No. _____

In the
Supreme Court of the United States

BLOM BANK SAL,
Petitioner,

v.

MICHAL HONICKMAN, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than 70 years, this Court has "required a movant seeking relief under Rule 60(b)(6)" of the Federal Rules of Civil Procedure "to show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). This Court has also stressed that a movant must be "faultless" to obtain relief. *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). "This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved." *Gonzalez*, 545 U.S. at 535 (cleaned up). In this case, Respondents declined multiple invitations and opportunities to amend their complaint. The District Court then dismissed their complaint with prejudice, and the Second Circuit affirmed. Only then did Respondents move to vacate the judgment so they could file an amended complaint. The District Court denied the motion under Rule 60(b)(6)'s well-settled standard. But the Second Circuit reversed, based on an unprecedented "balanc[ing]" test that requires district courts to consider Rule 15(a)'s "liberal pleading principles" when addressing a Rule 60(b)(6) motion to reopen a judgment for the purpose of filing an amended complaint.

The question presented is:

Whether Rule 60(b)(6)'s stringent standard applies to a post-judgment request to vacate for the purpose of filing an amended complaint.

PARTIES TO THE PROCEEDING

Petitioner BLOM Bank SAL was defendant in the United States District Court for the Eastern District of New York and appellee in the United States Court of Appeals for the Second Circuit.

Respondents Michal Honickman, Individually and for the Estate of Howard Goldstein, Eugene Goldstein, Lorraine Goldstein, Richard Goldstein, Barbara Goldstein Ingardia, Michael Goldstein, Chana Freedman, David Goldstein, Moses Strauss, Philip Strauss, Bluma Strauss, Ahron Strauss, Roisie Engelman, Joseph Strauss, Tzvi Weiss, Leib Weiss, Individually and for the Estate of Malka Weiss, Yitzchak Weiss, Yeruchaim Weiss, Esther Deutsch, Matanya Nathansen, Individually and for the Estate of Tehilla Nathansen, Chana Nathansen, Individually and for the Estate of Tehilla Nathansen, Yehudit Nathansen, S.N., a minor, Hezekial Toporowitch, Pearl B. Toporowitch, Yehuda Toporowitch, David Toporowitch, Shaina Chava Nadel, Blumy Rom, Rivka Pollack, Rachel Potolski, Ovadia Toporowitch, Tehilla Greiniman, Yisrael Toporowitch, Yitzchak Toporowitch, Harry Leonard Beer, Individually and as the Executor of the Estate of Alan Beer and Anna Beer, Phyllis Maisel, Estelle Caroll, Sarri Anne Singer, Judith Singer, Eric M. Singer, Robert Singer, Julie Averbach, Individually and for the Estate of Steven Averbach, Tamir Averbach, Devir Averbach, Sean Averbach, Adam Averbach, Maida Averbach, Individually and for the Estate of David Averbach, Michael Averbach, Eileen Sapadin, Daniel Rozenstein, Julia Rozenstein Schon, Alexander Rozenstein, Esther Rozenstein, Jacob Steinmetz,

