the District Court disposing of all the cases with which the *McCullough* and *Haynes* cases have been consolidated." (App. 102.)

In February 2015, Cassandra Frazier, individually and on behalf of the estate of her deceased husband, wrestler Nelson Lee Frazier Jr., commenced a wrongful-death action against WWE in Tennessee state court. WWE removed to federal court based on diversity of citizenship, 28 U.S.C. § 1331(a)(1), and the case was transferred to the district court and there consolidated with *Haynes*, *McCullough*, and the other cases against WWE. The district court granted WWE's motion to dismiss in *Frazier* on November 10, 2016. (App. 93-94.) Frazier did not appeal at that time based on the Second Circuit's dismissal of the appeals in *Haynes* and *McCullough*.

On March 28, 2018, this Court decided *Hall v. Hall*, 138 S. Ct. 1118 (2018). The Court held in *Hall* that a judgment entered in one of multiple cases consolidated under Rule 42(a) of the Federal Rules of Civil Procedure is a "final decision" immediately appealable under 28 U.S.C. § 1291.

On September 17, 2018, the district court entered judgment in the last of the seven consolidated cases.

(App. 62-63.) At that time, appeals were filed in five of the cases, including *Haynes*, *McCullough*, and *Frazier*. On September 9, 2020, the Second Circuit entered its Summary Order dismissing the appeals in *Haynes*, *McCullough*, and *Frazier*. (App. 6-7, 17.) The Second Circuit concluded that it lacked appellate jurisdiction because *Hall* rendered the notices of appeal filed in those cases untimely, barring the court from exercising jurisdiction under this Court's precedent. (App. 10-11.)

REASONS FOR GRANTING THE PETITION

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH FEDERAL LAW AND THIS COURT'S PRECEDENT BY DENYING THE PETITIONERS THEIR FUNDAMENTAL RIGHT TO APPEAL THE JUDGMENTS ENTERED AGAINST THEM

The Court has no love for a procedural Catch-22. *See, e.g.*, *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019) (undoing the "*San Remo* preclusion trap" that placed a takings plaintiff in the paradoxical situation of being unable to "go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning."). That is the situation the Petitioners find themselves in here. When Haynes and McCullough timely appealed the judgments entered against them in two of seven consolidated cases, more than a year before *Hall* was decided, the Second Circuit dismissed the appeals, telling them they were too early and to come back and renew their appeals when the last of the consolidated cases had been decided. When judgment was entered in the last case, after *Hall* was

decided, the Petitioners returned to the Second Circuit as instructed, only to be told, based on *Hall*, that it was now too late for their appeals to be heard. The Second Circuit thereby deprived the Petitioners of their fundamental right to appeal the judgments entered against them, which is guaranteed under federal law, as recognized by this Court in *Hall* itself and in prior decisions. Therefore, the Second Circuit's decision conflicts with federal law and this Court's precedent, and the Court should grant the petition and review the decision below.

A. This Court Has Recognized That A Losing Party's Ability To Appeal From A Final Decision Against Her or Him Is A Matter Of Right To Which He or She Is Entitled

The Second Circuit effectively denied the Petitioners any right to appeal the judgments entered against them by the district court in light of *Hall*. The Second Circuit's ruling is, however, fundamentally at odds with the basis for this Court's decision in *Hall* (and earlier cases).

In *Hall*, two cases—a "trust case" and an "individual case"—were consolidated in a district court under Rule 42(a) of the Federal Rules of Civil Procedure. Judgment was entered against the petitioner, Elsa Hall, in the trust case, but the individual case remained pending. Elsa filed a notice of appeal from the judgment in the trust case. The Third Circuit dismissed the appeal, applying its rule, similar to the one adopted by the Second Circuit in *Hageman*, that a judgment in one of multiple consolidated cases

generally may not be appealed until all of the consolidated cases have been finally decided.

