No. 10-810

IN THE

Supreme Court of the United States

UNITED STATES AND CALIFORNIA, ex rel.
KATHERINE R. O'CONNELL, et al.,

Petitioners,

v.

CHAPMAN UNIVERSITY,

Respondent.

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

BRIEF IN OPPOSITION

FRED M. PLEVIN
Counsel of Record
PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP
401 B Street, Tenth Floor
San Diego, CA 92101
(619) 237-5200
fplevin@paulplevin.com

Counsel for Respondent

235577

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

This case is a *qui tam* action brought under the False Claims Act in which the United States declined to intervene. Petitioners' notice of appeal was filed 58 days after the district court entered summary judgment for respondent Chapman University—well outside the 30-day period proscribed by 28 U.S.C. section 2107 and Federal Rule of Appellate Procedure 4(a)(1). The question presented is whether the court of appeals erred in concluding that dismissal of petitioners' untimely appeal was required by this Court's decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009), which held that an untimely appeal must be dismissed in precisely these circumstances.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Page

STATE CASES

Page

FEDERAL: STATUTES AND RULES

STATE: STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

A. Nature of Petitioners' Claims

The case below was brought by petitioners as *qui tam* relators pursuant to the False Claims Act (31 U.S.C. §§ 3729, *et seq.*) ("FCA").[1] The United States and the State of California both declined to intervene as parties. C.D. Cal Docket # 8; E.R. 416.[2]

Petitioners' theory of liability was that Chapman falsely represented to a private accreditation association, the Western Association of Schools and Colleges ("WASC"), that Chapman complied with a supposed WASC

1. Petitioners also pursued parallel state law claims under California's version of the FCA. Cal. Gov. Code §§ 12650, *et seq.* Because the California law is patterned after the FCA, decisions under the FCA are persuasive on the meaning of the California False Claims Act. *State ex rel. Bowen v. Bank of America Corp.*, 126 Cal. App. 4th 225, 236 (2005); *Laraway v. Sutro & Co., Inc.*, 96 Cal. App. 4th 266, 275 (2002), citing *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 320 (2000). The differences between the two statutory schemes are not relevant to the issues raised in the petition.

2. Pursuant to the citation format specified by this Court in Supreme Court Rule 24(g), and to maintain consistency with the citation format used by petitioners, the following record citation abbreviations are used in this brief: 1) "Pet.App." refers to the Appendix filed by petitioners; 2) "CA9 Docket" refers to the Clerk's Docket in the United States Court of Appeals for the Ninth Circuit, Case No. 07-56864 (9th Cir.); 3) "C.D. Cal Docket" refers to the Clerk's Docket in United States District Court, Central District of California, Case 8:04-cv-01256-PSG –RC (C.D. Cal); and 4) "E.R." refers to the Excerpts of Record filed in No. 07-56864 (9th Cir.), *See* CA9 Docket # 38.

requirement to provide 45 hours of classroom instruction for each three credit course it offered. Petitioners theorized that because compliance with accreditation standards is a condition of participating in financial aid programs under Title IV of the Higher Education Act (20 U.S.C. § 1070, *et seq.*) ("HEA") and similar state-funded programs, by allegedly lying to WASC, Chapman defrauded the United States and State of California. The lynchpin in all of Petitioners' theories of liability was that: (1) WASC had a minimum classroom hours requirement, and compliance with this requirement was a condition of accreditation; (2) that Chapman lied (either expressly or implicitly) to WASC about its compliance with the supposed classroom hours requirement; (3) but for its statements, Chapman would not have been accredited by WASC; and (4) Chapman should be deemed not to have been accredited and therefore out of compliance with state and federal student financial aid programs. C.D. Cal Docket # 36 (Second Amended Complaint ¶¶ 42-46).

B. The District Court's Entry Of Judgment For Chapman

After extensive discovery, Chapman filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The district court granted summary judgment, ruling that petitioners failed to raise a triable issue of fact as to the first element of FCA liability—that Chapman made a false statement or engaged in a fraudulent course of conduct. Pet.App. 4a, 16a-18a, 18a-20a. Among other things, the court concluded that petitioners had failed to identify any WASC provision obligating respondent to disclose information concerning classroom hours and that, in the absence of "any WASC

requirement of a quantum of classroom hours," petitioners failed to "establish a false statement that is a condition of government funding." Pet.App. 17a. The district court entered judgment for respondent on October 24, 2007. C.D. Cal Docket # 204; E.R. 5.