Individually and for the Estate of Amichai Steinmetz, Deborah Steinmetz, Individually and for the Estate of Amichai Steinmetz, Nava Steinmetz, Orit Mayerson, Netanel Steinmetz, Ann Coulter, for the Estate of Robert L. Coulter, Sr., Dianne Coulter Miller, Individually and for the Estate of Janis Ruth Coulter, Robert L. Coulter, Jr., Individually and for the Estate of Janis Ruth Coulter, Larry Carter, Individually and as the Administrator of the Estate of Diane Leslie Carter, Shaun Choffel, Richard Blutstein, Individually and for the Estate of Benjamin Blutstein, Katherine Baker, Individually and for the Estate of Benjamin Blutstein, Rebekah Blutstein, Nevenka Gritz, Individually and for the Estate of David Gritz and Norman Gritz, Jacqueline Chambers, Individually and as the Administrator of the Estate of Esther Bablar, Levana Cohen, Individually as the Administrator of the Estate of Esther Bablar, Eli Cohen, Sarah Elyakim, Joseph Cohen, Greta Geller, as the Administrator of the Estate of Hannah Rogen, Ilana Dorfman, as the Administrator of the Estate of Hannah Rogen, Rephael Kitsis, as the Administrator of the Estate of Hannah Rogen, Tova Guttman, as the Administrator of the Estate of Hannah Rogen, Temina Spetner, Jason Kirschenbaum, Isabelle Kirschenbaum, Individually and for the Estate of Martin Kirschenbaum, Joshua Kirschenbaum, Shoshana Burgett, David Kirschenbaum, Danielle Teitelbaum, Netanel Miller, Chaya Miller, Aharon Miller, Shani Miller, Adiya Miller, Altea Steinherz, Jonathan Steinherz, Temima Steinherz, Joseph Ginzberg, Peter Steinherz, Laurel Steinherz, Gila Aluf, Yitzhak Zahavy, Julie Zahavy, Tzvee Zahavy, and Bernice Zahavy were plaintiffs in the United

States District Court for the Eastern District of New York and appellants in the United States Court of Appeals for the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner BLOM Bank SAL states that it has no parent corporation and no publicly held corporation owns a beneficial interest in 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings within the meaning of Rule 14.1(b)(iii):

- *Honickman, et al. v. BLOM Bank SAL*, No. 19-CV-00008-KAM-SMG (E.D.N.Y.), judgment entered January 15, 2020, and motion to vacate denied April 8, 2022.
- *Honickman, et al. v. BLOM Bank SAL*, No. 20-575 (2d Cir.), district court's judgment affirmed July 29, 2021.
- *Honickman, et al. v. BLOM Bank SAL*, No. 22-1039 (2d Cir.), district court's judgment vacated and remanded February 29, 2024.

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PETITION FOR WRIT OF CERTIORARI

The decision below entrenches a highly consequential circuit split and flatly contradicts this Court's precedents. As those precedents make clear, obtaining relief from a final judgment under Rule 60(b)(6) "requires a showing of 'extraordinary circumstances.'" *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005). And those circumstances must demonstrate "that the [moving] party is faultless." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). After all, "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann v. United States*, 340 U.S. 193, 198 (1950).

For decades, lower courts have faithfully applied these finality principles. And they have uniformly rejected attempts by plaintiffs to avoid Rule 60(b)(6)'s stringent requirements by appealing to Rule 15(a)'s liberal amendment policy. The two inquiries are entirely separate. Accordingly, "if a plaintiff seeks to reopen a case under Rule 60(b) in order to file an amended complaint, she must satisfy one of the Rule 60(b) grounds *before* a court may consider her motion to amend." *Daulatzai v. Maryland*, 97 F.4th 166, 178 (4th Cir. 2024). As the Fourth Circuit aptly put it, adopting a contrary rule would have placed it "alone in the Nation in collapsing the Rule 60(b) standard with the standard for Rule 15(a)." *Id.* at 177.

But the Second Circuit has done just that—in a case where Respondents repeatedly declined to amend their complaint in the normal course. By rejecting the District Court's multiple invitations to amend their complaint, Respondents deliberately chose to proceed

on the complaint as pled and take their chances on a motion to dismiss and appeal. The District Court dismissed that complaint with prejudice. The Second Circuit affirmed after full merits briefing, oral argument, and supplemental briefing. And at no time during those appellate proceedings did Respondents seek leave to amend.

