No. 23-741

IN THE
Supreme Court of the United States

IFTIKAR AHMED,
Petitioner,
v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Government's opposition brief either does not dispute or expressly concedes every issue relevant to this Court's Rule 10 raised in Petitioner's petition for certiorari—essentially conceding that the question presented warrants review.

1. The Government does not dispute that an entrenched five-to-six circuit split exists about whether the cross-appeal rule is jurisdictional or mandatory, or whether it admits of exceptions. *Compare* Pet. 7 (discussing split), *with* Opp. 8–9 (not disputing split).

2. The Government does not dispute that the question presented is critically important and that, if the question is properly presented, then it warrants this Court's intervention, as the courts of appeals will not themselves resolve the intractable conflict. Nor could it dispute this, given the centrality of the cross-appeal rule and its limits to our adversarial system, *see Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008).

3. In addition, the Government *explicitly admits* that the Second Circuit decided the cross-appeal "question in a way that conflicts with relevant decisions of this Court." Rule 10(c); *see* Opp. 5–6 ("The government agrees with petitioner that [the court of appeals' characterization of the cross-appeal rule] is inaccurate and that the cross-appeal rule limits the jurisdiction of the courts of appeals."); Opp. 9 ("The government disagrees with that aspect of the court of appeals' analysis." (citing *Greenlaw*)).

4. The confusion engendered by the circuit split is illustrated by the fact that the Government walks

back the argument it expressly made below, admitting that the position it successfully advocated in the court of appeals—that "the cross-appeal requirement is not jurisdictional"—conflicts with *Greenlaw* and "the position [the Government] has taken previously in this Court." Opp. 9 & n.* (citing past cases).

* * * *

Despite these concessions, and the fact that the Government prevailed below based on an argument it made and now disavows, the Government still contends the Court should deny review. It raises two primary objections. *First*, that "the court of appeals' judgment is correct" because "[t]he 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." Opp. 5–6, 9. *Second*, that even if the Second Circuit's judgment is incorrect, this case is a poor vehicle because the "[district] court could have applied the NDAA whenever the case returned to it, without the need for any appeal or cross-appeal by the SEC." *Id.* at 6.

Both objections are meritless.

1. The Government's position that the cross-appeal rule does not apply here (Opp. 5–10) goes to the merits, not the propriety of review. Although the Government agrees the cross-appeal rule is jurisdictional (Opp. 5–6) and has taken that same position in numerous cases before this Court (Opp. 9), and although that entails an exception-less mandate, the Government now argues that there *are* exceptions due to the unique

circumstances of the case (Opp. 6–7, 9–11). Specifically, it makes two related arguments to defend the judgment below: (A) if a new statute changes the law while a case is on appeal and post-judgment proceedings are occurring in district court, an appellate court may remand for the district court to apply the new statute without violating the cross-appeal rule (Opp. 5–7, 9–10) or (B) "an exception to the cross-appeal rule" may be warranted for newly enacted statutes that change the law (Opp. 10). These are merits arguments providing no basis to deny review.

The question presented here is whether the cross-appeal rule is jurisdictional and mandatory, or whether it is right for an appeals court to find an exception or limitation based on the "unique circumstances" of a case. *Cf. Bowles* v. *Russell*, 551 U.S. 205, 214 (2007) (rejecting "unique circumstances" exception to timely-notice-of-appeal requirement because it is jurisdictional). By definition, the question must arise, in this or any other case, in the context of the "unique" facts of the particular case. In this case, the context is the enactment of a statute changing the law, with the Government saying it was not on notice of the need to file a cross-appeal (Opp. 6–8, 10); in the next case, there might be a statute the district court ignored, or an intervening appellate decision changing the law, or some other seemingly compelling excuse.

None of the circumstances of this case change the fact that the question presented—whether the cross-appeal rule is jurisdictional or mandatory, or whether that rule admits of any exception—is squarely implicated here, and the subject of a clear, undisputed, important, and intractable circuit split. The particular

circumstances underlying a purported exception or limitation to the cross-appeal rule do not provide an alternate ground supporting the judgment below, or a reason to deny review; instead, the "unique circumstances" adduced by the Government make clear that the question presented *is* implicated, and highlight the Second Circuit's error. *Bowles*, 551 U.S. at 214.[1]

In addition to not affecting whether this petition should be granted, the Government's novel arguments are wrong. *Bowles* and many other cases make clear that the jurisdictional label (conceded to apply here) carries significant consequences, and that courts cannot fashion equitable or other idiosyncratic exceptions to jurisdictional rules. 551 U.S. at 214. And *Greenlaw* instructed, while not resolving whether the cross-appeal rule is jurisdictional, that, "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." 554 U.S. at 245 (quoting *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 480 (1999)). As the Government and multiple courts of appeals recognize, all of this means the cross-appeal rule cannot be waived. *See* Opp. 5–6.

There is also no basis for the Government's new remand-for-the-district-court-to-bypass-appellate-limitations exception (whether in light of changes in the

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[1] The Government does not argue, and the Second Circuit did not hold, that the NDAA displaced the cross-appeal rule. The rule being jurisdictional, it would have taken a clear statement from Congress to displace it. *Boechler, P.C.* v. *Comm'r of Internal Revenue*, 596 U.S. 199, 203 (2022) ("[A] procedural requirement [i]s jurisdictional only if Congress 'clearly states' that it is." (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006))).

law, because post-judgment proceedings exist, or otherwise). Courts of appeals cannot circumvent the cross-appeal rule with the expedient of having a district court perform an act it could not do itself. Plainly, the appeals court in *Greenlaw* could not have bypassed the cross-appeal rule by remanding to the district court for resentencing and entry of an "amended judgment" if the sentence was too lenient, though the appellate court lacked the power to increase the sentence itself, and then entertain an appeal without obstacle from a post-remand decision on re-sentencing. *See* Pet. App. 54 (discussing the Second Circuit's remand so the court could enter "an amended judgment" "if appropriate"). That makes no sense, but it is what the Government says was perfectly legitimate.