C. Petitioners' Jurisdictionally Untimely Appeal

On December 21, 2007—**58 days** after the district court entered judgment—petitioners filed a notice of appeal. Pet.App. 3a; E.R. 1. At that time, there was a split among the circuits as to whether, under Rule 4(a)(1)(A)-(B) of the Federal Rules of Appellate Procedure ("Rule 4") and 28 U.S.C. section 2107(a)-(b) ("§ 2107"), the ordinary 30-day deadline for filing an appeal or the 60-day deadline applicable when the United States is a party applied in an FCA action where the government declined to intervene. The Ninth Circuit's position was that the 60-day deadline governed.

On June 8, 2009, after the parties completed their briefing below but before the Ninth Circuit scheduled oral argument, this Court issued its decision in *United States ex rel. Eisenstein v. City of New York,* 129 S. Ct. 2230 (2009). Resolving the circuit split, this Court determined that the United States is not a "party" for purposes of § 2107 and Rule 4 when it declines to intervene in an FCA action, and therefore, the 30-day time limit for filing an appeal under § 2107(a) and Rule 4(a)(1)(A) applies, not the 60-day time limit under § 2107(b) or Rule 4(a)(1)(b). *Eisenstein*, 129 S. Ct. at 2233, 2236-37.

D. The Ninth Circuit's Dismissal Of The Appeal Under *Eisenstein*

After *Eisenstein*, Chapman promptly moved to dismiss the appeal for lack of jurisdiction. Petitioners then filed a "Motion For Rule 4(a)(5)(A)(ii) Relief and for Stay Pending *Haight*," requesting a stay pending the Ninth Circuit's disposition in *United States ex rel. Haight, et al. v. Catholic Healthcare West, et al.*, Ninth Circuit Case No. 07-16857, another case involving *qui tam* relators who waited more than 30 days to file their notice of appeal. CA9 Docket #54; *See also*, Pet.App. 2a. The Ninth Circuit granted petitioners' motion to stay pending its decision in *Haight*. CA9 Docket #57; *See also*, Pet.App. 2a. The court also ordered petitioners to file either "a response to appellees' motion to dismiss or move for appropriate relief" following the issuance of the remittitur in *Haight*. *Id.*

In accordance with *Eisenstein*, the Ninth Circuit dismissed the appeal in *Haight* as untimely, and this Court denied the *Haight* relators' petition for a writ of certiorari. *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 366 (2010). Petitioners then filed their motion "for appropriate relief," which they titled a "motion for relief under Rule 4(a)(5)(A)(ii)." The arguments proffered by petitioners in their motion paralleled the arguments made unsuccessfully by the appellants in *Haight*. While presenting various theories for relief, petitioners did not argue that the court of appeals had the authority to consummate an "equitable

vacatur"[3] of the district court's judgment, nor did they ask the court of appeals to undertake any such vacatur.

The Ninth Circuit denied petitioner's motion and granted Chapman's motion to dismiss. Pet.App. 1a-3a. In an unpublished order, the court explained that dismissal was required under *Eisenstein* and the Ninth Circuit's own ruling in *Haight.* Pet.App. 1a-2a. This petition for certiorari followed.

REASONS FOR DENYING THE PETITION

Petitioners concede that their appeal was "jurisdictionally untimely" under this Court's decision in *Eisenstein*, but ask this Court to decide whether the Ninth Circuit was entitled to "vacate and remand for entry of a fresh judgment from which a timely appeal may be taken." Pet. i. There is no reason to grant certiorari to address that question. First, although they floated plenty of theories for avoiding the obvious impact of *Eisenstein,* petitioners did not raise the "equitable vacatur" issue below, and the Ninth Circuit did not address it. Second,

3. Petitioners use the label "equitable vacatur" to describe this Court's use of its supervisory powers to vacate a district court judgment with an order to issue a fresh judgment in order to correct a procedural error in certain cases involving direct appeals. As noted below, petitioners cite no cases in which this practice has been applied by a court of appeals. Despite this, and for convenience, in this brief the term "equitable vacatur" will be used to describe the equitable relief petitioners argue should have been invoked *sua sponte* by the court of appeals in this case, *i.e.*, an order to vacate the district court judgment and to issue fresh judgment.