Then, 18 months after the dismissal with prejudice—and after that dismissal was affirmed on appeal—Respondents filed a Rule 60(b)(6) motion to vacate the judgment so they could try again with an amended complaint. The District Court properly applied Rule 60(b)(6)'s "extraordinary circumstances" standard to deny Respondents' motion. Yet, the Second Circuit reversed. Based on a newly crafted test adopted by a split panel in *Mandala v. NTT Data*, 88 F.4th 353 (2d Cir. 2023), *reh'g en banc denied* (2d Cir. Feb. 13, 2024), the Second Circuit held that the District Court abused its discretion in failing to "give 'due regard' to '*both* the philosophy favoring finality of judgments . . . and the liberal amendment policy of Rule 15(a).'" Pet.App.7 (quoting *Mandala*, 88 F.4th at 361). In the Second Circuit's view, district courts are "required to consider Rule 60(b) finality and Rule 15(a) liberality in tandem" when plaintiffs seek to reopen a judgment in order to file an amended complaint. *Id.*

That reasoning is untenable. The Second Circuit's balancing test effectively rewrites the Federal Rules of Civil Procedure, eviscerates the finality principles embodied in Rule 60(b), and contravenes this Court's precedents several times over. It also squarely conflicts with every one of the eleven other Circuits that have addressed this issue. Those courts have

unanimously held that Rule 15's general policy has no place in the Rule 60(b)(6) analysis. Indeed, over 40 years ago, then-Judge Breyer explained that, absent extraordinary circumstances, the Federal Rules of Civil Procedure do not "allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision." *James v. Watt*, 716 F.2d 71, 78 (1st Cir. 1983) (Breyer, J.).

Not only is the Second Circuit's outlier test wrong, but its decision threatens to unleash far-reaching consequences in cases filed within that court's bounds. As Judge Sullivan noted in his *Mandala* dissent, the Second Circuit's novel balancing test "will erode the finality of judgments throughout th[e] Circuit, significantly undermine the important purposes served by Rule 60(b), and increase the workload of busy district court judges who carry the heaviest burden in our system of civil justice." Pet.App.192 (Sullivan, J., dissenting). Worse still, the test will encourage litigants to wait to amend their complaint until after final judgment and appeals have run their course, as Respondents did here. That wasteful course is at odds with the finality and efficiency principles that animate the Federal Rules, which this Court's precedents have long enforced.

The Court should thus grant certiorari to restore uniformity in the law, to reverse the Second Circuit's error on this issue of exceptional importance, and to preserve the finality of judgments protected by Rule 60(b)(6).

OPINIONS BELOW

The District Court's opinion dismissing the case is reported at 432 F. Supp. 3d 253 and is reproduced at Pet.App.54-87. The Second Circuit's opinion affirming the district court's dismissal is reported at 6 F.4th 487 and is reproduced at Pet.App.20-53. The District Court's opinion denying Respondents' motion to vacate the judgment and amend their complaint is available at 2022 WL 1062315 and is reproduced at Pet.App.9-19. The Second Circuit's opinion vacating the judgment of the lower court and remanding for further proceedings is available at 2024 WL 852265 and is reproduced at Pet.App.1-8.

JURISDICTION

The Second Circuit issued its decision on February 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60(b)(6) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief."

Federal Rule of Civil Procedure 15(a)(2) provides that "a party may amend its pleading . . . with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

STATEMENT OF THE CASE

A. The Initial District Court Proceedings

Respondents filed this lawsuit on January 1, 2019, a day before the statute of limitations expired. They are victims and the families of victims of a series of terrorist attacks carried out by Hamas between December 1, 2001, and August 19, 2003. Complaint, *Honickman, et al. v. BLOM Bank SAL*, No. 1:19-cv-00008-KAM-SMG (E.D.N.Y. Jan 1, 2019), ECF No. 1. The complaint accuses Petitioner of aiding and abetting those attacks by providing routine financial services to three customers (Sanabil, Subul al-Khair, and Union of Good; together, the "Three Customers"), who Respondents allege are associated with Hamas. As Petitioner explained in the proceedings below, it categorically abhors terrorism, has no connection to Hamas, and is not legally or factually responsible for Respondents' injuries.

Respondents pled their claim under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), *id.* § 2333(d)(2). Under JASTA, a United States national "injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States." *Id.* § 2333(a). JASTA provides for secondary liability against "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." *Id.* § 2333(d)(2).

