No. 20-1169

IN THE

Supreme Court of the United States

WILLIAM ALBERT HAYNES III, ET AL.,

Petitioners,

vs.

WORLD WRESTLING ENTERTAINMENT, INC.,

Respondent.

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

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

David R. Fine
K&L GATES LLP
17 North Second St.,
18th Fl.
Harrisburg, PA 17101
(717) 231-4500

Jerry S. McDevitt
(*counsel of record)*
Curtis B. Krasik
K&L GATES LLP
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222
(412) 355-6500
jerry.mcdevitt@klgates.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Respondent World Wrestling Entertainment, Inc. ("WWE"), asks the Court to deny the petition for a writ of *certiorari*.

INTRODUCTION

There is no reason for the Court to accept review in this case. Petitioners make no suggestion that their case creates or perpetuates a split of authority, and they make only a half-hearted and incorrect assertion that there is an issue of widespread public importance. The petition meets none of the Court's usual criteria for granting review. It is, instead, an unadorned request that the Court correct an error—even though none was made—or create a *sui generis* equitable exception to a jurisdictional deadline despite clear authority precluding such a remedy and facts that underscore that Petitioners' dilemma is of their own creation.

The Second Circuit correctly resolved this one-off case. When it originally decided *McCullough* v. *World Wrestling Entertainment, Inc.*, 838 F.3d 210 (CA2 2016), the Court of Appeals followed then-controlling circuit authority, *Hageman* v. *City Investing Co.*, 851 F.2d 69 (CA2 1988), to conclude that an appeal from the dismissal of just two of a group of consolidated cases was premature.[1] When it reached the later decision for which Petitioners now seek review, the Court of Appeals followed *Hall* v. *Hall*, 138 S.Ct. 1118 (2018), which had in the interim overruled *Hageman*. That is precisely what the Court of Appeals was required to do.

---

[1] App. 102.

Moreover, even if the Second Circuit had erred, there is no indication that the error has or will affect other cases. The Court decided *Hall* three years ago, and Petitioners have identified no other cases like theirs, and there will not likely be more cases like theirs.

Petitioners' real complaint is that the Second Circuit did not create some sort of equitable exception to *Hall* just for their case. But they never asked the Court of Appeals for that sort of relief, and the court would have had no authority to grant it since the timely filing of a notice of appeal is mandatory and jurisdictional. *See Bowles* v. *Russell,* 551 U.S. 205, 209, 214 (2007) (timely filing of notice of appeal is mandatory and jurisdictional and courts cannot create equitable exceptions); *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. 368, 379 (1981) ("A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.") (quotation omitted).

Bowles precludes any equitable exception but, even if it did not, this case would not be a good candidate for equitable relief from the deadline. Both before and after the Court announced its decision in *Hall,* there were plainly steps Petitioners could have taken to preserve their appellate rights and to address that new authority, but they did nothing, and their current situation is of their own making.

There is no reason for the Court to step into a one-off case to assist counseled parties who made no effort to protect their appellate rights. The WWE asks the Court to deny the petition.

STATEMENT OF THE CASE

There are three cases at issue in the petition: (1) *Haynes* v. *World Wrestling Entertainment, Inc.*; (2) *McCullough* v. *World Wrestling Entertainment, Inc.;* and (3) *Frazier* v. *World Wrestling Entertainment, Inc*. The District Court in Connecticut consolidated those cases with four others raising similar claims regarding former professional wrestlers' claims that they suffered from chronic traumatic encephalopathy ("CTE") arising from their performances as wrestlers. *See* Fed. R. Civ. P. 42.[2] Konstantine W. Kyros, Esq., was lead counsel for the plaintiffs in those suits.[3]

Because the petition focuses solely on the application of *Hall* to the appeals from the dismissals of these three cases, the Court need not delve into the underlying merits. It is sufficient to note that, when it adjudicated each of the claims, the District Court correctly held that the three complaints failed to

---

[2] App. 9.

