

No. 21-1507

**In the
Supreme Court of the United States**

HOUSTON BYRD, JR., PETITIONER

v.

**BRAD D. FARNSWORTH and
CHRISTOPHER COOK, RESPONDENTS**

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**RESPONDENT BRAD D. FARNSWORTH'S
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Brian D. Sullivan*
Brian P. Nally
Brianna M. Prislipsky
REMINGER CO., L.P.A.
101 West Prospect Avenue, Suite 1400
Cleveland, OH 44115-1093
(216) 687-1311
bsullivan@reminger.com

Counsel for Respondent Brad D. Farnsworth

**Counsel of Record*

COUNTERSTATEMENT OF QUESTION PRESENTED

This appeal arises out of claims Petitioner Houston Byrd, Jr. (“Petitioner”) has brought against Respondent Brad D. Farnsworth (Farnsworth), an investment professional, who facilitated the sale of an annuity contract to Petitioner in December 2012. Petitioner did not file suit until April 7, 2021, in the Court of Common Pleas in Licking County, Ohio. Generally, Petitioner alleges that the sale of his annuity violates state and federal criminal statutes, state and federal annuities laws, and constituted common law breaches of contract and fiduciary duty.

The case was then removed to federal court, after which Farnsworth filed a motion to dismiss Petitioner’s claims because the statutes cited in his complaint did not afford private rights of action, and his remaining claims were otherwise barred by the statute of limitations. Farnsworth also filed a motion to have Petitioner declared a vexatious litigator due to his conduct in that action as well as in more than a dozen other actions initiated by Petitioner. The district court granted both motions, and Petitioner appealed to the Sixth Circuit Court of Appeals, which affirmed. Left with no further avenue to pursue his claims against Farnsworth and the other defendants, Petitioner has now petitioned this Court for a Writ of Certiorari.

Petitioner raises the following issues in his Petition: 1) whether Petitioner has a private right of action under the several state and federal criminal statutes referenced in his complaint, and 2) whether Petitioner’s claims are time-barred, and 3) whether

the district court and circuit court properly had jurisdiction over his claims.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is available at *Byrd v. Cook*, S.D.Ohio No. 2:21-cv-2288, 2021 U.S. Dist. LEXIS 121883 (June 30, 2021). The opinion of the District Court is available at *Byrd v. Cook*, 6th Cir. No. 21-3623, 2021 U.S. App. LEXIS 33204 (Nov. 8, 2021).

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its judgment on November 8, 2021 and denied a petition for rehearing en banc on December 15, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. Respondent denies that the case satisfies the standard set forth in this Court's Rule 10(a), (b) or (c).

STATUTORY PROVISIONS INVOLVED

Petitioner argues that his complaint was improperly removed to the Southern District of Ohio pursuant to 28 U.S.C. § 1441(b)(2), which precludes removal jurisdiction on the basis of diversity of citizenship when a defendant is a resident of the state in which the action is brought. 28 U.S.C. § 1441(a) provides that a case may be properly removed pursuant to 28 U.S.C. § 1331 when the cause of action arises under the federal law.

Under both Ohio and federal law, a claim for securities fraud must be brought within five years of the sale of the security. See, 28 U.S.C. § 1658(b); Ohio Rev. Code § 1707.43(B).

Common law claims for breach of fiduciary duty and fraud are subject to a four-year statute of limitations based upon when the alleged injury of fraud is discovered or should have been discovered. Ohio Rev. Code § 2305.09(C).

COUNTERSTATEMENT OF THE CASE

Petitioner is a litigant with an extensive history of pursuing frivolous and meritless claims. Outside of this current suit, Petitioner has filed more than a dozen lawsuits—all of which have been dismissed—including two cases against the Supreme Court of Ohio and one against the Chief Justice of the Supreme Court of Ohio (the Honorable Judge Maureen O'Connor) in both her official and private capacity. Motion to Declare Plaintiff a Vexatious Litigator, RE 7-1 through 7-44, PageID # 203-630.