JASTA secondary liability requires "that the defendant consciously and culpably 'participate[d]' in a wrongful act so as to help 'make it succeed.'" *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 493 (2023) (quoting *Nye & Nissen v. United States*, 326 U.S. 613, 619 (1949)). And "JASTA further restricts secondary liability by requiring that the 'act of international terrorism' be 'committed, planned, or authorized by' a foreign terrorist organization designated as such 'as of the date on which such act of international terrorism was committed, planned, or authorized.'" *Id.* at 495 (quoting 18 U.S.C. § 2333(d)(2)). "Thus, it is not enough . . . that a defendant have given substantial assistance to a transcendent 'enterprise' separate from and floating above all the actionable wrongs that constitute it. Rather, a defendant must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong—here, an act of international terrorism." *Id.*

Under JASTA, one of the three elements for aiding-and-abetting liability is that "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance (the 'general awareness' element)." Pet.App.33 (cleaned up); *see also Twitter*, 598 U.S. at 486, 487, 503. Accordingly, to state a claim, Respondents needed to plausibly allege that Petitioner was aware of a link between the Three Customers and Hamas at the time Petitioner provided services to them. But they failed to do so.

Before moving to dismiss Respondents' complaint, Petitioner submitted a three-page letter summarizing the grounds for its contemplated motion to dismiss, as required by the District Court's Individual Practices. Mot. for Pre-Motion Conference, *Honickman, et al. v. BLOM Bank SAL*, No. 1:19-cv-00008-KAM-SMG (E.D.N.Y. May 8, 2019), ECF No. 20. One of Petitioner's principal arguments was that the complaint did not plausibly allege the general awareness element needed to state their JASTA claim. *Id.* at 2. This argument, in turn, relied on the complaint's failure to allege that Petitioner was aware of any connection between the Three Customers and Hamas before the attacks. In response, Respondents chose not to amend; they instead stood on the allegations in their complaint. Mot. to Adjourn Conference, *Honickman, et al. v. BLOM Bank SAL*, No. 1:19-cv-00008-KAM-SMG (E.D.N.Y. June 5, 2019), ECF No. 30.

At a pre-motion conference, the District Court asked Respondents' counsel: "Are there any *additional facts* you could add to the allegations that the defendant is challenging here or are you comfortable standing on your complaint as it is?" Pet.App.93 (emphasis added). Respondents' counsel declined the Court's invitation: "No, I think we are prepared to brief it based on the arguments presented in the pre-motion letter." *Id.* The Court then asked whether Respondents would seek leave to amend if the Court granted Petitioner's motion to dismiss. Respondents' Counsel unequivocally stated that they "would not seek leave to amend." Pet.App.94.

After the conference, the District Court issued an Order memorializing the fact that the "Court offered [Respondents] an opportunity to amend their complaint to add additional information in response to the arguments raised by [Petitioner]," but they "declined to do so and represented that they would not be seeking to amend their Complaint in this regard." Minute Entry & Scheduling Order, *Honickman, et al. v. BLOM Bank SAL*, No. 1:19-cv-00008-KAM-SMG (E.D.N.Y. May 15, 2019).

Consistent with its pre-motion letter, Petitioner moved to dismiss, based on, among other things, the complaint's failure to plausibly suggest that Petitioner knew of the Three Customers' purported affiliation with Hamas before the alleged attacks. *See, e.g.*, Memo. in Supp. of Mot. to Dismiss, *Honickman, et al. v. BLOM Bank SAL*, No. 1:19-cv-00008-KAM-SMG (E.D.N.Y. July 30, 2019), ECF No. 36-1 at 1, 8, 9, 18. Respondents once again stood on their papers. *See* Memo. in Opp. to Mot. to Dismiss, *Honickman, et al. v. BLOM Bank SAL*, No. 1:19-cv-00008-KAM-SMG (E.D.N.Y. July 30, 2019), ECF No. 37 at 18. They did not move to amend or ask for an opportunity to replead should the District Court find their allegations lacking.

