No. 14-374

In the Supreme Court of the United States

DAVID RAINEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in light of this Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007), holding that statutory time limits on appeals are jurisdictional, this Court should overrule *United States* v. *Healy*, 376 U.S. 75 (1964), which holds that a timely motion to reconsider renders an order dismissing an indictment non-final for purposes of the appeal deadline set forth in 18 U.S.C. 3731.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 757 F.3d 234. The order of the district court (Pet. App. 30a-86a) is reported at 946 F. Supp. 2d 518.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2014. The petition for a writ of certiorari was filed on September 25, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves charges against petitioner for obstruction of Congress's investigation of the 2010 *Deepwater Horizon* oil and gas blowout in the Gulf of Mexico. Petitioner was indicted on one count of obstruction of Congress, in violation of 18 U.S.C. 1505,

and one count of making a false statement, in violation of 18 U.S.C. 1001. Indictment 12-13; see Pet. App. 6a. The district court dismissed the Section 1505 count, and, after filing a motion for reconsideration of that order, the government appealed. *Id.* at 6a. The court of appeals concluded that it had jurisdiction over the appeal pursuant to 18 U.S.C. 3731, vacated the district court's order, and remanded for further proceedings. *Id.* at 1a-29a.

1. On April 20, 2010, a blowout of oil and natural gas occurred on the *Deepwater Horizon*, a drilling rig leased by the multinational energy corporation BP plc (BP) and operated in the Gulf of Mexico. Petitioner was BP's Vice President of Exploration for the Gulf of Mexico and was appointed the Deputy Incident Commander of the "Unified Command" formed by the United States Coast Guard to respond to the disaster. See Pet. App. 2a.

The charges against petitioner allege that he played a central role in BP's subsequent effort to conceal—from Congress and the public—the rate at which oil was flowing from the well into the ocean. The Unified Command initially estimated that oil was flowing at a rate of 1000 barrels per day (BOPD), and it later raised that estimate to 5000 BOPD in response to an analysis performed by the National Oceanic and Atmospheric Administration. Pet. App. 2a-3a. BP engineers sent petitioner internal company studies estimating the rate to be between 64,000 and 146,000 BOPD and 14,000 to 82,000 BOPD, respectively. *Id.* at 3a. Instead of relying on these analyses, petitioner performed his own calculation of the flow rate using two different methodologies that he discovered on the internet. Under one of those methods (known as the

"Bonn" method), petitioner estimated the flow rate to be as high as 92,000 BOPD. *Ibid.* Under the other method (known as the American Society for Testing and Materials (ASTM) method), petitioner purported to derive an estimate of 5000 to 6000 BOPD. *Ibid.* Petitioner did not properly apply the ASTM standards, however, and he reverse-engineered the data to arrive at the lower figure. *Ibid.*; Gov't C.A. Br. 6.

Despite the conflicts between the BP engineering data and petitioner's calculation of the flow rate, BP publicly stood by the 5000 BOPD estimate and rejected alternative estimates generated by outside experts. Pet. App. 3a-4a. At one point, a BP engineering supervisor warned petitioner and other BP executives that internal models showed that the flow rate could in fact be as high as 100,000 BOPD. *Id.* at 4a. Petitioner nonetheless prepared a memorandum defending the company's 5000 BOPD flow-rate estimate. *Ibid.* The memorandum selectively omitted the evidence questioning the lower flow-rate figure and falsely represented that petitioner's purported ASTM estimates had been central to Unified Command's decision to raise its estimate to 5000 BOPD. *Ibid.*; see Gov't C.A. Br. 8.

Unified Command eventually formed a "Flow Rate Technical Group" consisting of independent and government experts. Pet. App. 4a. Following their own investigation, the Group estimated in August 2010 that the flow rate after the blowout was approximately 62,000 BOPD, and that it was 53,000 BOPD at the time the well was shut. *Ibid.*; Gov't C.A. Br. 8. The Group further concluded that a total of approximately 4.9 million barrels of oil had been released into the

Gulf of Mexico during the course of the spill. Gov't C.A. Br. 8.