petitioners have pointed to no conflict of authority in the circuits on this issue. Although they observe that *this Court* has engaged in the so-called "equitable vacatur" practice to address unique procedural issues in the past, the Ninth Circuit's failure to engage in such a practice here (even assuming it had the authority to do so) in no way conflicts with this Court's decisions. Third, there is no other compelling reason to grant review. Indeed, this Court explicitly recognized in *Eisenstein* that the jurisdictional rule compelled by § 2107 could lead to "harsh consequences," including the dismissal of "pending cases" in which appeals were retroactively deemed untimely. *Eisenstein,* 129 S. Ct. at 2236, n.4. There is no reason for this Court to review the Ninth Circuit's factbound and faithful application of *Eisenstein* here.

I. The Sole Question Presented Was Neither Pressed Nor Passed Upon Below.

1. The Ninth Circuit's unpublished order below represents a straightforward and unsurprising application of *Eisenstein*, which establishes that when the United States has not intervened in an FCA action, the notice of appeal must be filed within 30 days from entry of judgment. This Court recognized in *Eisenstein* that its decision would apply retroactively to late-filed appeals in FCA cases in circuits that had embraced the 60-day rule, explaining that it "must . . . decide the jurisdictional question before it irrespective of the possibility of harsh consequences." *Eisenstein*, 129 S. Ct. at 2236, n.4. The Ninth Circuit took note of this, observing that the question of whether *Eisenstein* applied retroactively was not left open for it to decide. Pet.App. 2a-3a ("*Eisenstein* applies

retroactively and requires dismissal of these appeals. *See*, 129 S. Ct. at 2236 n.4"). Therefore, the Ninth Circuit did not decide any question of federal law or federal practice (see Petition at p. 25) that had not already been settled by this Court. Quite the contrary. Every issue that was material to the Ninth Circuit's disposition of the appeal was expressly settled by *Eisenstein*.

2. In response to Chapman's motion to dismiss the appeal as jurisdictionally untimely under *Eisenstein*, petitioners offered the Ninth Circuit lots of (misguided) theories for avoiding the undeniable impact of *Eisenstein:*

- They asked the court of appeals to assume or deem that they had made a timely motion to the district court under Rule 4(a)(5)(A)(ii) and assume that the district court would have granted such a motion, thereby conferring jurisdiction on the court of appeals and avoiding application of *Eisenstein*. CA9 Docket #58, p. 15-16.

- They argued that although a court of appeals does not have authority to extend the 30-day time limit to file a notice of appeal, it has the authority to consider a Rule 4(a)(5) motion by reading Rule 2 and Rule 26(b) together. *Id.*, p. 16.

- They urged that their notice of appeal was, "in substance and in retrospect, a Rule 4(a)(5)(A)(ii) motion," such that a court of appeals can retroactively recast the notice of appeal as a motion for extension of time pursuant to Rule 2 and Rule 26. *Id.*, p. 15-16.

- They also asked for remand to the district court—not for any so-called "equitable vacatur"—but only so the district court could consider relief under Rule 4. *Id.*, p. 7, 18.

- They asked for a determination that their reliance on the Ninth Circuit's decision in *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996) constituted "excusable neglect" warranting the relief they sought. *Id.*, p. 6-8.

- Finally, they asserted that retroactive application of *Eisenstein* violated petitioners' due process rights. *Id.*, p. 16-17.

The Ninth Circuit properly rejected each of those arguments and gave effect to this Court's decision in *Eisenstein* and the jurisdictional mandate of § 2017. Pet. App. 2a-3a. Petitioners never asked the court of appeals to consider remanding to the district court with an order to vacate the judgment below and issue a "fresh judgment from which a timely appeal may be taken." Pet. i. There is no reason why petitioners could not have done so. Indeed, a central premise of their certiorari petition to this Court is that the practice of "equitable vacatur" has a long "tradition" and—to believe petitioners—is virtually ubiquitous. Pet. 6.