The District Court then held oral argument. Pet.App.100. There, Petitioner's counsel again emphasized the complaint's failure to connect the Three Customers to Hamas "at the time of any of the attacks." Pet.App.109. "At the very most, what the complaint alleges is that BLOM provided financial services to three entities, two of which were *later* determined by the U.S. government to have provided

financial support to [Hamas]." Pet.App.108 (emphasis added).

The District Court pressed Respondents' counsel on this point, asking "[w]here do you allege in your complaint that BLOM Bank knew that these account holders are alter egos or are a part of, or the same as [Hamas]?" Pet.App.121. The District Court then offered Respondents' counsel *yet another* opportunity to amend the complaint, specifically with respect to Petitioner's alleged "knowledge":

> The Court: So everything I need to consider in terms of sufficiency of your pleading is going to be found in the complaint that's filed in this case, correct?
>
> Mr. Radine: Yes, Your Honor. The—
>
> The Court: *There are no facts that you would have to offer to address some of the contentions of the defendants regarding knowledge, especially?*
>
> Mr. Radine: *I think we could always add allegations*, but the—we believe the complaint goes far enough in saying that BLOM . . . was generally aware of its role in th[e] [il]licit conduct . . . .

Pet.App.124-25 (emphasis added).

The District Court granted Petitioner's motion to dismiss, holding that Respondents had not "plausibly allege[d] that BLOM was generally aware of any connection between the Three Customers and Hamas" "at the time it provided financial services to the Three Customers." Pet.App.73.

The court noted that it "typically grants plaintiffs an opportunity to amend their complaints following dismissal, to address any deficiencies raised by the Court's order." Pet.App.85. However, here, Respondents "[did] not request leave to amend, and specifically declined the Court's offer to do so." *Id.* Accordingly, "[i]n light of [Respondents'] rejection of the opportunity to amend their pleading at the pre-motion conference, and the fact that they ha[d] not identified any additional facts they could allege which would address the deficiencies in their complaint," the District Court dismissed the complaint with prejudice. Pet.App.86.

B. Respondents' Initial Appeal To The Second Circuit

Rather than request leave to amend, Respondents appealed. In that appeal, they did not challenge the District Court's decision to dismiss without leave to amend. Instead, they doubled down on their argument that their existing allegations were sufficient. After oral argument, the Second Circuit held the appeal in abeyance pending its decision in *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021). Then, after issuing the *Kaplan* decision—which clarified that Circuit's view of JASTA's elements—the Second Circuit ordered the parties to submit supplemental briefs addressing the significance of that decision. Arg. Notice, *Honickman, et al. v. BLOM Bank SAL*, No. 20-575 (2d Cir. Nov. 10, 2020), Dkt. No. 90. At this point, Respondents had *yet another* opportunity to ask for a remand and leave to amend in light of Kaplan. Once again, they did neither and instead relied on the allegations in their

complaint to argue that those allegations state a claim. *See generally* Appellants' Post-Arg. Br., *Honickman, et al. v. BLOM Bank SAL*, No. 20-575 (2d Cir. July 9, 2021), Dkt. No. 98, at 1-16.

The Second Circuit affirmed the District Court's dismissal because the complaint's "allegations [did] not support an inference that BLOM Bank was aware of the Three Customers' ties with Hamas prior to the relevant attacks." Pet.App.49. Respondents did not seek rehearing or even belatedly request that the Second Circuit modify its decision to remand and permit leave to amend the complaint.

C. The Post-Judgment Proceedings

Respondents then returned to the District Court and moved to vacate the District Court's now-affirmed judgment so they could amend their complaint. Mot. for Pre-Mot. Conference to Vacate Judgment & Amend Compl., *Honickman, et al. v. BLOM Bank SAL*, No. 1:19-cv-00008-KAM-SMG (E.D.N.Y. Aug. 9, 2021), ECF No. 50. The District Court held a pre-motion conference, and then ordered briefing "only as to the issue of vacatur." Scheduling Order, *Honickman, et al. v. BLOM Bank SAL*, No. 1:19-cv-00008-KAM-SMG (E.D.N.Y. Dec. 7, 2021). After briefing, the District Court held that "plaintiffs have not demonstrated any extraordinary circumstances warranting relief under Rule 60(b)(6)." Pet.App.14. It also held that Respondents had not demonstrated that they would suffer an "extreme and undue hardship" from letting the judgment stand because they "have had ample opportunity to pursue all legal avenues available to them for relief." Pet.App.16.

