No. 21-7467

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK MURACA,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION OF THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an incarcerated individual have the timely and speedy right to an attorney before important court decisions are made, such missing a deadline for an Appeal?

2. Whether the Court of Appeals properly relied on Bowels v. Russell appropriately since the Petitioner did not have timely and speedy access to an attorney while incarcerated, given the fact that incarcerated individuals, such as the Petitioner does not have full and free access to legal representation?

3.Should the Court of Appeals have made an exception to 28 U.S.C. § 2107(b)(2); Fed. R. App. P. 4(a)(1)(B)(ii) because the Petitioner did not have access to his attorney to appropriately make decisions to go to trial to refute false and misleading statements made by witnesses?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were the Securities and Exchange Commission of the United States of America against Patrick Muraca.

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TABLE OF AUTHORITIES

CASES

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the First Circuit, by unpublished summary order, reproduced in the appendix at App. 1, affirmed the Appellee's motion to dismiss was granted, and the appeal was dismissed. Appellant did not file a notice of appeal within the 60-day deadline. See 28 U.S.C. § 2107(b)(2); Fed. R. App. P. 4(a)(1)(B)(ii). The deadline cannot be equitably tolled. See Bowles v. Russell, 551 U.S. 205, 214 (2007).

The ruling of the district court is reprinted at App. 4.

JURISDICTION

The summary order of the court of appeals was entered on January 26, 2022. This petition for a writ of certiorari is being timely filed within ninety days of the summary order, in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides the following, in pertinent part:

No person shall be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI, provides the following, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the **assistance of counsel for his defense.**

STATEMENT OF THE CASE

1. The prosecution related to allegations that Petitioner, who had a decades-long background in the medical technology field and founded two biotechnology companies–NanoMolecularDX LLC ("NMDX") and MetaboRX LLC ("Metabo")–solicited investments through false representations and misappropriated the invested funds for his personal use. In addition, the Government alleged that Petitioner made false statements after having initially obtained the investments, and otherwise fabricated evidence. Following a seven-day jury trial, Petitioner was found guilty of one count each of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; and making a false statement, in violation of 18 U.S.C. § 1001. With respect to the false statement count, however, the jury found only one of the seven alleged false statements to have been proved.

2. The above recounts the criminal trial in the Southern District of New York, these criminal allegations were created due to the Securities and Exchange Commission's allegation of misappropriation of funds. While every investor of the company had given the petitioner their direct support and told the SEC, that there was no malfeasance, the SEC kept pushing forward for criminal charges to be filed.

3. On April 2nd, 2020, the US District Court in Massachusetts entered a final judgment against Patrick Muraca and two biotechnology companies he controlled nano molecular DX, LLC and metabola RX, LLC for defrauding investors, ordering baraka to disgorge over $400,000 in ill-gotten gains.

According to the SEC complaint filed on July 31st, 2017, Morocco established two pharmaceutical development companies and raised nearly 1.2 million by representing that the investor money would be used to develop products to detect cancer and other diseases. The SEC trace the flow of investor funds into Muraca's personal bank account and alleged that at least $400,000 have been used to pay rent for restaurants and fund other purchases by Moroccan including payments to a casino, automotive shop, and a cigar shop. The SEC's complaint alleges that the investors were never informed of the alternative uses of their investments in nano molecular DX, LLC and MetaboRX, LLC.

On December 5th, 2019, the court granted the SEC motion for summary judgment, finding that Muraca, NanomolecularDX, LLC and MetaboRx, LLC had violated the securities laws, and now the court has entered a final judgment, permanently

enjoining Muraca from never becoming a CEO, director, or leader of a company again and a fine and disgorgement was also levied. The petitioner filed an appeal on August 24th, 2021, to appeal the decision of the United States District Court of Appeals for the first district case number 21-1559. To the fact that the petitioner's attorney, acted without his knowledge because of the fact that the attorney was not able to get in touch with the petitioner as the petition was incarcerated and in United States federal custody. Because of this lack of contact the petitioner had no idea that the court had made a final decision and one was unable to file an appeal due to his incarceration and to the fact that he was unable to contact his attorney, or his attorney contact him (App 4)