Other targets of Petitioner's filings have included the attorney who represented him in prior family court proceedings, the judge who presided over those proceedings, the Ohio Department of Job and Family Services (twice), a Domestic Relations Office in Florida, the Franklin County Child Support Agency, the Ohio Attorney General, and the Ohio Inspector General, among many others. *Id.* All of these cases precede the current litigation. *Id.*

In December 2012, almost ten years ago, Petitioner purchased an annuity from Farnsworth. Complaint, RE 1-1, PageID # 34. In July 2015, Petitioner began to express frustration that his annuity was subject to what he called “excessive fees,” and that the annuity did not grow. Complaint, RE 1-1, PageID # 15-16. That same month, Petitioner attempted to cancel the annuity but did not manage

to do so until April 2017. (*Id.*) Petitioner escalated the matter by seeking relief from the Financial Industry Regulatory Authority (FINRA), and its Office of the Ombudsman. *Id.*, at PageID # 13.

In April 2021, Petitioner filed his complaint pro se. RE 1-1. Petitioner named as defendants both Farnsworth and Christopher Cook (“Cook”), the head of the Office of the Ombudsman. As an initial point, the exact nature of Petitioner’s precise claims is not readily decipherable. Petitioner’s complaint is sprawling, and it contains whole sections devoted to legal analysis and email chains, which have been spliced and directly inserted into the text of the complaint. As the district court noted, Petitioner’s complaint “is nearly incomprehensible *** [i]t lacks organization and structure, which renders the content difficult to interpret.” *Byrd v. Cook*, S.D.Ohio No. 2:21-cv-2288, 2021 U.S. Dist. LEXIS 121883, at *2 (June 30, 2021).

Though the particular form of Petitioner’s claims is not wholly clear from the face of his complaint, he appears to allege violations of both state and federal criminal statutes, including 18 U.S.C. § 1341 (mail fraud) and Ohio Rev. Code § 2913.02 (theft), as well as alleged violations of state and federal securities laws. RE 1-1, PageID # 24. Petitioner also alleges common law claims for alleged fraud, breach of fiduciary duty, and conspiracy. RE 1-1, PageID # 15. Generally, Petitioner’s primary allegation appears to be that he was charged fees for his annuity that he claims were excessive, and that his annuity did not appear to grow. *Id.*

Shortly after Petitioner’s complaint was filed, Cook filed a notice to remove the case to the Southern

District of Ohio on the basis of federal question jurisdiction, as Petitioner's claims relied heavily upon federal securities law and thus presented a federal question. Notice of Removal, RE 1. Farnsworth thereafter filed a motion to dismiss Petitioner's claims because 1) the state and federal statutes cited by Petitioner did not afford private rights of action, and 2) Petitioner's securities and common law claims were barred by the applicable statutes of limitations. Motion to Dismiss for Failure to State a Claim RE 6. Separately, Cook filed a motion to dismiss on the basis that Petitioner had failed to state a claim upon which relief could be granted. Motion to Dismiss, RE 5.

In addition to his motion to dismiss, Farnsworth also filed a motion to have Petitioner deemed a vexatious litigator due to his conduct in that action, as well as his conduct in over a dozen other actions, which were detailed at length in Farnsworth's motion. RE 7. In response, Petitioner filed several "motions to strike" various filings by defendants, numerous "objections" to decisions by the district court, a request for the recusal of the magistrate judge, and motions for sanctions against Farnsworth's counsel subsequent to the filing of Farnsworth's motion to dismiss, requesting \$25,000 and later \$50,000 in compensatory damages, and later objections to the denial of his motions for sanctions. RE 8-9, 11, 13, 16-17, 24. Petitioner then filed his own motion to dismiss, made under the mistaken belief that a lack of diversity would preclude federal question jurisdiction. RE 14.