If petitioners *had* pressed this issue below, the court of appeals might have passed upon several critical questions. Initially, the court could have considered whether or not it even possesses the authority to invoke "equitable vacatur." If the court concluded that it has such authority, it could have proceeded to consider whether that authority exists

in a case involving an untimely appeal under § 2107. In addressing this issue, the court could have considered whether such relief was appropriate in light of *Eisenstein,* and whether invoking equitable relief could be harmonized with *Bowles v. Russell,* 551 U.S. 205 (2007), in which this Court observed that it "has no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 214. Finally, the court could have considered whether petitioners' reliance on the Ninth Circuit's *Haycock* decision to file their notice of appeal more than 30 days after issuance of the judgment warranted invoking extraordinary equitable relief, in light of the existence of a circuit split on this issue and well-established law treating § 2107 as "mandatory and jurisdictional." *Id.* at 209. But, of course, the court of appeals did not consider any of these issues because the question presented in the petition was neither pressed nor passed upon below.

3. This Court rarely grants certiorari to decide a question that was not raised or decided by the court below. *See, e.g., Meyer v. Holley*, 537 U.S. 280, 291-92 (2003) ("in the absence of consideration of that matter by the Court of Appeals, we shall not consider it"); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them," quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *See also*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (same); *Clark v. Arizona*, 548 U.S. 735, 764-65 (2006) (because the due process issue highlighted by the writ petition was neither pressed nor passed upon below, the Court did not consider the issue); *United States v. Wells,* 519 U.S. 482, 488 (1997) (Supreme Court may consider an issue only when it has

been either pressed or passed by the court below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (This Court's "traditional rule . . . precludes a grant of certiorari . . . when the question presented was not pressed or passed upon below"); *Accord National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

There is no reason for this Court to deviate from that long-standing practice and reach out and grant certiorari to decide the question presented here. Indeed, departure from this Court's traditional certiorari practice is particularly unwarranted here, given that the question presented concerns the scope of the court of appeals' own authority and prerogative to exercise such authority if it exists. Not only did the Ninth Circuit not pass upon this question below but petitioners have pointed to *no* court of appeals authority directly addressing it.[4] That the question presented was neither pressed or passed upon below is, by itself, a sufficient basis to deny certiorari.

---

4. Petitioners claim that *this Court* has invoked equitable vacatur on various occasions *sua sponte* in the context of various direct appeals. *See*, Petition at p. 17, citing *Franklin v. Lawrimore*, 516 U.S. 801 (1995). But petitioners are not asking *this* Court to engage in a so-called "equitable vacatur," and this case is on certiorari, not direct appeal. Petitioners ask the Court to grant certiorari to decide whether the *Ninth Circuit* should have undertaken an "equitable vacatur." There is no reason for the Court to ignore customary principles governing the exercise of this Court's certiorari jurisdiction—including the venerable "pressed and passed upon rule"—in deciding whether to grant certiorari on that question.

II. The Ninth Circuit's Unpublished Order Dismissing The Appeal Does Not Conflict With Any Decisions Of Other Circuits Or Of This Court.

A. There Is No Conflict Of Authority Among Circuits

Petitioners are not asking *this Court* to do an "equitable vacatur." Instead, they claim that the *Ninth Circuit* should have done it. Pet. i, 7, 22-23. Although petitioners have canvassed some 60 years of Supreme Court precedent, they have not cited a *single* court of appeals case addressing the use of equitable vacatur by a court of appeals (including, of course, the Ninth Circuit's unpublished order dismissing the appeal in this case), much less going their way on it. Nor have petitioners cited a single case from this Court holding, or even remotely suggesting, that a court of appeals should, or even may, invoke "equitable vacatur" in these circumstances. And, even if the court of appeals had authority to engage in such an "equitable vacatur," there is no argument that it was *required* to exercise that equitable authority here, such that its failure to do so requires reversal. For this reason alone, the Ninth Circuit's decision below does not create any conflict of authority requiring this Court's intervention.

B. The Ninth Circuit's Order Dismissing This Appeal Does Not Conflict With Any Decision Of This Court

Nor have petitioners identified any conflict of authority with this Court's decisions. None of this Court's decisions cited by petitioners discuss whether the courts

of appeals are authorized (or required) to engage in "equitable vacatur" in the type of circumstances here. And, if anything, the cases cited by petitioners involving what they label as "equitable vacatur" establish that the practice is not generally applicable, its use is primarily historical,[5] and it has been invoked only by this Court and only in very limited circumstances not present here.