Following the blowout, the House Subcommittee on Energy and Environment, a subcommittee of the Committee on Energy and Commerce of the House of Representatives, began investigating the spill. Pet. App. 4a. In response to a request for a congressional briefing, petitioner informed the Subcommittee that 5000 BOPD was the most accurate estimate of the flow rate. *Id.* at 4a-5a. In doing so, however, he failed to disclose his own and other internal BP estimates that placed the flow rate significantly higher. *Id.* at 5a; Gov't C.A. Br. 9. Petitioner was also the primary source of the flow-rate information for BP's response to the Subcommittee's later request for all internal BP documents relating to its flow-rate estimates. Pet. App. 5a; Gov't C.A. Br. 10. BP's response appended petitioner's prior memorandum defending the 5000 BOPD flow-rate estimate, but it omitted key information that would have undercut this estimate, including the alternative (and much higher) estimates prepared by petitioner and the BP engineers. Pet. App. 5a; Gov't C.A. Br. 10-11.

2. In November 2012, a federal grand jury in the Eastern District of Louisiana returned a two-count indictment against petitioner. The indictment included one count of obstruction of Congress, in violation of 18 U.S.C. 1505 (Count One), and one count of making false statements, in violation of 18 U.S.C. 1001 (Count Two). Indictment 12-13; see Pet. App. 6a. Petitioner moved to dismiss Count One on various grounds. As relevant here, petitioner argued that the indictment failed to properly allege that he knew of the pending congressional investigation. *Ibid.* He also argued

that Section 1505, which criminalizes obstructing a due and proper inquiry or investigation by either House of Congress or "any committee of either House or any joint committee of the Congress," 18 U.S.C. 1505, does not apply to the obstruction of subcommittee investigations, *ibid.*

On May 20, 2013, the district court issued an order dismissing Count One of the indictment. Pet. App. 30a-86a. The court agreed with petitioner that Section 1505 does not apply to the obstruction of a congressional subcommittee. *Id.* at 65a-78a. The court also found that the indictment had not sufficiently alleged petitioner's knowledge of the Subcommittee's investigation. *Id.* at 54a-65a.

On June 19, 2013, the government moved the district court to reconsider its order, arguing that the court had committed a clear error of law in finding that a subcommittee was not a "committee" for purposes of Section 1505. 2:12-CR-00291 Docket entry No. (Docket entry No.) 128, at 1. The court denied the government's motion on June 21, 2013. Docket entry No. 133. The government filed its notice of appeal 28 days later, on July 19, 2013. Docket entry No. 142.

3. In June 2014, the court of appeals vacated the district court's order dismissing Count One and remanded the case for further proceedings. Pet. App. 1a-29a.

The court of appeals began by holding that the government's notice of appeal was timely under 18 U.S.C. 3731 and that the court had jurisdiction over petitioner's appeal. Pet. App. 7a-9a. The court explained that Section 3731 provides that an appeal by the government "shall be taken within [30] days after the decision, judgment or order has been rendered."

Id. at 7a. The court held that the government's notice of appeal was timely because it was filed within 30 days of the district court's disposition of the government's motion for reconsideration. *Id.* at 9a.

The court of appeals rejected petitioner's argument that the government's appeal was untimely because it was filed more than 30 days after the district court's original May 20, 2013, order dismissing Count One of the indictment. Pet. App. 7a-9a. In doing so, the court of appeals relied on this Court's decision in *United States* v. *Healy*, 376 U.S. 75 (1964), which holds that "a timely petition for rehearing by the [g]overnment filed within the permissible time for appeal renders the judgment not final for purposes of appeal until the court disposes of the petition." *Id.* at 77-78; see Pet. App. 7a. The court of appeals explained that *Healy*—a decision that this Court "has repeatedly reaffirmed"—"validat[ed] the exact sequence [followed by the government] in this case." *Id.* at 7a-8a (citing *United States* v. *Ibarra*, 502 U.S. 1, 6-7 (1991) (per curiam) and *United States* v. *Dieter*, 429 U.S. 6, 8-9 (1976) (per curiam)).

The court of appeals also rejected petitioner's argument that this Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007) implicitly overruled *Healy*. Pet. App. 8a-9a. The court of appeals noted that, under *Bowles*, the statutory deadline for filing an appeal is a jurisdictional limit that may not be adjusted by a court. *Id.* at 9a. But, the court explained, *Healy* is distinguishable from *Bowles*, insofar as *Healy* "does not extend the statutory prescribed filing period, but delineates when the [30]-day period begins to run." *Ibid.* "Under *Healy*, the [g]overnment continues to be bound by the [30]-day requirement, but the judgment

becomes final, and the clock begins to run, only after the disposition of a timely filed motion to reconsider." *Ibid.* The court noted that this interpretation of *Bowles* and *Healy* is consistent with decisions by the Seventh and Tenth Circuits. *Ibid.* (citing *United States* v. *Cook*, 599 F.3d 1208, 1212-1213 (10th Cir.), cert. denied, 131 S. Ct. 331 (2010) and *United States* v. *Henderson*, 536 F.3d 776, 778-779 & n.2 (7th Cir. 2008), cert. denied, 558 U.S. 830 (2009)).