[3] Before the cases were consolidated in the District of Connecticut, Mr. Kyros engaged in significant forum shopping. Mr. Kyros first filed the *Haynes* action in Oregon in October 2014 as a putative class action. Three months later, he filed a second, repetitive putative CTE class action in Pennsylvania. A month later, he filed the *Frazier* action in Tennessee. Two months later, he filed the *McCullough* action in California, again as a putative class action. In June 2015, the federal court in Oregon determined that Mr. Kyros had engaged in forum shopping and transferred the *Haynes* case to the District of Connecticut. The next day, undeterred, Mr. Kyros filed another CTE case in Texas. All of the cases filed after *Haynes* were ultimately transferred to the District of Connecticut by courts that enforced the forum-selection clauses in the contracts between the WWE and the performers.

state a plausible claim.[4] Additionally, the Second Circuit's 2020 opinion reached the merits of the only case for which the appeal was timely—*Laurinaitis v. World Wrestling Entertainment, Inc.*—and affirmed the District Court's determination that all of the claims in that lawsuit, styled as a mass action, were time-barred.[5] The Second Circuit's merits holding regarding limitations in *Laurinaitis* would apply equally to *Haynes, McCullough* and *Frazier* had the appeals in those three cases been timely.

On March 21, 2016, the District Court dismissed all claims in the *Haynes* and *McCullough* cases.[6] The plaintiffs in those cases took immediate appeals to the Second Circuit. The WWE responded with motions to dismiss the appeals as premature pursuant to the circuit's then-controlling precedent, *Hageman v. City Investing Co.,* 851 F.2d 69 (2d Cir. 1988), which held that appeals in consolidated cases had to wait until all of the cases were concluded. The Court of Appeals agreed and dismissed both *Haynes* and *McCullough* on September 27, 2016. *See McCullough* v. *World Wrestling Entertainment, Inc.,* 838 F.3d 210 (CA2 2016).[7] The plaintiffs in those cases sought neither rehearing nor *certiorari*. Neither did they ask the District Court to certify their claims for immediate appeal under Federal Rule of Civil Procedure 54(b).

On November 10, 2016, the District Court dismissed the complaint in *Frazier* for failure to state a

---

[4] *Id.*

[5] App. 12.

[6] *Id.*

[7] App. 102.

claim for which relief could be granted after noting, among other things, that Mr. Frazier died in the shower after suffering a heart attack six years after he last performed for the WWE.[8] The plaintiff in that case made no effort at that time to appeal, and he did not ask the District Court for a Rule-54(b) certification.

On March 27, 2018, this Court decided *Hall* and held that, in consolidated cases such as this one, a final decision in one of the consolidated cases is immediately appealable. *See* 138 S. Ct. at 1131. That also, of course, meant that the jurisdictional clock for filing a notice of appeal would begin to run.

---

[8] App. 9. In dismissing *Frazier,* the District Court noted that Mr. Kyros had filed deceptive pleadings, and it warned him to adhere to the ethical rules lest he be sanctioned. He did not heed the warning, and the District Court later sanctioned him in certain of the other consolidated cases. In that opinion, the District Court offered some sense of the baselessness of the plaintiffs' claims:

> By Plaintiffs' own admission, Frazier was a six-foot-nine-inch, nearly 500-pound man who "suffered from diabetes, an enlarged heart, and obesity" and suffered a heart attack in the shower. [FAC ¶ 50, 160]. Even if the Court assumes for the purposes of this motion that Plaintiffs' unprovable allegation that Frazier "had CTE" were true, the Amended Complaint does not contain a single allegation that heart failure can be a symptom or consequence attributable to a neurologically degenerative condition like CTE. Thus, counsel's allegation that Frazier's "inability to survive the heart attack" can be "more likely than not attributed" to his CTE is yet another bald and baseless allegation, unprovable and unsupportable, which the Court deems unworthy of the barest measure of credibility.

App. 84.

Notably, the District Court dismissed one of the consolidated cases—*Singleton v. World Wrestling Entertainment, Inc.*—the day after this Court decided *Hall,* yet Mr. Kyros did not file a notice of appeal in accordance with *Hall* even though the Court's announcement of its decision in *Hall* and the attendant coverage in the legal press would have alerted counsel to the change in the law.

Although their earlier appeals had been dismissed on the basis of circuit authority *Hall* overruled, the plaintiffs in *Haynes* and *McCullough* made no request to the Second Circuit for any sort of relief such as, for example, recalling the mandate in the September 2016 appeal. Likewise, the plaintiff in *Frazier* took no immediate steps to address the change in authority. Instead, all of these plaintiffs sat on their hands.