None of the "equitable vacatur" cases identified by petitioners provides that the Ninth Circuit was required (or even authorized) to engage in an equitable vacatur here. Petitioners' fifty-plus examples of "equitable vacatur" all involve cases subject to direct appeals to this Court from three-judge district courts. These direct appeals cases can be broken down into five primary categories: (1) opinions discussing a district court's erroneous decision to convene a three-judge panel under former 28 U.S.C section 380;[6] (2) opinions discussing the propriety of a district court's erroneous decision to convene a three-judge panel under

5. Of the more than 50 instances of purported "equitable vacatur" cited by petitioners, the most recent application was in 1995. *Franklin v. Lawrimore*, 516 U.S. 801 (1995). Since 1977, equitable vacatur has been used three times, each time without discussion. *Id.*; *Clinton v. Jeffers*, 503 U.S. 930 (1992); *Ayers v. Winter*, 467 U.S. 1211 (1984).

6. *Phillips v. United States*, 312 U.S. 246, 248, 254 (1941); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173-74 (1939) (*per curiam*); *Rorick v. Bd. of Com'rs of Everglades Drainage Dist.*, 307 U.S. 208, 212-13 (1939); *Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 U.S. 243, 251-52 (1938) (*per curiam*); *Wall v. McNee*, 296 U.S. 547, 548 (1935) (*per curiam*); *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 18-19 (1934) (*per curiam*); *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391-92 (1934).

28 U.S.C. section 2281;[7] (3) opinions discussing whether a judgment entered by the three-judge district court panel was subject to direct appeal under 28 U.S.C. section 1253;[8] (4) opinions discussing appellants who erroneously filed a direct appeal of the decision of a single judge;[9] and (5) orders where this Court applied equitable vacatur to direct appeal questions without discussion.[10]

While this Court did not explain the reason for invoking "equitable vacatur" in many of these decisions, other authorities have concluded that "equitable vacatur" was granted in each of these cases to correct errors

---

7. *Butler v. Dexter*, 425 U.S. 262, 267 (1976) (*per curiam*); *Bd. of Regents of Univ. of Texas Sys. v. New Left Ed. Project*, 404 U.S. 541, 545 (1972); *Moody v. Flowers*, 387 U.S. 97, 104 (1967); *Pennsylvania Pub. Util. Comm'n v. Pennsylvania R. Co.*, 382 U.S. 281, 282 (*per curiam*) (1965).

8. *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (*per curiam*); *Dickson v. Ford*, 419 U.S. 1085 (1974); *Perez v. Ledesma*, 401 U.S. 82, 88 (1971); *Rockefeller v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970) (*per curiam*); *Mitchell v. Donovan*, 398 U.S. 427, 431-32 (1970) (*per curiam*); *United States v. Belt*, 319 U.S. 521, 522-23 (1943).

9. *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 101 (1974); *United States v. Christian Echoes Nat. Ministry, Inc.*, 404 U.S. 561, 566 (1972) (*per curiam*); *Wilson v. City of Port Lavaca, Tex.*, 391 U.S. 352 (1968) (*per curiam*); *Mengelkoch v. Indus. Welfare Comm'n*, 393 U.S. 83, 83-84 (1968) (*per curiam*).

10. Petitioners cite a handful of equitable vacatur cases with respect to which Chapman was unable to find any Supreme Court document, lower court decision, or secondary source that described the reason for applying equitable vacatur. *Ayers v. Winter*, 467 U.S. 1211 (1984); *Rogers v. Inmates' Councilmatic Voice,* 422 U.S. 1031 (1975); *Daniel v. Waters,* 417 U.S. 963 (1974).

involving use of three-judge district court panels or errors in taking a direct appeal—situations obviously not presented here. These sources include: (1) decisions from other courts (both underlying district court cases and later decisions) discussing the facts of the cases where this Court has used equitable vacatur;[11] (2) a Supreme Court treatise;[12] (3) the jurisdictional statements filed in the various direct appeals, explaining that the case was filed with this Court as a direct appeal resulting from an