This Court granted certiorari and reversed. *Hall*, 138 S. Ct. at 1123. The Court pointed out that had the trust case and the individual case not been consolidated, there would have been no question that Elsa could have immediately appealed the judgment in the trust case as a "final decision" under 28 U.S.C. § 1291. *Id.* That is because an appeal to a court of appeals from a final decision under § 1291 "is a 'matter of right.'" *Id.* at 1124 (quoting *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 407 (2015) ("An unsuccessful litigant in a federal district court may take an appeal, as a matter of right, from a 'final decisio[n] of the district cour[t].' 28 U.S.C. § 1291.")). The Court emphasized the fundamental right to take an appeal under § 1291: "[A]ny litigant armed with a final judgment from a lower federal court is entitled to take an appeal." *Id.* (quoting *Arizona v. Manypenny*, 451 U.S. 232, 244 (1981)); *see also id.* at 1131 ("The normal rule is that a 'final decision' confers upon the losing party the immediate right to appeal."). Based on this principle, the Court had earlier held in *Gelboim* that one of multiple cases consolidated for multidistrict litigation under 28 U.S.C. § 1407 is immediately appealable upon the entry of an order disposing of that case, regardless of whether any of the others remain pending, because "[f]orcing an aggrieved party to wait for other cases to conclude would substantially impair his ability to appeal from a final decision fully resolving his own case—a 'matter of right,' *Gelboim*, 574 U.S., at [407], to which he was 'entitled,' *Manypenny*, 451 U.S., at 244." *Id.* at 1128; *see also id.* (consolidation cannot

"prejudice rights to which the parties would have been due had consolidation never occurred"). In *Hall*, the Court adopted a clear rule extending this same principle to cover cases consolidated under Rule 42(a). *See id.* at 1122, 1131.

In this case, the Second Circuit expressly relied on *Hall* in dismissing the appeals in *Haynes*, *McCullough*, and *Frazier*, but its ruling has the opposite effect to the Court's recognition in *Hall* of a litigant's right to take an appeal from a final decision. If the Second Circuit's decision stands, the plaintiffs in these cases (and other similarly situated plaintiffs in consolidated cases across the country) will be denied their fundamental right to appeal the final decisions entered against them. The denial is especially egregious in these cases, in which Haynes and McCullough attempted to exercise their right to appeal, but the Second Circuit expressly mandated that they wait to "renew[]" their appeals upon entry of a final judgment in the district court disposing of all the cases with which their cases had been consolidated. (App. 102.) Then, when they did just that, the Second Circuit held that their appeals, formerly too early, were now too late in light of *Hall*, thereby depriving them of any right whatsoever to appeal the final decisions entered against them. (App. 10-11.) The Second Circuit's ruling simply does not hold up against the basis for this Court's decisions in *Hall* and *Gelboim*.

B. The Petitioners Did Not Have Any Viable "Work-Arounds" To Avoid Losing Their Fundamental Right To Appeal

The Second Circuit offered little explanation for denying the Petitioners their guaranteed right to appeal under federal law. The Second Circuit tersely noted that the Petitioners had not, following this Court's decision in *Hall*, "sought relief" from the Second Circuit or in the district court. (App. 11.) The Second Circuit held that this failure to raise any arguments "as to *Hall*'s applicability or as to any 'work-arounds'" was fatal because *Hall* rendered their notices of appeal untimely, thus depriving the court of jurisdiction to hear the appeals. (App. 11) (citing *Bowles v. Russell*, 551 U.S. 205, 209 (2007) ("This Court has long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." (internal quotation marks omitted.) That the time to take an appeal is mandatory and jurisdictional actually argues against the Second Circuit's decision in this matter, however.

The Second Circuit did not itself identify any "work-arounds" that the Petitioners might have pursued in the district court or in the Second Circuit. But their options were extremely limited given the jurisdictional nature of the time to appeal.

The district court entered the judgments in *Haynes* and *McCullough* on March 21, 2016, and on November 10, 2016 in *Frazier*. Parties generally have 30 days to file a notice of appeal from a final decision. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A); *Hall*, 138 S. Ct. at 1124. If a losing party files a motion within 30

days after the expiration of the 30-day period, the district court may, upon a showing of excusable neglect or good cause, extend the time to appeal for another 30 days or for 14 days after the order granting the motion is entered, whichever is later. *See* 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(5). Here, Haynes and McCullough timely filed their notices of appeal within 30 days of the judgment entered against them, only to be rebuffed by the Second Circuit. Frazier did not appeal based on the Second Circuit's mandate in *Haynes* and *McCullough*.

A party may also seek to have the district court reopen the time for filing an appeal, but only if certain conditions are satisfied, including that the motion is filed within 180 days after the judgment or order is entered and the moving party did not receive notice of the entry of the judgment or order within 21 days after entry. *See* 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(6). Here, the Petitioners had notice of the district court's entry of judgment against them, and this Court decided *Hall* more than 180 days after the entry of judgment in any event. Accordingly, the Petitioners were jurisdictionally barred from filing another appeal after *Hall* was decided.[1]

It appears that the only other option in the district court would have been to file a motion seeking relief from the judgments under Rule 60(b) of the Federal

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[1] This is true even if the judgments against the Petitioners were required to be entered on a separate document and so were not deemed to have been entered until 150 days after the district court's memorandum decisions were filed. *See* Fed. R. Civ. P. 58(c)(2)(B). Each of the decisions was filed more than 330 days before this Court decided *Hall* on March 27, 2018.