On September 27, 2018, the District Court resolved the last of the consolidated cases, *Laurinaitis*, in the WWE's favor.[9] On October 26, 2018, the plaintiffs filed notices of appeal in five of the seven consolidated cases—including the three cases that

---

[9] App. 19. In its opinion, the District Court sanctioned Petitioners' counsel after explaining that

> [t]he Court has been extremely forgiving of Attorney Kyros' and his appearing co-counsels' highly questionable practices throughout this case, in an effort to give each wrestler a fair hearing. However, despite second, third, and fourth chances to submit pleadings that comply with Rules 8, 9, and 11, Attorney Kyros has persisted in asserting pages and pages of frivolous claims and allegations for which he lacked any factual basis."

App. 61.

are the subjects of the petition before this Court, *Haynes, McCullough* and *Frazier*.

The WWE filed motions to dismiss those appeals because they were untimely. The appellants responded with an incorrect argument that *Hall* did not apply to the sort of consolidation that had occurred in their cases or that their untimely appeals should be permitted because of their lawyer's "excusable neglect." They did not raise the issue that is the basis of their present *certiorari* petition.[10] The Second Circuit deferred resolution of those motions to the merits panel to decide after oral argument.

As the oral argument in the Court of Appeals began, one of the judges foreseeably asked appellants' counsel about the effect of *Hall* on the Second Circuit's jurisdiction:

> JUDGE PARK: This is Judge Park. I guess before getting into the merits, I'd like to ask you about on the motions to dismiss or I guess before we even get there, I'd like to ask you about the impact of the Supreme Court's holding in *Hall* and the situation here with the notices of appeal. It seems to me that the Supreme Court made clear in the *Hall* decision that there is a 30-day time limit and that is what applies to each individual case regardless of whether they're consolidated but they're independent appeals. And, you know, notwithstanding this Court's decision earlier in this case, wouldn't we have to follow that decision of the Supreme Court?

---

[10] The motions to dismiss and responses to them are available through the PACER system.

MR. KYROS: Well, I think we addressed that when WWE filed the motion to dismiss the appeal for lack of appellate jurisdiction. And I just found the argument as unresolved. I don't have—I wasn't prepared to speak about that but essentially the argument there is that the issue was unresolved. I think we cited to even a K&L Gates article that described that there were situations like this that—in both people that had filed appeals, filed appeals and then had not, you know, availed themselves, hadn't yet been given the right to their appeal. So...

JUDGE NARDINI: I'm sorry, Mr. Kyros. This is Judge Nardini. You're aware that the motion to dismiss was referred to this panel for consideration, correct?

MR. KYROS: Yes.

JUDGE NARDINI: That motion was not denied. You understand that, right?

MR. KYROS: Yes, Your Honor.

JUDGE NARDINI: And this goes to the jurisdiction of this Court to decide, right?

MR. KYROS: Yes, it does, Your Honor.

JUDGE NARDINI: And you were not prepared to discuss this issue?

MR. KYROS: I apologize, I misspoke. I was—I had my prepared comments but I looked at the argument and I really rest on what we said. I'm not sure…

> JUDGE NARDINI: Well, actually instead of resting on your papers and telling us that it's an unresolved issue, because I think the question before the Court is whether we need to resolve it, right? So it's not helpful to say nobody's resolved it, right? Because here we are today, right? I mean we may have to rule on this, right? So why should we rule in your favor and not dismiss any number of your clients' claims for lack of jurisdiction? Could you explain to us why?
>
> MR. KYROS: Well, Your Honor, I think that the issue in the *Hall* decision was it gave the wrestler, excuse me, gave the plaintiffs in that case the right to appeal. So these cases get consolidated for all purposes and in our case this Court decided that we would have to wait until the final order came down before we took our appeal. So I felt that the, the argument was sort of a difficult one for looking at the rights of these plaintiffs because if they had not, you know, if they had, there was no way for them to follow that. We took the right of appeal with the *Haynes* and *McCullough* cases. So I mean I think that we—once the judge issued the final decision in this case we took a timely appeal.[11]

The argument then turned to a discussion of the sanctions orders the District Court had entered against Mr. Kyros.

---

[11] The recording of the oral argument is available on the Second Circuit's website. The WWE's counsel prepared the transcript of the oral-argument colloquy from that recording.