Because of this issue that Muraca was not able to file an appeal to challenge witnesses who most certainly made false statements to the SEC, which is provable, the petitioner was not able to provide an adequate defense in the Civil Procedure that ultimately led to the criminal conviction. This criminal conviction was predicated on false statements, inaccurate information, and incompetence by the SEC attorneys as to the understanding of the use of funds and to the actual pleas of the investors, that this was not actionable. Because of the SEC actions, both companies, that had actual intellectual

property, products and moving towards commercialization were effectively destroyed because of these actions.

REASONS FOR GRANTING THE PETITION

The Court Should Grant Certiorari to Make Clear That incarcerated individuals, have the right to equal access to attorneys for their defense of both civil and criminal related issues. This is afforded to any defendant in any case by Amendment VI of the constitution of the United States of America.

The petitioner was incarcerated in two separate federal facilities, Fort Dix NJ and USP Canaan in Pennsylvania, both in the federal prison camps. The petitioner was assaulted and had a medical emergency while at Fort Dix New Jersey and was placed in the special housing unit for a period of approximately four months. During that time the petitioner did not have access to his attorney after repeated calls to the prison officials to have a attorney call for the petitioner. The petitioner was finally allowed to speak to his attorney for 10 minutes and then was allowed a 30-minute visit by his attorney in his criminal matter to discuss an appeal. The petitioner was then moved without notice to his attorney to MDC Brooklyn and was therefore approximately 45 days. An attorney call was then made, and a short meeting was allowed for his criminal case. During this time, his family, civil attorney Anthony Doyle was not informed of his move and

could not contact the petitioner do too federal prison rules. The petitioner was then moved to USP Canaan in Waymart PA, and then had no contact with any attorney from that point forward even after requesting attorney calls. the petitioner was locked in the special housing unit in USP Canaan since a COVID infection was evident in the camp and that the petitioner was at high risk for morbidity and mortality as it relates to COVID infection because of Diabetes and heart disease. The petitioner's civil attorney, Anthony Doyle, did not have instruction that the petitioner wanted to go to trial and capitulated to the District Court of Massachusetts by waving his rights to a trial. The Petitioner Never directed his attorney to agree to waive his right to trial as he could not contact his attorney.

The reason that this court should grant the Certiorari is to challenge the Bowles V. Russell decision of 2007 United States Supreme Court number 06-5306 that there are extenuating circumstances that should be considered in filing an appeal in U.S. Federal court especially if the petitioners are incarcerated. The Bureau of Prisons has very strict guidelines on how incarcerated individuals can speak to their attorneys making it very difficult to be able to be notified of specific dates, court hearings, or any type of rulings that the court may have made. The petitioner's VI amendment

was violated when it made it almost impossible to speak with attorneys concerning both his criminal appeals case as well as his civil case that led to the criminal case, for the petitioners will to be heard and understood. If the petitioner could have spoken with his civil attorney Anthony Doyle counted the petitioner would have told the attorney that he wanted to go to trial, to directly refute the false statements made by the witnesses, to the SEC and to the FBI. There is direct evidence that was not heard at the criminal trial that would most certainly refute specific false testimony of these witnesses, specifically the SEC, Thomas Weber, Brad Vincent, Stephanie Roy, and Martha Gravasi, hence these same false statements were utilized by the SEC to establish criminal intent.

As the Supreme Court heard this case of Bowels V. Russell in 2007, Justice SOUTER, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting. They had the dissenting opinion of the following:

SOUTER, J., DISSENTING

BOWLES V. RUSSELL

551 U. S. ____ (2007)

SUPREME COURT OF THE UNITED STATES

NO. 06-5306

"The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent.