Turning to the merits, the court of appeals held that the district court had erred in dismissing Count One of the indictment. The court of appeals explained that Section 1505 prohibits the obstruction of congressional subcommittees, and it further held that the indictment properly alleged that petitioner knew of the congressional investigation. Pet. App. 15a, 29a. The court accordingly remanded the case to the district court for further proceedings. *Id.* at 29a.

ARGUMENT

Petitioner argues (Pet. 5-16) that the court of appeals lacked jurisdiction over the government's appeal. He concedes that the government's appeal was timely under the rule articulated by this Court in *United States* v. *Healy*, 376 U.S. 75, 77-78 (1964). Nonetheless, he argues that *Healy* should be overruled in light of *Bowles* v. *Russell*, 551 U.S. 205 (2007). His argument lacks merit. The decision below is consistent with this Court's precedent and the decisions of the courts of appeals that have addressed this issue. No further review is warranted.

1. The court of appeals correctly held that the government's appeal was timely filed in accordance with 18 U.S.C. 3731. That provision allows the government to appeal any "decision, judgment, or order of a dis-

trict court dismissing an indictment," so long as the appeal is taken "within [30] days after the decision, judgment or order has been rendered." 18 U.S.C. 3731. The clear premise underlying Section 3731 is that the district court's "decision, judgment, or order" being appealed reflects that court's final determination with respect to the matter at issue. Once the district court has made clear that its ruling is final, Section 3731 requires the government to act within 30 days if it wishes to appeal that ruling.

In *Healy* and subsequent cases, this Court has repeatedly held that if the government files a timely motion asking the district court to reconsider its ruling, that motion renders the ruling non-final for purposes of Section 3731 and corresponding rules of procedure. See 376 U.S. at 77-80; accord *United States* v. *Ibarra*, 502 U.S. 1, 6-7 (1991) (per curiam); *United States* v. *Dieter*, 429 U.S. 6, 8-9 (1976) (per curiam). In such circumstances, Section 3731's 30-day deadline does not begin to run until after the district court denies such a motion. See *Healy*, 376 U.S. at 77-78.

The Court has justified this interpretation of Section 3731 by noting that it is "senseless" for an appellate court "to pass on an issue while a motion for rehearing is pending below." *Healy*, 376 U.S. at 80. The Court has emphasized the "wisdom of giving district courts the opportunity promptly to correct their own alleged errors" and the dangers of "imposing added and unnecessary burdens on the courts of appeals." *Dieter*, 429 U.S. at 8. The Court has further noted that this approach tracks "the well-established rule in civil cases" and reflects a "traditional and virtually unquestioned practice" governing appeals brought by the United States and private parties in both civil and

criminal cases. *Healy*, 376 U.S. at 78-79; see *Dieter*, 429 U.S. at 8 (noting that *Healy* reflects "the consistent practice in civil and criminal cases alike").

Here, the government filed its notice of appeal 28 days after the district court denied its request for reconsideration. See Docket entry Nos. 133, 142; see also p. 5, *supra*. That appeal was timely under Section 3731.

2. Petitioner does not dispute that the government's appeal was timely under the *Healy* line of cases. Instead, he contends (Pet. 5-16) that those decisions are inconsistent with *Bowles* v. *Russell*, *supra*. That assertion is incorrect, and no compelling reason exists for this Court to reconsider *Healy*.

a. In *Bowles*, the Court held that the statutory time limits for taking an appeal in a civil action under 28 U.S.C. 2107 (2006) are jurisdictional and that a district court may not extend those limits. See 551 U.S. at 209-214. Neither the Court's opinion nor the dissent mentioned *Healy* or undermined its reasoning in any way. *Bowles* prevents courts from extending the statutory time limit for filing an appeal, but it does not address when a district court's ruling is final—and thus when that time limit begins to run in the first place. It therefore does not disturb *Healy*'s holding that a timely request for reconsideration "renders the judgment *not* final for purposes of appeal." 376 U.S. at 78 (emphasis added); see *Ibarra*, 502 U.S. at 6 (motion for rehearing "renders an otherwise final decision of a district court not final"); *Dieter*, 429 U.S. at 8 (noting that *Healy* "treat[s] timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending").

b. Petitioner does not deny that *Bowles* is silent on the specific issue decided by *Healy*—the treatment of a timely motion for reconsideration in determining when a statutory time limit begins to run. He nonetheless asserts (Pet. 11) that *Healy* violates *Bowles* because its holding constitutes an "uncodified judge-made rule that conflicts with the text of [a] jurisdictional statute."