On September 9, 2020, the Second Circuit resolved the appeals in a summary order.[12] With respect to *Haynes, McCullough* and *Frazier*, the Court of Appeals recited the procedural history and noted the plaintiffs' inaction after this Court decided *Hall*:

> This inaction was fatal. Arguments as to *Hall*'s applicability or as to any "workarounds" have been waived. *Hall* controls and renders the notices of appeal in *Haynes*, *Singleton*, *Frazier*, and *McCullough* untimely. Untimely notices of appeal are jurisdictional bars to this Court's review. *See Bowles v. Russell*, 551 U.S. 205, 209 (2007) ... Accordingly, we lack appellate jurisdiction over the appeals in *Haynes*, *McCullough*, *Frazier*, and *Singleton* and, for that reason, those appeals are dismissed.

Haynes, et al. v. *World Wrestling Entertainment, Inc.,* et al.*,* Nos. 18-3322-cv, at Typeset 8 (2d Cir. Sept. 9, 2020).[13]

The Court of Appeals did reach the merits in one of the CTE cases, *Laurinaitis,* which was the last of the consolidated cases the District Court dismissed such that the notice of appeal was timely. In *Laurinaitis*, the Second Circuit determined that the District Court correctly held that the claims were all time barred or frivolous.[14]

---

[12] App. 1.

[13] App. 11.

[14] App. 12.

The Court of Appeals also held that it lacked appellate jurisdiction over sanctions orders against Mr. Kyros because the District Court had not yet quantified the sanctions.[15]

On October 15, 2020, the Second Circuit denied Petitioners' rehearing petition.

REASONS FOR DENYING THE WRIT

I. There is no split of authority, and the issue presented is not of sufficient importance to warrant this Court's review.

The petition meets none of the Court's usual criteria for granting *certiorari*. *See* Supreme Ct. R. 10.

Petitioners' characterization of the question presented in their petition makes clear that their goal is error correction. They ask the Court to decide—

> 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?[16]

---

[15] App. 17.

[16] Petition at i.

But this Court does not sit to correct errors. *See* Supreme Ct. R. 10 ("A petition for a writ or certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Petitioners do not and cannot suggest that there is any division among the courts of appeals on that question. The WWE has been unable to find any case other than this one in which a party has raised it. Indeed, that question is not even presented in *Frazier* since, as noted above, there was no interlocutory appeal in that case.

The uniqueness of this case likewise undercuts Petitioners' contention that the issue is of broad public importance. The Court decided *Hall* three years ago, and Petitioners have not identified even one other case that presents their issue. That is unsurprising since the particular facts of these cases and the issue Petitioners draw from those facts are so idiosyncratic. They have not appeared elsewhere and, given that history and given that *Hall* has now settled the timing issue, those facts are entirely unlikely to occur again.

II. The Second Circuit did not err.

In framing their question for review, Petitioners ask if the Second Circuit erred in holding that it did not have jurisdiction over the appeals in *Haynes, McCullough* and *Frazier*. The answer is that the Court of Appeals made no mistake.

At the time the Court of Appeals decided the appeals at issue here, this Court had decided in *Hall* that, as each case in a consolidated group is resolved, the dismissal is immediately appealable.

That necessarily means that the time to take an appeal begins to run for each individual case when that case is dismissed. Section 2107(a) of the Judicial Code requires a party to file a notice of appeal within 30 days of the order or judgment to be challenged. It is undisputed that the October 26, 2018, notices that gave rise to the appeal at issue here were not filed within 30 days of the dismissals of the *Haynes, McCullough* and *Frazier* cases. Thus, the Second Circuit properly held that the appeals were untimely under controlling law.

Petitioners obliquely suggest that the Second Circuit should have made an equitable exception in their cases because of that court's earlier dismissals in accordance with its then-controlling authority. They are wrong.

First, although not mentioning it directly, Petitioners seem to invoke the "unique circumstances" doctrine of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), to seek an equitable exception to the appeal deadline. But *Bowles* expressly overruled *Harris Truck Lines* and definitively held that courts have no authority to make equitable exceptions to jurisdictional deadlines. *See* 551 U.S. at 214.

Second, as demonstrated below, even if *Bowles* did not preclude equitable exceptions, Petitioners make a particularly weak claim for equity since they had means to preserve their appellate avenues that they simply did not pursue.