Magistrate Judge Chelsey M. Vascura subsequently issued a report and recommendation in which she found removal was proper, which the Court adopted. *Byrd v. Cook*, S.D.Ohio No. 2:21-cv-2288,

2021 U.S. Dist. LEXIS 101226 (May 28, 2021). The Southern District of Ohio then granted both Farnsworth and Cook’s motions, dismissing Petitioner’s claims against both Defendants. *Byrd v. Cook*, S.D.Ohio No. 2:21-cv-2288, 2021 U.S. Dist. LEXIS 121883, at *11 (June 30, 2021). The district court found that the criminal statutes cited by Petitioner in his complaint did not afford private rights of action, and that Petitioner’s securities and common law claims were barred by their respective statutes of limitations. *Id.*

The district court also acknowledged that Petitioner had “demonstrated willingness to file repetitive and baseless motions that strain judicial bandwidth,” in both that action and numerous prior ones and subsequently granted Farnsworth’s motion to have Petitioner deemed a vexatious litigator. *Byrd v. Cook*, S.D.Ohio No. 2:21-cv-2288, 2021 U.S. Dist. LEXIS 121883, at *13 (June 30, 2021). In designating Petitioner a vexatious litigator, the district court enjoined Petitioner from filing any further actions without first seeking leave from the Court or obtaining a good faith certificate from a licensed attorney. *Id.* at 16. Petitioner was further required to include the captions and case numbers of all prior actions in any complaint subsequently filed “in this or any other court.” *Id.*

Petitioner then filed a notice of appeal to the Sixth Circuit Court of Appeals, addressing only the issue of subject matter jurisdiction. RE 30, PageID # 758. Specifically, Petitioner alleged that, because Defendants were Ohio residents, they were “forum defendants” who were precluded from removing the case to federal court. *Id.*, PageID #758-59.

Petitioner continued to engage in vexatious conduct during the Sixth Circuit proceedings. In the course of his appeal, Petitioner filed another motion for sanctions, a motion to have Farnsworth's brief stricken, and a motion for default judgment on his motion for sanctions. Petitioner also filed a preemptive document titled "Concerns and Issues for Clarifications," in which he restated his claims that his complaint was improperly removed to federal court, which the Southern District of Ohio "knowingly condoned." See *Concerns and Issues for Clarification*, filed 7/22/2021. Nonetheless, the Sixth Circuit affirmed the district court's ruling after determining that removal was proper on the basis of federal question jurisdiction. *Byrd v. Cook*, 6th Cir. No. 21-3623, 2021 U.S. App. LEXIS 33204, at *4 (Nov. 8, 2021).

After the Sixth Circuit affirmed the Southern District of Ohio's ruling, Petitioner filed a motion for an en banc rehearing and a motion to recall the Sixth Circuit's mandate. After both of those motions were denied, Petitioner then filed a motion to reconsider his motion for a rehearing, which was also denied.

Having exhausted his objections below, Petitioner filed his Writ for a Petition of Certiorari asking this Court to review the lower courts' rulings.

REASONS FOR DENYING THE PETITION

I. The Southern District of Ohio and Sixth Circuit both properly had jurisdiction over Byrd's claims.

As a threshold matter, both the Southern District of Ohio and the Sixth Circuit Court of Appeals had jurisdiction over Petitioner's claims. Pursuant to 28 U.S.C. § 1331, district courts have original jurisdiction over all civil actions that arise under the Constitution or laws of the United States. Here, Petitioner alleges that numerous federal laws, including 18 U.S.C. § 1341, 1346, 1348, and self-styled "federal securities statutes" were violated by the sale of Petitioner's annuity. Because those claims subsequently arise under federal law, they invoke federal question jurisdiction.

It is well settled that "[f]ederal question jurisdiction can be established by showing either that [1] federal law creates the cause of action or that [2] the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law." *Warthman v. Genoa Township Bd. of Trustees*, 549 F.3d 1055, 1060 (6th Cir. 2008) (internal citation and quotation omitted). Whether a cause of action arises under federal law must be apparent from the face of the "well-pleaded complaint." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987). For purposes of assessing whether federal-question jurisdiction exists, federal courts ignore any potential federal defenses that may arise in the course of the litigation. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003).

