No. 23-741

In the Supreme Court of the United States

IFTIKAR A. AHMED, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the government's failure to file a notice of cross-appeal from the district court's disgorgement order barred the court of appeals from remanding to allow the district court to recalculate petitioner's disgorgement obligation under a new statute of limitations that Congress enacted while petitioner's appeal was pending and that applies by its terms to all pending cases.

RELATED PROCEEDINGS

United States District Court (D. Conn.):

SEC v. *Ahmed*, No. 15-cv-675 (June 16, 2021)

United States Court of Appeals (2d Cir.):

SEC v. *Ahmed*, No. 15-2658 (Nov. 4, 2016)

Camabo Indus., Inc. v. *Hudson Ins. Co.*, No. 16-248 (Jan. 3, 2017)

SEC v. *Ahmed*, No. 20-475 (Oct. 29, 2020)

In re Ahmed, No. 21-181 (Feb. 16, 2021)

SEC v. *Ahmed*, Nos. 18-2903, 18-2932, 19-102, 19-103, 19-355, 19-2974, 19-3375, 19-3610, and 19-3721 (Mar. 11, 2021)

SEC v. *Ahmed*, Nos. 20-434, 20-439, and 20-959 (Mar. 11, 2021)

SEC v. *Ahmed*, No. 21-283 (Mar. 18, 2021)

SEC v. *Ahmed*, No. 20-4198 (June 10, 2021)

SEC v. *Ahmed*, Nos. 21-1686 and 21-1712 (June 28, 2023)

SEC v. *Ahmed*, Nos. 22-135, 22-184, 22-3077, and 22-3148 (June 28, 2023)

SEC v. *Ahmed*, No. 24-235 (notice of appeal filed Jan. 25, 2024)

SEC v. *Ahmed*, No. 24-487 (notice of appeal filed Feb. 17, 2024)

United States Supreme Court:

Shalini Ahmed v. *SEC*, No. 23-987 (petition filed Mar. 6, 2024)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-52) is reported at 72 F.4th 379. The opinion of the district court (Pet. App. 53-72) is not published in the Federal Supplement but is available at 2021 WL 2471526. Earlier opinions of the district court (Pet. App. 75-202) are reported at 308 F. Supp. 3d 628 and 343 F. Supp. 3d 16.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2023. Petitions for rehearing were denied on October 12, 2023 (Pet. App. 203-204). The petition for a writ of certiorari was filed on January 5, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 2005 and 2015, petitioner fraudulently stole more than $65 million from his employer, a venture-

capital firm, and from the portfolio companies in which the firm's funds invested. Pet. App. 6-8. In 2015 the Securities and Exchange Commission (SEC or Commission) filed a civil enforcement action in the United States District Court for the District of Connecticut charging petitioner with violations of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.*; the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*; and the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 *et seq.* Pet. App. 8. The Commission also joined as relief defendants several individuals and entities, including petitioner's wife and children, that had received ill-gotten gains from petitioner's fraud. *Id.* at 5, 8. Shortly after the Commission filed suit, petitioner fled the United States; he remains a fugitive. *Id.* at 8, 121.

The district court entered summary judgment for the SEC on liability, finding that petitioner had violated the Securities Act, the Exchange Act, and the Advisers Act. Pet. App. 9, 116-202. The court subsequently ordered the payment of $41.9 million in disgorgement, $1.5 million in prejudgment interest, and $21 million in civil penalties, and it permanently enjoined petitioner from violating the securities laws. *Id.* at 9-10, 75-115. In calculating disgorgement, the court applied the five-year statute of limitations in 28 U.S.C. 2462, based on this Court's decision in *Kokesh* v. *SEC*, 581 U.S. 455 (2017). See Pet. App. 85-90. The district court appointed a receiver to manage the liquidation and distribution of petitioner's family assets that had been frozen since the outset of the case. See *id.* at 10.

2. Petitioner and relief defendants appealed. At petitioner's request, the court of appeals stayed the appeal pending this Court's decision in *Liu* v. *SEC*, 140 S. Ct.

1936 (2020). Pet. App. 10-11; 18-2903 C.A. Doc. 286 (Nov. 21, 2019). The Court in *Liu* ultimately held "that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under" Section 21(d)(5) of the Exchange Act. 140 S. Ct. at 1940.