The Second Circuit made no error.

III. Petitioners had means to pursue their appeals.

Petitioners tell the Court repeatedly that they had no "workarounds" to avoid losing the opportunity to appeal. That is not so.

First, if the plaintiffs in *Haynes* and *McCullough* believed the Second Circuit incorrectly dismissed their 2016 appeals as premature, they could have sought *en banc* rehearing or filed a petition for a writ of *certiorari* with this Court. They did neither.

Second, even before *Hall,* those plaintiffs could have sought immediate review prior to a final resolution of all of the consolidated cases by requesting from the District Court certification under Federal Rule of Civil Procedure 54(b). Indeed, the Second Circuit's 2016 decision in *McCullough* expressly noted that avenue. *See* 838 F.3d at 212.[17] The plaintiffs made no effort to employ Rule 54(b).

After the Court decided *Hall,* the plaintiffs in *Haynes* and *McCullough* could have asked the Second Circuit to recall its mandate from the 2016 appeal. *See Sargent* v. *Columbia Forest Prods., Inc.*, 75 F.3d 86, 90 (CA2 1996) ("One circumstance that may justify recall of a mandate is a supervening change in governing law that calls into serious question the correctness of the court's judgment.") (quotation omitted).[18]

---

[17] App. 99.

[18] Had Petitioners sought a recall of the mandate in the weeks after the Court issued its *Hall* decision, the Second Circuit would have considered whether "whether there was a substantial lapse in time between the issuing of the mandate and the motion to recall the mandate ..." *Stevens* v. *Miller*, 676 F.3d 62,

Simply stated, Petitioners created their own dilemma by their inactivity. They seek now to blame the Second Circuit for their circumstance and to have this Court accept for review a case that meets none of the Court's guidelines for *certiorari.*

IV. This case would in any event be a poor vehicle for the Court's consideration because Petitioners did not raise the issue below.

To the extent Petitioners seek review to ask for an equitable exception to *Hall,* they have waived that argument because they did not assert it in the Court of Appeals. *See United States* v. *United Foods, Inc.,* 533 U.S. 405, 417 (2001) (Court will not consider arguments not pressed below). Petitioners argued instead that *Hall* did not apply or that the court should excuse their lawyer's "excusable neglect."[19]

---

69 (CA2 2012). In considering that timing issue, the Second Circuit considers both the time between the mandate and the motion to recall the mandate *and* the time between the change in authorities and the motion to recall the mandate. *See, e.g., United States* v. *Tapia,* 816 Fed.Appx. 619 (CA2 2020). Here, this Court decided *Hall* less than a year and a half after the Second Circuit dismissed the appeals in *Haynes* and *McCullough*. Had Petitioners reacted with a prompt motion to recall the mandate, they would have at least demonstrated diligence. Instead, Petitioners did absolutely nothing. Indeed, Mr. Kyros did not lodge any appeal from the dismissal of the *Singleton* case even though it was dismissed essentially at the same time this Court decided *Hall*. (Notably, perhaps so as not to highlight that lack of diligence, Petitioners present no argument to this Court regarding the Second Circuit's dismissal of the *Singleton* appeal on jurisdictional grounds.)

[19] *See* Opposition to Motion to Dismiss in *McCullough* v. *World Wrestling Entertainment, Inc.,* No. 18-3278 (2d Cir.) (CM/ECF Doc. 71).

They have abandoned those arguments in their petition to this Court.

Thus, even if the issue were of sufficient importance to merit this Court's review, this case would be a poor vehicle for the Court's consideration.

CONCLUSION

There is no circuit split. The issue Petitioners present is important only to them since there are no other cases that present the issue—and there is no reason to believe any such cases will arise in the future. And, in any event, the Second Circuit reached the right decision and there is no basis either legally or factually for an equitable exception to *Hall*.

The Court should deny the petition for a writ of *certiorari*.

David R. Fine
K&L GATES LLP
17 North Second St.,
18th Fl.
Harrisburg, PA 17101
(717) 231-4500

Jerry S. McDevitt
(*counsel of record)*
Curtis B. Krasik
K&L GATES LLP
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222
(412) 355-6500
jerry.mcdevitt@klgates.com

March 18, 2021