Petitioner's claims against Farnsworth arise under federal securities law, which subsequently triggers federal question jurisdiction. Specifically, as

best can be determined from the face of his complaint, Petitioner's claims arise from the alleged breach of federal securities laws. Moreover, Petitioner's "right to relief" required the resolution of federal questions of law, namely 1) whether the federal criminal statutes cited by Petitioner afforded private rights of action, and 2) whether Petitioner's claims were properly brought pursuant to their applicable statutes of limitations. This was sufficient to grant the district court jurisdiction over Petitioner's claims.

Petitioner alleges that removal was improper pursuant to the "forum defendant rule," under which a defendant in a diversity action is prohibited from removing a case when that defendant is a resident of the state in which the case was filed. Because this case does not arise under diversity jurisdiction, however, the district court properly concluded that removal jurisdiction was proper. See also, *Hairston v. Sun Belt Conference Inc.*, E.D.La. No. 21-2088, 2021 U.S. Dist. LEXIS 240219, at *17 (Dec. 16, 2021); *Curtis v. BP America, Inc.*, 808 F.Supp. 2d 976, 982 (S.D. Tex. 2011) ("The forum-defendant rule does not apply to cases arising under federal law"). As a result, both the district court and Sixth Circuit had proper jurisdiction over Petitioner's claims, as Petitioner's claims invoked federal question jurisdiction pursuant to 28 U.S.C. § 1331.

II. The criminal statutes invoked by Petitioner do not afford a private right of action.

Petitioner's claims were properly dismissed. The criminal statutes Petitioner cites to in his complaint and Petition to this Court do not provide private causes of action. Generally, a criminal statute

that does not provide for an express private right of action will not be interpreted as having provided for one. Here, none of the statutes invoked by Petitioner contain express provisions for private causes of action. Accordingly, because none of the statutes cited by Petitioner provide private rights of action, his claims were properly dismissed by the district court.

In determining whether a criminal statute provides a private right of action, the central inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action. *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1177 (6th Cir.1979), citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S. Ct. 2479 (1979). The provision of a criminal penalty does not necessarily preclude implication of a private cause of action for damages. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201-202, 88 S. Ct. 379 (1967). However, when there is nothing more than a “bare criminal statute, with absolutely no indication that civil enforcement of any kind” was meant to be provided, a court may not infer a private right of action. *Id.* “Where Congress has provided a specific provision, the court should not expand the remedy beyond the limits where Congress was prepared to go.” *Ryan* at 1177, citing *United States v. Sisson*, 399 U.S. 267, 297, 90 S. Ct. 2117 (1970).

Petitioner invokes numerous criminal statutes in his complaint and Petition, including 18 U.S.C. §§ 656 (theft), 1341 (mail fraud), 1346 (“scheme or artifice to fraud”), 1348 (securities and commodities fraud), 1349 (attempt and conspiracy), and Ohio Rev. Code § 2913.02 (theft). None of these statutes provide for private causes of action. For example, 18 U.S.C. § 656 does not provide for a private right of action.

Campbell v. M&T Bank, W.D.Pa. No. 3:16-cv-118, 2017 U.S. Dist. LEXIS 41041, at *16 (Mar. 22, 2017), citing *U.S. ex rel. Nagy v. Patton*, No. MISC.A. 110267, 2012 U.S. Dist. LEXIS 70995, 2012 WL 1858983, at *2 (E.D. Pa. May 22, 2012).