But no conflict exists between *Healy* and *Bowles*. *Bowles*'s holding that Section 2107 is jurisdictional and not subject to judge-made equitable exceptions rests on "a century's worth of precedent and practice in American courts." 551 U.S. at 209 n.2; see *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010) (emphasizing historical basis of *Bowles*'s holding). That traditional rule developed in parallel with the rule embraced in *Healy*, which itself dates back over a century. See 376 U.S. at 78 (noting that treating a decision as non-final for purposes of the time limit for filing an appeal reflects "the well-established rule in civil cases," dating back at least as far this Court's decision in *United States* v. *Ellicott*, 223 U.S. 524 (1912)). Petitioner's suggestion that *Bowles* is inconsistent with *Healy* cannot be reconciled with the longstanding coexistence of both doctrines.

Nor does *Healy* contradict the text of Section 3731. Under that provision, the time for filing an appeal begins to run when the district court's decision is "rendered." 18 U.S.C. 3731. But the history and purpose of Section 3731 make clear that in this context—when the decision starts the clock for the deadline for taking an appeal—the decision is not rendered until it is final.

The natural reading of the statutory text as requiring a final decision accords with Section 3731's purpose, which is to allow the government to take an appeal in cases where the district court has made an adverse ruling. If the district court has before it a timely motion asking to reconsider that ruling, it is not clear whether any such appeal will be necessary. The point of the reconsideration motion is to allow the district court to reconsider. As this Court explained in *Healy*, granting the district court the chance to correct its own errors saves time and conserves judicial resources. 376 U.S. at 80.

Running the 30-day deadline from the denial of a motion for reconsideration is also consistent with Section 3731's history—and especially with Congress's long acquiescence in *Healy*'s analysis. This Court decided *Healy* in 1964. Congress then amended the statute twice, in 1968 and again in 1971.[1] Neither amendment disturbed *Healy* nor questioned the Court's conclusion that a timely request for reconsideration renders a district court's decision non-final for purposes of Section 3731's 30-day deadline. In fact, the 1971 amendment directed courts to "liberally construe[] [Section 3731] to effectuate its purposes." Act of Jan. 2, 1971, Pub. L. No. 91-644, Tit. III, § 14(a), 84 Stat. 1890. In 1976, this Court issued its decision in *Dieter* reaffirming and applying *Healy*. Since then, Congress has amended Section 3731 four additional times—in 1984, 1986, 1994, and 2002—each time without addressing *Healy*'s analysis. Meanwhile,

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[1] See Act of Jan. 2, 1971, Pub. L. No. 91-644, Tit. III, § 14(a), 84 Stat. 1890; Act of June 19, 1968, Pub. L. No. 90-351, Tit. VIII, § 1301, 82 Stat. 237.

this Court once again applied *Healy* in its 1991 *Ibarra* decision.[2]

This Court "normally assume[s]" that "when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010). Here, Congress's repeated amendment of Section 3731—and its decision not to overrule *Healy* or its progeny—shows that Congress deliberately acquiesced in that decision. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (relying on congressional acquiescence in consistent line of this Court's precedent). And this Court has emphasized that such acquiescence is a strong reason to adhere to principles of stare decisis. *Ibid.*; *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007); *Shepard* v. *United States*, 544 U.S. 13, 23 (2005).[3]

c. Finally, petitioner's strict interpretation of *Bowles* would undermine judicial efficiency and waste scarce judicial resources. As this Court explained in *Healy*, allowing parties a full "opportunity to petition

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[2] See Act of Nov. 2, 2002, Pub. L. No. 107-273, Div. B, Tit. III, § 3004, 116 Stat. 1805; Act of Sept. 13, 1994, Pub. L. No. 103-322, Tit. XXXIII, § 330008(4), 108 Stat. 2142; Act of Nov. 10, 1986, Pub. L. No. 99-646, § 32, 100 Stat. 3598; Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, §§ 205, 1206, 98 Stat. 1986, 2153.