I " 'Jurisdiction,' " we have warned several times in the last decade, " 'is a word of many, too many, meanings.' " *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 90 (1998) (quoting *United States* v. *Vanness*, 85 F. 3d 661, 663, n. 2 (CADC 1996)); *Kontrick* v. *Ryan*, 540 U. S. 443, 454 (2004) (quoting *Steel Co.*); *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 510 (2006) (quoting *Steel Co.*); *Rockwell Int'l Corp.* v. *United States*, 549 U. S. ___, ___ (2007) (slip op., at 9) (quoting *Steel Co.*). This variety of meaning has insidiously tempted courts, this one included, to engage in "less than meticulous," *Kontrick*, *supra*, at 454, sometimes even "profligate … use of the term," *Arbaugh*, *supra*, at 510.

In recent years, however, we have tried to clean up our language, and until today we have been avoiding the erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word. Thus, although we used to call the sort of time limit at issue here "mandatory and jurisdictional," *United States* v. *Robinson*, 361 U. S. 220, 229 (1960), we have recently and repeatedly corrected that designation as a misuse of the "jurisdiction" label. *Arbaugh*, *supra*, at 510 (citing *Robinson* as an example of improper use of the term "jurisdiction"); *Eberhart* v. *United States*, 546 U. S. 12, 17–18 (2005) *(per curiam)* (same); *Kontrick*, *supra*, at 454 (same).

But one would never guess this from reading the Court's opinion in this case, which suddenly restores *Robinson*'s indiscriminate use of the "mandatory and jurisdictional" label to good law in the face of three unanimous repudiations of *Robinson*'s error. See *ante*, at 4. This is puzzling, the more so because our recent (and, I repeat, unanimous) efforts to confine jurisdictional rulings to jurisdiction proper were obviously sound, and the majority makes no attempt to show they were not.

The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sU. S.onte* consideration in the courts of appeals mandatory, see *Arbaugh*, *supra*, at 514As the Court recognizes, *ante*, at 5-6, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick*, *supra*, at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). But neither is jurisdictional treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U. S., at 516. Thus, we have held "that time prescriptions, however emphatic, 'are not properly typed "jurisdictional," ' " *id.*, at 510

(quoting *Scarborough* v. *Principi*, 541 U. S. 401, 414 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here.

The doctrinal underpinning of this recently repeated view was set out in *Kontrick:* "the label 'jurisdictional' [is appropriate] not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U. S., at 455. A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject matter jurisdiction unless Congress says otherwise.

The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional, *Day* v. *McDonough*, 547 U. S. 198, 205 (2006). Statutes of limitations may thus be waived, *id.*, at 207-208, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness,

see *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95-96 (1990).

Consistent with the traditional view of statutes of limitations, and the carefully limited concept of jurisdiction explained in *Arbaugh*, *Eberhart*, and *Kontrick*, an exception to the time limit in 28 U. S. C. §2107(c) should be available when there is a good justification for one, for reasons we recognized years ago. In *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, 217 (1962) *(per curiam)*, and *Thompson* v. *INS*, 375 U. S. 384, 387 (1964) *(per curiam)*, we found that "unique circumstances" excused failures to comply with the time limit. In fact, much like this case, *Harris* and *Thompson* involved district court errors that misled litigants into believing they had more time to file notices of appeal than a statute actually provided. Thus, even back when we thoughtlessly called time limits jurisdictional, we did not actually treat them as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him. Since we did not dishonor reasonable reliance on a judge's official word back in the days when we uncritically had a jurisdictional reason to be unfair, it

is unsupportable to dishonor it now, after repeatedly disavowing any such jurisdictional justification that would apply to the 14-day time limit of §2107(c).

The majority avoids clashing with *Harris* and *Thompson* by overruling them on the ground of their "slumber," *ante*, at 9, and inconsistency with a time-limit-as-jurisdictional rule.[Footnote 5] But eliminating those precedents underscores what has become the principal question of this case: why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years, culminating in *Arbaugh*'s summary a year ago? The majority begs this question by refusing to confront what we have said: "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional." ' " *Arbaugh*, 546 U. S., at 510 (quoting *Scarborough*, 541 U. S., at 414). This statement of the Court, and those preceding it for which it stands as a summation, cannot be dismissed as "some dicta," *ante*, at 4, n. 2, and cannot be ignored on the ground that some of them were made in cases where the challenged restriction was not a time limit, see *ante*, at 6. By its refusal to come to

grips with our considered statements of law the majority leaves the Court incoherent.