11. *Franklin v. Lawrimore*, 516 U.S. 801 (1995) (*See*, *Castro County, Tex. v. Crespin*, 101 F.3d 121, 124-25 (D.C. Cir. 1996)); *Clinton v. Jeffers*, 503 U.S. 930 (1992) (*See. Jeffers v. Clinton*, 796 F. Supp. 1202, 1203 (E.D. Ark. 1992)); *Winters v. Lavine*, 429 U.S. 1012 (1976) (*See*, *Winters v. Lavine*, 574 F.2d 46, 53 (2d Cir. 1978)); *Webster v. Perry,* 417 U.S. 963 (1974) (*See*, *Webster v. Perry*, 367 F. Supp. 666, 667-68 (M.D.N.C. 1973)); *Edelman v. Townsend,* 412 U.S. 914, 915 (1973) (*See*, *Alexander v. Weaver*, 345 F. Supp. 666, 668 (N.D. Ill. 1972)); *Bd. of Pub. Instruction v. Banks,* 401 U.S. 988 (1971) (*See, Banks v. Bd. of Pub. Instruction of Dade County*, 314 F. Supp. 285, 287 (S.D. Fla. 1970)); *Hutcherson v. Lehtin,* 400 U.S. 923 (1970) (*See*, *Hutcherson v. Lehtin*, 313 F. Supp. 1324, 1325 (N.D. Cal. 1970)); *Carlough v. Richardson,* 399 U.S. 920 (1970) (*See*, *Carlough v. Finch*, 309 F. Supp. 1025, 1027 (S.D. Fla. 1969)); *Dahl v. Republican State Comm.,* 393 U.S. 408 (1969) (*per curiam*) (*See*, *Dahl v. Republican State Comm.*, 319 F. Supp. 682, 683-84 (W.D. Wash. 1970)).

12. *1A West's Fed. Forms, Supreme Court § 241, Jurisdiction on Appeal from a United States District Court-Introductory Comment*, Bennett Boskey (5th ed.), discussing several decisions (*Democratic Exec. Comm. of Columbiana Cnty. v. Brown,* 422 U.S. 1002 (1975); *Smart v. Texas Power & Light Co.,* 421 U.S. 958 (1975); *Custom Recording Co. v. Blanton,* 421 U.S. 943 (1975); *BT Inv. Managers Inc. v. Dickinson,* 421 U.S. 901 (1975)) that resulted from errors in the direct appeal procedures.

error of a three-judge panel;[13] and (4) cases where this Court applied "equitable vacatur" without discussion, but cited directly to past Supreme Court precedent where "equitable vacatur" was utilized to relieve the parties of an error involving direct appeal or a three-judge panel.[14] Not a single "equitable vacatur" case identified by petitioners involves § 2107—the jurisdictional statute at issue here, which has been the subject of recent decisions by this Court.[15]

---

13. *Burlington N., Inc. v. Sterling Colorado Beef Co.*, 429 U.S. 1084 (1977) (*See*, jurisdictional statement at 1976 WL 194552, *1); *Gustafson v. Hoffman*, 429 U.S. 806, 806-807 (1976) (*See*, jurisdictional statement at 1976 WL 194321, *2-3); *Shouse v. Pierce County*, 425 U.S. 929 (1976) (*See*, jurisdictional statement at 1976 WL 194730, *1); *Nat'l Socialist White People's Party v. Walsh,* 425 U.S. 929 (1976) (*See*, jurisdictional statement at 1976 WL 194720, *1-2); *Stamler v. Willis*, 393 U.S. 407 (1969) (*per curiam*) (*See*, jurisdictional statement at 1968 WL 129265, *10).

14. *Stivers v. Minnesota*, 429 U.S. 1084 (1977); *Mendez v. Heller,* 420 U.S. 916 (1975); *Custom Recording Co. v. Blanton,* 421 U.S. 943 (1975); *Smart v. Texas Power & Light Co.,* 421 U.S. 958 (1975); *Driskell v. Edwards,* 419 U.S. 812 (1974); *Sumrall v. Kidd,* 394 U.S. 215 (1969) (*per curiam*); *Dahl v. Republican State Comm.,* 393 U.S. 408 (1969) (*per curiam*); *Skolnick v. Bd. of Comm'rs,* 389 U.S. 26 (1967) (*per curiam*); *Canton Poultry, Inc. v. Conner,* 388 U.S. 458 (1967) (*per curiam*).