On January 1, 2021—shortly after this Court decided *Liu*—Congress enacted the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA), Pub. L. No. 116-283, 134 Stat. 3388. For cases involving violations of certain specified federal securities laws, the NDAA extended the statute of limitations for "a claim for disgorgement" to "not later than 10 years after the latest date of the violation." § 6501, 134 Stat. 4626 (15 U.S.C. 78u(d)(8)(A)). The NDAA provided that its amendment to the statute of limitations "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act." *Ibid.*

On the government's motion, the court of appeals granted a "limited remand * * * for a determination of [petitioner's] disgorgement obligation consistent with § 6501 of the [NDAA], and, if appropriate, entry of an amended judgment." 18-2903 C.A. Doc. 533, at 2 (Mar. 11, 2021); see Pet. App. 11-12.

3. On remand, the district court applied the NDAA's ten-year statute of limitations and recalculated petitioner's disgorgement obligation as $64.2 million and his prejudgment-interest obligation as $9.8 million. Pet. App. 53-72. Petitioner contended that the disgorgement award could not properly be increased because the Commission had not filed a cross-appeal from the original disgorgement order. *Id.* at 63. The court rejected that argument, noting that, under Second Circuit

precedent, "the requirement of a cross-appeal is a rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded." *Ibid.* (quoting *Finkielstain* v. *Seidel*, 857 F.2d 893, 895 (2d Cir. 1988)). The district court found that it would make little sense to apply the cross-appeal rule on these facts because the court's prior rulings "could not have put the [government] on notice of any grounds for cross appeal because the NDAA had not yet passed" and "no prejudice resulted to [petitioner] as the Parties had ample opportunity to brief the issue on remand." *Id.* at 64.

4. On appeal, the Commission noted the Second Circuit's prior holding that "the requirement of a cross-appeal is a rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded." 21-1686 C.A. Gov't Br. 36 (quoting *Finkielstain*, 857 F.2d at 895). The SEC also argued that there was "no basis for the Commission to take a cross-appeal from the district court's disgorgement award" at the time a notice of appeal would have been due because "the Commission had prevailed * * * within the constraints then permitted by *Kokesh*." *Id.* at 34-35. The Commission therefore contended that the courts below had "authority to apply an intervening statute duly enacted by Congress"—the NDAA, which expressly applies to cases pending on the date the statute was enacted. *Id.* at 36.

The court of appeals affirmed in relevant part. Pet. App. 1-52. The court found that "the cross-appeal rule is inapplicable to [petitioner's] case because the SEC did not seek to 'enlarge its rights under the judgment by enlarging the'" "'scope of equitable relief,'—*i.e.*, the outcome that the cross-appeal rule forbids—but rather sought to remand the case to present its NDAA

arguments to the district court in the first instance." *Id.* at 27 (citation omitted). The court of appeals explained that "the SEC could not have presented these arguments in a timely cross-appeal because the NDAA was enacted *after* the deadline to file a cross-appeal had passed." *Ibid.* The court accordingly concluded that application of the cross-appeal requirement "would frustrate congressional intent and judicial economy." *Id.* at 28. In the alternative, the court held that "the cross-appeal rule did not deprive the district court of jurisdiction to recalculate disgorgement" because it is "'a rule of practice which is not jurisdictional.'" *Id.* at 26 (quoting *Finkielstain*, 857 F.2d at 895).

ARGUMENT

The court of appeals properly remanded to the district court for the limited purpose of re-calculating petitioner's disgorgement obligation under the NDAA's expressly retroactive statute of limitations. The cross-appeal requirement is inapplicable where, as here, Congress has adopted legislation that applies to pending cases; a case remains pending in the district court; and the court of appeals remands to allow the district court to apply the new legislation in the first instance. Petitioner has identified no disagreement among the courts of appeals on that question. Further review is not warranted.

The petition for a writ of certiorari focuses on the court of appeals' characterization of the cross-appeal rule as a "rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded." Pet. App. 26 (quoting *Finkielstain* v. *Seidel*, 857 F.2d 893, 895 (2d Cir. 1988)). The government agrees with petitioner that this characterization is inaccurate and that the cross-appeal rule limits the jurisdiction of the

courts of appeals. But "[t]his Court 'reviews judgments, not statements in opinions,'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted), and the court of appeals' judgment is correct.