In ruling that Bowles cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court. Yet more incongruously, all of these pronouncements by the Court, along with two of our cases, are jettisoned in a ruling for which the leading justification is *stare decisis*, see *ante*, at 4 ("This Court has long held …").

II

We have the authority to recognize an equitable exception to the 14-day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge. Bowles, though, does not have to convince us as a matter of first impression that his reliance was justified, for we only have to look as far as *Thompson* to know that he ought to prevail. There, the would-be appellant, Thompson, had filed post-trial motions 12 days after the District Court's final order. Although the rules said they should have been filed within 10, Fed. Rules Civ. Proc. 52(b) and 59(b) (1964), the trial court nonetheless

had "specifically declared that the 'motion for a new trial' was made 'in ample time.' " *Thompson*, 375 U. S., at 385. Thompson relied on that statement in filing a notice of appeal within 60 days of the denial of the post-trial motions but not within 60 days of entry of the original judgment. Only timely post-trial motions affected the 60-day time limit for filing a notice of appeal, Rule 73(a) (1964), so the Court of Appeals held the appeal untimely. We vacated because Thompson "relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Id.*, at 387.

Thompson should control. In that case, and this one, the untimely filing of a notice of appeal resulted from reliance on an error by a district court, an error that caused no evident prejudice to the other party. Actually, there is one difference between *Thompson* and this case: Thompson filed his post-trial motions late and the District Court was mistaken when it said they were timely; here, the District Court made the error out of the blue, not on top of any mistake by Bowles, who then filed his notice of appeal by the specific date the District Court had declared timely. If anything, this distinction ought to work in Bowles's favor. Why should we have rewarded Thompson, who

introduced the error, but now punish Bowles, who merely trusted the District Court's statement.

Under *Thompson*, it would be no answer to say that Bowles's trust was unreasonable because the 14-day limit was clear and counsel should have checked the judge's arithmetic. The 10-day limit on post-trial motions was no less pellucid in *Thompson*, which came out the other way. And what is more, counsel here could not have uncovered the court's error simply by counting off the days on a calendar. Federal Rule of Appellate Procedure 4(a)(6) allows a party to file a notice of appeal within 14 days of "the date when [the district court's] order to reopen is entered." See also 28 U. S. C. §2107(c)(2) (allowing reopening for "14 days from the date of entry"). The District Court's order was dated February 10, 2004, which reveals the date the judge signed it but not necessarily the date on which the order was entered. Bowles's lawyer therefore could not tell from reading the order, which he received by mail, whether it was entered the day it was signed. Nor is the possibility of delayed entry merely theoretical: the District Court's original judgment in this case, dated July 10, 2003, was not entered until July 28. See App. 11 (District Court docket). According to Bowles's

lawyer, electronic access to the docket was unavailable at the time, so to learn when the order was actually entered he would have had to call or go to the courthouse and check. See Tr. of Oral Arg. 56-57. Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles's lawyer had no obligation to go behind the terms of the order he received.

I have to admit that Bowles's counsel probably did not think the order might have been entered on a different day from the day it was signed. He probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his copy of the federal rules and then off to the courthouse to check the docket. This would be a different case if the year were wrong on the District Court's order, or if opposing counsel had flagged the error. But on the actual facts, it was reasonable to rely on a facially plausible date provided by a federal judge.

I would vacate the decision of the Court of Appeals and remand for consideration of the merits."

Conclusion

The petitioner would ask the same as Justice Souter, Justice Stevens, Justice Ginsburg, and Justice Breyer stated should happen in the Bowels V. Russell case, to vacate the decision of the Court of Appeals and remand for consideration of the merits." The Petitioner wants is to be heard at Trial.

The petition for a writ of certiorari should be granted.

Dated: Pittsfield, Massachusetts
March 21, 2022

Respectfully submitted,

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