15. This Court has recently considered the jurisdictional nature of the time limits imposed by § 2107. Interpreting § 2107 in *Bowles*, this Court recognized that it has "long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Bowles,* 551 U.S. at 209 (citing six cases dating back to 1848). Therefore, "an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, . . . must be dismissed for want of jurisdiction," and "this Court has no authority to create equitable exceptions to jurisdictional

Moreover, unlike every "equitable vacatur" case relied on by petitioners, and unlike *Bowles,* this case does not involve an error in the proceedings below. Rather, petitioners' claimed "error" was their *own* reliance on the Ninth Circuit's interpretation of the deadline for filing an appeal under § 2107 at a time when there was a clear circuit split on this jurisdictional issue. *See*, *United States ex rel. Haycock v. Hughes Aircraft Co.*, *supra,* 98 F.3d at 1102 (identifying an "intercircuit conflict"). Despite the circuit split and this Court's holding in *Bowles* that § 2107 is "mandatory and jurisdictional," petitioners ***chose*** to wait 58 days to file their notice of appeal. There is nothing within existing law that requires, or even suggests, that "equitable vacatur" should have been considered by the Ninth Circuit under the circumstances of this case, much less that "equitable vacatur" was *required* in these circumstances. And, in any event, any *historical* practice of engaging in "equitable vacatur" to circumvent jurisdictional requirements is outmoded under this Court's recent precedents, including *Bowles* and *Eisenstein*.[16]

---

requirements." *Bowles,* 551 U.S. at 210, 214. The Court recently reaffirmed that understanding in *Henderson v. Shinseki,* ("the statutory limitation on the length of an extension of the time to file a notice of appeal in an ordinary civil case is 'jurisdictional,' and we therefore held [in *Bowles*] that a party's failure to file a notice of appeal within that period could not be excused based on equitable factors. . . ."). *Henderson v. Shinseki,* 131 S.Ct 1197, 1201-1202 (2011). Although petitioners' petition appears to based on the unstated premise that *Bowles* is wrong or at least "question[able]," Pet. 24 (citing Scott Dodson, *The Failure of* Bowles v. Russell, 43 Tulsa L. Rev. 631 (2008)), petitioners do not ask this Court to overrule *Bowles* and therefore must accept it on its terms. Pet. 9.

16. None of the dicta on which petitioners rely (Pet. 25-26) from *Reed Elsevier, Inc. v. Muchnick,* 130 S. Ct. 1237 (2010), alters

28 U.S.C. section 2106 ("§ 2106") does not require any different result. That statute generally describes the function of the Supreme Court and the circuit courts to review cases "lawfully brought before [the court] for review." § 2106. Here, petitioners' untimely appeal was not "lawfully brought before [the Ninth Circuit Court of Appeals] for review" because it was indisputably "jurisdictionally untimely." Pet. i. Petitioners argue that Congress implicitly ratified the purported practice of "equitable vacatur" in its 1948 revisions to what is now § 2106, but there is nothing either in the text of the statute or in the legislative history or cases upon which they rely to support their hypothesis.[17] To the contrary, the authority relied on by petitioners as the earliest application of

---

the precedential force of those decisions. And this Court's decision in *Henderson*—which simply held that this Court's precedents (including *Bowles*) governing the jurisdictional requirements for review by *Article III* courts did not control "review by an *Article I* tribunal as part of a unique administrative scheme," *Henderson*, 131 S. Ct. at 1204—does not help petitioners either.

17. The 1948 revisions to what is now § 2106 were part of H.R. 3214, 80th Cong. (1948) (enacted), an omnibus effort to recodify federal procedural law and gather it in one title. S. Conf. Rep. No. 80-1559, at 1-2; Cong. Rec. 6,7927 (1948). The specific revision to the predecessor to § 2106, which inserted "or a court of appeals" after "Supreme Court" was done "upon authority of *United States v. Illinois Surety Co.*, C.C.A. 1915, 226 F. 653, *affirmed* 37 S. Ct. 614, 244, U. S. 376, 61 L. Ed. 1206, wherein it was held that this section also applied to the courts of appeals in view of section 11 of the Circuit Court of Appeals Act of Mar. 3, 1891, ch. 517, 28 Stat. 829." H.R. Conf. Rep. No. 80-308, at A173 (1947). The statute was revised to recognize that the courts of appeals have the power to modify district court judgments and orders. There is no indication that Congress intended to expand this Court's occasional use of "equitable vacatur" to correct procedural errors in direct appeals cases.