And it is plain that this is exactly what occurred here: In fact, the Government does not seriously dispute that the courts below *did* enlarge the disgorgement order post-judgment and did so *because* the Second Circuit remanded on this specific issue and told the district court it could enter an amended judgment. The district court entered a final judgment adjudicating the claims based on pre-2010 conduct as time barred based on *Kokesh* v. *SEC*, 581 U.S. 455 (2017), and Petitioner appealed—but the Government did not. Opp. 2; Pet. App. 85–90. Congress changed the law mid-appeal, leading the appeals court to remand with instructions for the district court to consider the NDAA "and, if appropriate, ent[er] . . . an amended judgment." *SEC* v. *Ahmed*, 2021 WL 1171712, at *1 (2d Cir. Mar. 11, 2021) (granting government's motion for remand). The district court then *increased* the disgorgement order from nearly $42 million to more than $64 million, with prejudgment interest jumping from

$1.5 million to $9.8 million. That is a post-judgment increase of more than $30 million, despite the Commission not cross-appealing. Pet. App. 9–10, 12, 88–90; *see Greenlaw*, 554 U.S. at 244–45 ("[I]t takes a cross-appeal to justify a remedy in favor of an appellee."); *El Paso Nat. Gas Co.*, 526 U.S. at 479 ("Absent 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." (internal quotation marks omitted)). The fact that an appeals court may perceive an equitable reason to remand based on unique circumstances—a plain error, a new statute, manifest injustice—does not permit it to end-run *Greenlaw* or the cross-appeal rule.

Moreover, contrary to what the Government says, its new rule would implicate a split of authority: as explained in the petition and as is undisputed, multiple courts of appeals hold the cross-appeal rule applies post-remand. *Art Midwest Inc.* v. *Atl. Ltd. P'ship XII*, 742 F.3d 206, 211–12 (5th Cir. 2014); *Lazare Kaplan Int'l, Inc.* v. *Photoscribe Techs., Inc.*, 714 F.3d 1289, 1294 (Fed. Cir. 2013); *Gross* v. *FBL Fin. Servs., Inc.*, 588 F.3d 614, 621 (8th Cir. 2009); *JGR, Inc.* v. *Thomasville Furniture Indus., Inc.*, 550 F.3d 529, 533 (6th Cir. 2008); *Arnold* v. *E. Air Lines, Inc.*, 681 F.2d 186, 206 n.22 (4th Cir. 1982).

2. Alternatively, the Government contends that this case is a bad vehicle even if the Second Circuit's judgment is defective because, "[i]f 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." Opp. 8.[2]

This contention, never made until the Government's opposition to the petition for certiorari, does not identify a vehicle problem. Whether the Government could have successfully sought to amend the final judgment by asking the district court directly via another procedural mechanism has nothing to do with what actually occurred in this case, or with the Second Circuit's actual ruling.

Petitioner *did* appeal. The Government *did not* cross appeal, and also *did not* ask the district court to amend its final judgment through an alternative procedural mechanism. Instead, the Government obtained an erroneous ruling from the Second Circuit instructing the district court to "determin[e] . . . Appellant's disgorgement obligation consistent with § 6501 of the [NDAA], and, if appropriate, *ent[er] . . . an amended judgment*." *Ahmed*, 2021 WL 1171712, at *1 (emphasis added). That remand, not some other procedural mechanism, is what the district court relied upon to reopen and amend its prior final judgment on remedies. Pet. App. 54. On appeal from the revised post-remand final judgment, the Government did not argue the error was harmless because some other path had always been available to revising the judgment, but instead contended the cross-appeal rule was not jurisdictional, a position the Second Circuit accepted

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[2] Opp. 6 ("[T]he 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.").

without addressing the position now taken by the Government (unsurprisingly, given that it was not argued).[3]

In addition to the Government's hypotheticals not constituting a vehicle issue, the Government is also wrong. Had "petitioner . . . not appealed the original disgorgement award," the Government *could not* "have asked the district court to recalculate disgorgement under the new statute of limitations." *Contra* Opp. 8. That is because the district court entered its final judgment in 2018 and the NDAA was enacted in 2021. And under this Court's precedent, a new statute of limitations cannot constitutionally be applied to a final judgment "from which all appeals have been foregone." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

Nor is the case for granting review undermined even if some theoretical path still exists for the Government on remand to argue that the district court should enlarge relief for another reason (despite never having made the argument before). *Contra* Opp. 11. Any such argument would be for the Second Circuit or the district court to evaluate in the first instance; it does not pose any impediment to reviewing the question presented, because it formed no part of the decision of the Second Circuit. *Stinson* v. *United States*, 508 U.S. 36, 47–48 (1993) (leaving other contentions of the parties to be addressed on remand). And tellingly, the Government does not specify any actual path forward, likely because none exists. *See, e.g.*, Fed.

[3] There is no "harmless error" doctrine that saves the Government here, especially because the error below was jurisdictional, and the Government does not argue otherwise.

R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.").

CONCLUSION

The Government agrees the cross-appeal rule is jurisdictional and does not deny that there is an intractable and important circuit split that raises a question of law warranting this Court's intervention. It also admits that, below, it advocated for the rule of law that it now concedes is wrong and contrary to this Court's precedent, but that the Second Circuit adopted. The Government's only objections are a couple of contrived vehicle issues that should be disregarded. The petition should be granted, and the Court should reverse.

Respectfully submitted,

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