[3] Petitioner is also wrong to suggest (Pet. 8-9, 14-15) that the statutory question in this case is analogous to the equitable exception to the statutory appeal deadline at issue in *Bowles*. There, the Court overruled *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam) and *Thompson* v. *INS*, 375 U.S. 384 (1964) (per curiam), which both recognized a "unique circumstances" exception to the statutory deadline for filing an appeal. *Bowles*, 551 U.S. at 213-214. Here, *Healy* is not an exception to a jurisdictional time limit; rather, it defines when that time limit begins to run.

a lower court for the correction of errors" ultimately saves time and resources because a lower court's reconsideration may alleviate the need for appeal. 376 U.S. at 80; see *Ibarra*, 502 U.S. at 5; *Dieter*, 429 U.S. at 8. But under petitioner's theory, the only way a litigant could preserve his appellate rights would be to file a notice of appeal even if the lower court had not yet resolved his pending motion for reconsideration. Any such appeal would immediately divest the district court of jurisdiction, *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam), thereby depriving that court of any chance to correct mistakes and forcing the appellate court to hear an appeal that might otherwise be unnecessary.

In short, petitioner offers no compelling basis for reading *Bowles* to overrule *Healy* and its established approach for determining whether an appeal complies with a statutory filing deadline. *Bowles* and *Healy* do not conflict, and no reason exists for this Court to grant certiorari to reconsider *Healy*.

3. As petitioner acknowledges (Pet. 15-16), no court of appeals has adopted his theory that *Bowles* requires the overruling of *Healy*. The absence of any split of authority among the circuits further weakens petitioner's case for review by this Court.

The only other court of appeals that has addressed petitioner's theory of *Bowles* has rejected it on essentially the same grounds that the Fifth Circuit did here. In *United States* v. *Henderson*, 536 F.3d 776 (2008), cert. denied, 558 U.S. 830 (2009), the Seventh Circuit held that it had jurisdiction when the government had filed a notice of appeal within 30 days of the district court's disposition of a motion for reconsideration. *Id.* at 778-779. The court stated that *Healy*

"squarely controls the question" of jurisdiction because it establishes that "'criminal judgments are nonfinal for purposes of appeal so long as timely rehearing petitions are pending.'" *Id.* at 779 (quoting *Healy*, 376 U.S. at 78). Like the Fifth Circuit in this case, the Seventh Circuit expressly rejected the argument that *Bowles* implicitly overruled *Healy*. *Id.* at 779 n.2. The court explained that the issue in *Bowles*—whether a court may make an exception to a statutory time limit for filing an appeal—presents a "separate question" distinct from "when such a time limit begins to run." *Ibid.*

Similarly, in *United States* v. *Cook*, 599 F.3d 1208, cert. denied, 131 S. Ct. 331 (2010), the Tenth Circuit held that the government's motion for reconsideration of a suppression order had postponed the time for appeal. *Id.* at 1212-1213. While the court recognized that "[a] timely notice of appeal is 'mandatory and jurisdictional,'" *id.* at 1212 (quoting *Bowles*, 551 U.S. at 209), the court also explained that "[a] timely motion for reconsideration renders the original judgment non-final for purposes of appeal as long as the motion for reconsideration is pending, whether the issue involved is factual or legal," *ibid.* (citing *Dieter*, 429 U.S. at 8). The court therefore held that the government's appeal, filed within 30 days of the district court's disposition of the government's motion for reconsideration, was timely. *Id.* at 1213; see, *e.g.*, *United States* v. *Cos*, 498 F.3d 1115, 1120-1123 (10th Cir. 2007) (distinguishing *Bowles* from the question of when the jurisdictional time period begins to run).

4. Further review is also unwarranted in light of the interlocutory posture of this case. The court of appeals reversed the district court's dismissal of

Count One, and the case is currently scheduled to go to trial on both counts of the indictment in March 2015. Docket entry No. 257. If the jury acquits petitioner, his question presented will become moot. If petitioner is convicted, he will have the opportunity to raise any issues arising from the proceedings in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). In these circumstances, the better course is to deny review and consider petitioner's claims—if at all—only after the forthcoming trial.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2014

[4] Petitioner argues (Pet. 19-22) that it would be unjust for him to stand trial prior to this Court's review of the appeal on Count One and that the issue he now presents "will almost certainly be subsumed by consideration of merits issues" if raised after the trial. That is incorrect: If the jury convicts petitioner on Count One, nothing would prevent him from raising the identical question he now presents in any petition for a writ of certiorari at that time.