Rules of Civil Procedure. Rule 60(b) permits a court to relieve a party from a final judgment or order for various reasons, only two of which might be remotely applicable here—that "applying [the judgment or order] prospectively is no longer equitable" or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(5), (6). In essence, the Petitioners, plaintiffs below, would have asked the district court to vacate the final judgments entered against them on one of those grounds and to then immediately reenter the judgments so as to restart the 30-day time to appeal as a way to "work-around" the Court's decision in *Hall*.

While the circuit courts have generally been very skeptical of attempts to end-run the jurisdictional time limits to take an appeal, *see, e.g.*, *West v. Keve*, 721 F.2d 91, 97 (3d Cir. 1983) (where the purpose of a Rule 60(b) motion is to extend the time for appeal, the motion must meet the time limitations of Federal Rule of Appellate Procedure 4(a)), some of the courts have indicated that "Rule 60(b) may be used, sparingly, to restore the right to appeal in extraordinary cases when parties rely on grounds other than lack of notice" of the final judgment being appealed, *Washington v. Ryan*, 833 F.3d 1087, 1094 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017). *See generally* 16A Catherine T. Struve, *Federal Practice and Procedure* § 3950.6 (5th ed., Westlaw updated through Oct. 2020) ("[I]f the would-be appellant argues that the need for relief arises not from lack of notice of the entry of judgment but rather from some other, truly extraordinary, circumstance, then Civil Rule 60(b)(6) relief may be available in the Sixth and Ninth Circuits—especially if the litigant is a habeas petitioner who argues that an

egregious circumstance such as attorney abandonment or obstruction by guards barred him or her from taking a timely appeal."). Even in a habeas case, however, a ruling by this Court changing a circuit court's decisional law is not one of those truly extraordinary grounds for attempting to seek relief from the jurisdictional time limits for taking an appeal. *See Gonzalez v. Crosby*, 545 U.S. 524, 536-37 (2005); *cf. Felzen v. Andreas*, 134 F.3d 873, 876-78 (7th Cir. 1998) ("Equitable considerations are altogether irrelevant when a court lacks adjudicatory power."), *aff'd per curiam by an equally divided Court sub nom. Cal. Pub. Employees' Ret. Sys. v. Felzen*, 525 U.S. 315 (1999).

As for "work-arounds" in the Second Circuit, they were simply nonexistent. While a district court may extend the time to file an appeal under the limited circumstances described in Federal Rule of Appellate Procedure 4, the circuit courts are prohibited from doing so. *See* Fed. R. App. P. 26(b)(1) (the court "may not extend the time to file . . . a notice of appeal (except as authorized in Rule 4)"); *Martinez v. Trainor*, 556 F.2d 818, 819 (7th Cir. 1977) ("Timely filing of a notice of appeal is mandatory and jurisdictional, and cannot be extended by the appellate court." (internal quotation marks omitted)); 16A Struve, *supra*, § 3950.3 (Federal Rule of Appellate Procedure 4 "places in the hands of the district judge the power to extend the appeal time; Federal Rule of Appellate Procedure 26(b) forbids the courts of appeals from doing so"). Thus, seeking relief from the Second Circuit in the wake of this Court's decision in *Hall* was not an option.

C. Only This Court Can Remedy Any Unintended Consequences Of Its Decision In *Hall*

In the end, despite the lamentable lack of legal analysis on this issue in the Second Circuit's summary order, it may not have had other good options for dealing with the unfairness of applying *Hall* to deny appeals to parties in consolidated cases decided before *Hall*, which may fall solely to this Court, if that is, in fact, the result required by *Hall*. After *Hall*, the Alabama Supreme Court took up the same issue under state law. *See Nettles v. Rumberger, Kirk & Caldwell, P.C.*, 276 So. 3d 663 (Ala. 2018). Although it was not bound to do so, the court, noting that Rule 42(a) of the Alabama Rules of Civil Procedure is derived directly from Federal Rule 42(a), adopted this Court's ruling in *Hall* and held that "[o]nce a final judgment has been entered in a case, it is immediately appealable, regardless of whether it is consolidated with another still pending case." *Id.* at 669.