"equitable vacatur" demonstrates that this Court's assumed authority to invoke "equitable vacatur" was derived from the direct appeal statutes themselves, and not any general jurisdictional statute. *Gully v. Interstate Nat. Gas Co.,* 292 U.S. 16, 18 (1934) (*per curiam*). In any event, there certainly is no conflict of authority over the proper application of § 2106 in this context.

III. There Is Otherwise No Compelling Reason To Grant Certiorari.

A. In Deciding *Eisenstein*, This Court Knew There Could Be "Harsh Consequences"

Petitioners decry the result below—dismissal of their late-filed appeal as jurisdictionally untimely—as "inequitable." Pet. 5. But this Court expressly recognized in *Eisenstein* that its decision would require pending appeals like petitioners' to be dismissed. Specifically, Eisenstein argued that affirming the dismissal of his appeal would "unfairly punish those who relied on the holdings of courts adopting the 60-day limit in cases in which the United States was not a party." *Eisenstein*, 129 S. Ct. at 2236, n.4. In fact, relators in another Ninth Circuit FCA case who filed an appeal more than 30 days after entry of judgment filed an *amicus* brief in *Eisenstein* arguing that appeals like theirs should not be dismissed. Brief of Amici Curiae Patricia Haight and in Defense of Animals, *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009) (No. 08-660); *See also*, 2009 WL 583802 (Patrica Haight was a relator in *United States ex rel. Haight et al. v. Catholic Healthcare West, et al.*, Ninth Circuit Case No. 07-16857). The *Haight amici* argued that they were entitled to rely on existing Ninth

Circuit precedent (*i.e.*, *Haycock*) permitting appeals up to 60-days after entry of judgment in FCA cases in which the United States has not intervened, and urged this Court to reverse the Second Circuit, or in the alternative, issue a prospective ruling. *Id.* at 4-12. In *Eisenstein,* a unanimous Court turned away these arguments, noting that it "must . . . decide the jurisdictional question before it irrespective of the possibility of harsh consequences." *Eisenstein*, 129 S. Ct. at 2236, n.4.[18]

Petitioners here are in exactly the same position as the unsuccessful *Eisenstein amici.* That the dismissal of their appeal would be required by § 2107 despite apparent harsh consequences was foreseen by this Court.

B. The District Court Properly Concluded That Petitioners' Claims Are Meritless

Nor is the loss of the appeal in this False Claims Act case troublesome on the merits. In its motion for summary judgment, Chapman demonstrated that petitioners' claim failed on several fundamental levels. However, in granting Chapman's motion, the district court relied on the most glaring flaws. First, the district court agreed with existing case law in concluding that "the HEA imposes no affirmative duty on Chapman to insure accreditation standards are unfailingly maintained, and no FCA claim can be maintained based on standards that are not a prerequisite to payment of government funds." Pet.App.

---

18. As noted above, following *Eisenstein*¸ the Ninth Circuit dismissed the appeal of the *Haight amici,* and this Court denied *certiorari*. *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 366 (2010).

17a, citing *U.S. ex rel. Diop v. Wayne County Comm. College Dist.*, 242 F. Supp. 2d 497, 532-534 (E.D. Mich. 2003).

Most importantly, however, the district court recognized that petitioners' entire case rested upon the existence of WASC's "strict 45 hour rule," but no such rule even exists. The district court concluded: "In the absence of any WASC requirement of a quantum of classroom hours, [petitioners] cannot establish a false statement that is a condition of government funding." Pet.App. 17a. Petitioners' subsidiary theories of liability were similarly flawed.[19] Pet.App. 18a-20a, 20a-23a.

Of course, petitioners were free to bring a *timely* appeal from that ruling. But they indisputably failed to do so. And nothing about the Ninth Circuit's factbound—and unassailably correct—application of *Eisenstein* leading to that result warrants this Court's review.

19. For example, Petitioners alleged that Chapman falsely certified compliance with requirements in certain memoranda of understanding ("MOU") with the United States Department of Defense. However, the district court ruled that on their face, the MOUs are not related to receipt of government funds. Pet. App. 18a-20a. And, Petitioners also brought a state False Claims Act claim, but this claim failed for the same reasons as the FCA claim. Pet.App. 23a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRED M. PLEVIN
Counsel of Record
PAUL, PLEVIN, SULLIVAN &
CONNAUGHTON LLP
401 B Street, Tenth Floor
San Diego, CA 92101
(619) 237-5200

Counsel for Respondent