Numerous circuit courts have further held that the mail fraud statute (§ 1341) provides no private right of action. *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178 (6th Cir.1979), citing *Bell v. Health-Mor, Inc.*, 549 F.2d 342, 346 (5th Cir. 1977); *Krupnick v. Union National Bank*, 470 F. Supp. 1037 (W.D. Pa. 1979). There is also “no question that 18 U.S.C. § 1348 is a criminal statute without a private right of action.” *Heath v. Root9B*, D.Colo. Civil Action No. 18-cv-01516-RBJ-KMT, 2019 U.S. Dist. LEXIS 34391, at *17 (Mar. 4, 2019), citing *Butler v. ONEWEST Bank*, FSB, No. 10-00300HG-KSC, 2010 U.S. Dist. LEXIS 81100, 2010 WL 3156047, at *3 (D. Haw. Aug. 6, 2010).

Petitioner presents no explanation or exception for the above holdings. Because the state and federal criminal statutes cited by Petitioner in his complaint offer no private right of action, the district court and Sixth Circuit properly concluded that Petitioner had failed to state a claim upon which relief could be granted.

III. Petitioner’s claims are time-barred as a matter of law.

Even if Petitioner was entitled to private rights of action for his claims, his claims are also barred due to their applicable statutes of limitation. Under Ohio law, securities claims are subject to a five-year statute of limitations. Similarly, Petitioner’s state tort law claims for breach of contract and breach of fiduciary

duty are subject to four-year statutes of limitations. Here, at the latest, Petitioner had notice of his claims in July 2015, when he contacted Farnsworth and asked to have his annuity cancelled. Because Petitioner's claims were not filed until April 7, 2021, more than five years after Petitioner had notice of the allegations underlying his complaint, Petitioner's claims are subsequently time-barred and were properly dismissed by the courts below.

Under both Ohio and federal law, a claim for securities fraud must be brought within five years of the sale of the security. See, 28 U.S.C. § 1658(b); Ohio Rev. Code § 1707.43(B). Similarly, common law claims for breach of fiduciary duty and fraud are subject to a four-year statute of limitations that begins to run when the alleged injury of fraud is discovered or should have been discovered. See *Investors REIT One v. Jacobs*, 46 Ohio St. 3d 176, 546 N.E.2d 206, 207 (Ohio 1989) (syllabus); Ohio Rev. Code § 2305.09(C).

Petitioner initially purchased his annuity in December 2012. Three years later, in July 2015, Petitioner contacted Farnsworth and expressed numerous frustrations about the annuity, including allegations that the accompanying fees were too high, and that the annuity was not growing at a sufficient rate. That same month, Petitioner attempted to have his annuity cancelled, though he did not succeed in doing so until July 2017. Petitioner's complaint was not filed until April 2021, **six years after** he had notice of his purported claims. Under both the five-year statute of limitations for securities fraud, and the four-year statute of limitations for common law negligence, Petitioner's claims are time-barred.

Accordingly, Petitioner has failed to cite a relevant conflict between circuit courts that would be sufficient to invoke this Court's jurisdiction under this or any of the legal bases for dismissal cited by the Southern District of Ohio or Sixth Circuit Court of Appeals. Accordingly, Petitioner's Petition should be denied, as he has failed to demonstrate that his claims were viable as a matter of law.

CONCLUSION

For all the above reasons, the Petition for a Writ of Certiorari should be denied. First, the Sixth Circuit's decision does not bear upon any important question of federal law that this Court should decide, nor does it conflict with any relevant decision of this Court. Further, there is no relevant conflict among the Circuits as to whether removal is proper under 28 U.S.C. § 1331 when a plaintiff's claim asserts causes of action under federal statutes, subsequently presenting a federal question. Finally, neither the Southern District of Ohio nor the Sixth Circuit Court of Appeals erred in dismissing and upholding the dismissal of Petitioner's complaint, as he had failed to state a claim upon which relief could be granted.

Dated: July 1, 2022

Respectfully submitted,

Brian D. Sullivan*
Brian P. Nally
Brianna M. Prislipsky
REMINGER CO., L.P.A.
101 West Prospect Avenue, Suite 1400
Cleveland, OH 44115-1093
(216) 687-1311
bsullivan@reminger.com

*Counsel for Respondent
Brad D. Farnsworth*

**Counsel of Record*