That represented a change in Alabama law, so the court overruled its earlier decision in *Hanner v. Metro Bank & Protective Life Insurance Co.*, 952 So. 2d 1056 (Ala. 2006), in which the court had followed the holdings in some of the federal circuit courts that a judgment on fewer than all of the claims in a consolidated action can be appealed only if the trial court has certified a judgment as final pursuant to Rule 54(b) of the Alabama Rules of Civil Procedure. *Id.* at 1061. That was essentially the approach taken by the Second Circuit before *Hall*. *See Hageman*, 851 F.2d at 71 ("[W]hen there is a judgment in a consolidated case that does not dispose of all claims which have been

consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification."). The Alabama Supreme Court recognized in *Nettles* that it was "overruling clear precedent on which other litigants may have relied—in determining, for example, if and when a notice of appeal is due." 276 So. 3d at 669 n.1. The court therefore ruled that it would apply its decision in that case prospectively only. *Id.*

This Court's decision in *Hall* likewise had the effect of changing the rule in the Second Circuit for when an appeal could be taken from a judgment in less than all of the cases consolidated in a district court. Unlike the Alabama Supreme Court, however, it was not up to the Second Circuit to decide to apply this Court's decision in *Hall* prospectively only. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 751-53 (1995).[2]

Even so, the problem identified by the court in *Nettles* is even more significant in the federal system, involving not just one but many States and other jurisdictions in which the Court's ruling in *Hall* could

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[2] Before the Court overruled *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), "insofar as the case (selectively) permitted the prospective-only application of a new rule of law," *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995), the Second Circuit might have taken the position that the Petitioners should not be denied their right to appeal based on *Hall*. *See, e.g.*, *Trinity Broad. Corp. v. Eller*, 835 F.2d 245, 247 (10th Cir. 1987) (*Chevron Oil* considerations justified prospective-only application of court's decision adopting rule that a judgment in a consolidated action that does not dispose of all claims is not a final decision under 28 U.S.C. § 1291 absent certification under Fed. R. Civ. P. 54(b), where the appellant would otherwise "lose its appeal forever").

potentially result in hundreds of cases in which parties are denied their fundamental right to appeal merely because their cases were consolidated with other cases. *See* Desiree Moore & Daisy Sexton, High Court Answers Appeal Question for Consolidated Cases, Law 360 (June 18, 2018), *available at* https://www.law360.com/articles/1054337/high-court-answers-appeal-question-for-consolidated-cases (last visited Dec. 15, 2020) (noting that there are "consolidated actions pending around the country" involving pressing questions such as whether parties who relied on now-overruled circuit precedent not to take immediate appeals, or who took immediate appeals and were denied, have forever lost their right to appeal and, if not, when does the appellate clock begin to run). That would directly contradict the result intended by this Court in *Hall*. *See Hall*, 138 S. Ct. at 1128 (consolidation cannot "prejudice rights to which the parties would have been due had consolidation never occurred"). But only this Court can determine that *Hall* should not be applied by the Second Circuit and other courts in such a way as to cause the Petitioners, and many others, to lose their ability to appeal—a "matter of right" to which they were "entitled," *id.* (internal quotation marks omitted)—through no fault of their own.

The circumstances of these cases show all too well why the Court should allow the writ and consider taking action to forestall any unintended consequences of its decision in *Hall*. Despite the existing Second Circuit precedent, Haynes and McCullough appealed the judgments against them, even though the judgments did not dispose of all of the consolidated

cases in the district court, just to make sure the cases were not among the exceptional ones overcoming the strong presumption of nonappealability then applied in the Second Circuit under *Hageman*. The cases involved an entire class of athletes alleging serious injuries. The Second Circuit ruled they were not and dismissed the appeals, but expressly "without prejudice to renewals of these appeals upon entry of a final judgment in the District Court disposing of all the cases" that had been consolidated with *Haynes* and *McCullough*. (App. 102.) In short, the Second Circuit told the appellants that they were too early. Haynes and McCullough, along with Frazier, in reliance on the Second Circuit's decision dismissing their appeals, did as they were mandated and waited until the district court disposed of the last of the consolidated cases. As instructed, the Petitioners then filed new appeals, only to be told by the Second Circuit that they were now too late, leaving the court without jurisdiction to hear the appeals based on *Hall*. If that is really the effect of *Hall*, then the Court should take this case up and ensure that the Petitioners, and no other similarly situated parties, are unintentionally deprived of their fundamental right to appeal just because judgment was entered against them in a case that happens to have been consolidated with one or more other cases and decided before *Hall*.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Second Circuit on the question presented herein.

Respectfully submitted,

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