Because the cross-appeal requirement is inapplicable here, the decision below does not cleanly implicate any division of authority on the separate question of whether that requirement is jurisdictional. This case would be a poor vehicle to consider that question. Even assuming that the rule imposed a jurisdictional limitation on the court of appeals' ability to apply the NDAA in the Commission's favor, the NDAA by its terms applies to all "pending" cases. Separate and apart from petitioner's own appeal of the original disgorgement order, ongoing receivership proceedings remained pending in the district court, so that court could have applied the NDAA whenever the case returned to it, without the need for any appeal or cross-appeal by the SEC.

1. The cross-appeal requirement was not triggered in this case because the district court's authority to apply the NDAA's new (and expressly retroactive) ten-year statute of limitations did not depend on petitioner's pursuit of his own appeal.

a. The NDAA's statute of limitations for SEC actions seeking disgorgement applies "with respect to any action or proceeding that is pending on, or commenced on or after," January 1, 2021. § 6501, 134 Stat. 4626. That statutory language is an "explicit retroactivity command." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 255-256 & n.8 (1994) (describing language providing that proposed amendments were applicable to "all proceedings pending on or commenced after the date of enactment") (citation omitted); see *Martin* v. *Hadix*, 527 U.S. 343, 354 (1999) (describing the language in

Landgraf as "unambiguously address[ing] the temporal reach of the statute"). The court of appeals concluded that the relevant NDAA provision is retroactive, Pet. App. 29-31, and petitioner does not challenge that holding in this Court.

A case is "pending" if it "[r]emain[s] undecided," *Black's Law Dictionary* (11th ed. 2019); is "awaiting decision," *ibid.*; or is "continuing," Pending, *Oxford English Dictionary Online* (July 2023), https://perma.cc/L84U-NH6Y. The Commission's action remained undecided and was awaiting decision—and therefore pending—on January 1, 2021, when Congress enacted the NDAA. That action was continuing not only in the court of appeals, where petitioner's appeal had been filed but not yet decided, but also in the district court, where post-judgment receivership proceedings remained ongoing (and are still ongoing now). Because the relevant portion of the NDAA unambiguously applies to pending actions and this case clearly falls within its scope, the ten-year statute of limitations governed the proceedings below once the NDAA was enacted. § 6501, 134 Stat. 4626 (directing that the new statute of limitations "shall apply" to pending actions).

b. Petitioner contends that, by remanding the case to allow the district court to apply the NDAA's new statute of limitations, despite the government's failure to file a notice of cross-appeal, the court of appeals violated the cross-appeal rule. Pet. 12-14. The cross-appeal rule provides that, "[a]bsent a cross-appeal, an appellee * * * may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999) (quoting *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435

(1924)). The rule ensures that, if a defendant files a notice of appeal and his adversary does not, the defendant can pursue his appeal without fear that doing so will ultimately subject him to an increased sanction. See *Greenlaw* v. *United States*, 554 U.S. 237, 252-253 (2008).

The court of appeals correctly held that the cross-appeal rule did not apply here "because the SEC did not seek to 'enlarge its rights under the judgment,'" and instead "sought to remand the case to present its NDAA arguments to the district court in the first instance." Pet. App. 27 (citation omitted). As discussed, see p. 7, *supra*, for purposes of the NDAA's amendment to the governing limitations period, this case remained "pending" in the district court for reasons (*i.e.*, the ongoing receivership proceedings) that were unrelated to petitioner's own appeal. If petitioner had not appealed the original disgorgement award, the SEC could have asked the district court to recalculate disgorgement under the new statute of limitations without appealing the original disgorgement order. The court of appeals' limited remand therefore did not "enlarg[e] [the SEC's] own rights" or "lessen[] the rights of" petitioner. *Neztsosie*, 526 U.S. at 479 (citation omitted). Nor did the remand subject petitioner to an adverse consequence that could not have been imposed if petitioner had declined to pursue his own appeal. See *Greenlaw*, 554 U.S. at 252-253. It simply allowed the district court to exercise the same authority that it could have exercised if no appeal had been taken.

2. Petitioner challenges (Pet. i, 6-12) the court of appeals' holding that the cross-appeal requirement is not jurisdictional. He argues that this holding was erroneous and conflicts with this Court's decision in *Greenlaw* and decisions of other courts of appeals.

The government disagrees with that aspect of the court of appeals' analysis. The government remains of the view—consistent with the position it has taken previously in this Court—that the requirement that an appellee must file a notice of cross-appeal to enlarge his rights or lessen an appellant's rights is generally jurisdictional. See, *e.g.*, Gov't Br. at 13, *Greenlaw*, *supra* (No. 07-330) ("[A] notice of appeal by the government in a criminal case is necessary to vest the court of appeals with jurisdiction to correct sentencing errors that result in a sentence being too low."); Gov't Br. at 20-22, *Neztsosie*, *supra* (No. 98-6) (arguing that, in an appeal under 28 U.S.C. 1292(a)(1), the court of appeals has jurisdiction to enlarge the appellee's rights or constrict the appellant's rights only if a notice of cross-appeal has been filed); Pet. 12-13 (describing prior government filings).*

As discussed, see pp. 6-8, however, the cross-appeal requirement is not implicated where, as here, Congress has enacted new legislation that applies to pending cases; a case remains pending in the district court; and the court of appeals remands the case to allow the district court to apply the new legislation in the first instance. Those aspects of this case provide a fully sufficient basis for both the court of appeals' remand order and its subsequent affirmance of the district court's increased disgorgement award. Pet. App. 27-28. The court of appeals' separate statement that the cross-appeal requirement is "a rule of practice which is not

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* To the extent the Commission asserted in the court of appeals that the cross-appeal requirement is not jurisdictional, that argument was based on binding Second Circuit precedent—and was subsidiary to the Commission's primary argument that the cross-appeal rule was inapplicable in the first place. See 21-1686 C.A. Gov't Br. 34-36; see also p. 4, *supra*.

jurisdictional," *id.* at 26 (citation omitted), therefore was unnecessary to the court's disposition of the case. This Court's resolution of any disagreement between the decision below and decisions of this Court or other courts of appeals on whether the cross-appeal requirement is jurisdictional therefore would be complicated—if not precluded—by the court of appeals' separate determination that the cross-appeal rule is inapplicable. Cf. *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970) (noting that a prevailing party may rely on an alternative ground to support the judgment). Further review is not warranted.

3. Finally, two idiosyncratic features of this case make it an especially poor vehicle for the Court to consider whether the cross-appeal rule is jurisdictional.

a. The SEC's failure to file a notice of cross-appeal in this case did not result from inadvertence, or from a strategic choice that the Commission later regretted. Rather, the Commission "could not have presented these arguments in a timely cross-appeal because the NDAA was enacted *after* the deadline to file a cross-appeal had passed." Pet. App. 27. The court of appeals concluded that application of the cross-appeal rule in cases like this one "would make little sense" because it would require litigants to "'either anticipat[e] * * * statutes not yet enacted or * * * assert[] * * * frivolous grounds in appeals and cross-appeals in the hope that a new statute might affect their resolution favorably.'" *Id.* at 27-28 (citation omitted). Whether or not that aspect of the case would ultimately warrant an exception to the cross-appeal rule, this unusual feature would complicate the Court's task in resolving the question presented. And petitioner has not identified any disagreement among the courts of appeals on whether,

in circumstances like this one, a court of appeals may order a limited remand for a district court to apply a newly enacted statutory provision that Congress has expressly made applicable to pending cases.

b. As explained above, even if the cross-appeal rule divested the court of appeals of jurisdiction to remand the case for application of the NDAA, nothing in the cross-appeal rule limited the *district court's* authority to apply the NDAA after the Second Circuit resolved petitioner's appeal. Under the NDAA's plain text, the Commission could have asked the district court to recalculate disgorgement under the NDAA *after* petitioner's appeal was decided, so long as the action remained pending, as it did here. See p. 7, *supra* (explaining that receivership proceedings in the district court were ongoing when the district court increased the disgorgement award, and that they remain ongoing today). Thus, even if this Court granted certiorari and petitioner prevailed in his challenge to the court of appeals' remand order, there would be no sound basis for overturning the district court's own application of the NDAA to the circumstances of petitioner's case. This Court should not grant review of a question whose resolution will not ultimately affect petitioner's disgorgement obligation. Cf. *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of certiorari) (explaining that review generally is not warranted where the effect of resolving the question presented "would be hypothetical").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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