Respondents appealed again. After oral argument in that appeal, the Second Circuit issued its decision in *Mandala v. NTT Data, Inc.*, 88 F.4th 353 (2d Cir. 2023), *reh'g en banc denied* (2d Cir. Feb. 13, 2024). *See* Pet.App.161-92. There, a split panel held that, when a losing party seeks post-judgment relief under Rule 60(b)(6) to amend its complaint, the district court must balance Rule 60(b)(6)'s finality principles with Rule 15(a)(2)'s "liberal amendment policy." Pet.App.176. And, where a losing party has not yet filed an amended complaint, the Second Circuit held that it is an abuse of discretion for a district court to deny a Rule 60(b)(6) motion based solely on the movant's "failure to demonstrate adequate grounds for relief under Rule 60." Pet.App.17 & n.5. In doing so, the court flipped the burden from Rule 60 movants (who normally must prove extraordinary circumstances) to their opponent (to show that the movant should not receive another bite at the apple). As Judge Sullivan explained in dissent, the Second Circuit's rule "undermines the principle that Rule 60(b)(6) affords litigants an extraordinary remedy and effectively holds that such relief is available in the ordinary course." Pet.App.190.

In this case, the Second Circuit reaffirmed *Mandala*'s rule. It held that "the district court exceeded its discretion by basing its ruling on an erroneous view of the law because it failed to balance Rule 60(b)'s finality principles and Rule 15(a)'s liberal pleading principles." Pet.App.7-8. "[W]hen presented with a motion to vacate and amend," the Second Circuit explained, "the district court is required to consider Rule 60(b) finality and Rule 15(a) liberality in tandem." Pet.App.7. Thus, applying *Mandala*, the

Second Circuit faulted the District Court for analyzing the Rule 60(b) motion "under only Rule 60(b)'s standard." *Id.*

REASONS FOR GRANTING THE PETITION

The Second Circuit's dilution of Rule 60(b)(6)'s stringent standard conflicts with this Court's precedents and decisions from eleven other Circuits. It also opens a dangerous loophole threatening to undermine the finality of judgments in the federal courts. Rather than allow this problematic circuit split to persist, this Court should grant certiorari and swiftly reverse.

I. The Second Circuit's Rule Conflicts With The Decisions Of Eleven Other Circuits.

This Court has long recognized the compelling interest in protecting the finality of judgments under the Federal Rules of Civil Procedure. Consistent with those principles, Rule 60(b)(6) presents unsuccessful litigants with only "narrow grounds for obtaining post-judgment relief." *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 616 (6th Cir. 2010) (Sutton, J.). Rule 60(b)(6) may be used to reopen a judgment only when the movant demonstrates "extraordinary circumstances." *Gonzalez*, 545 U.S. at 535. But in the Second Circuit's view, the "liberal spirit of Rule 15(a)" generally entitles litigants whose complaints have been dismissed with prejudice a chance to vacate the dismissal under Rule 60(b)(6) to amend—even after the judgment has been affirmed on appeal. Pet.App.175. This view places the Second Circuit alone among the Circuits. The First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have taken the opposite

approach. And the Second Circuit has already refused to reconsider its rule *en banc*. Thus, only this Court can restore uniformity on this important question.

The circuit split here could not be more clear. In fact, when considering the issue at the same time as the Second Circuit, the Fourth Circuit observed that adopting the Second Circuit's approach would have put it "alone in the Nation in collapsing the Rule 60(b) standard with the standard for Rule 15(a)." *Daulatzai*, 97 F.4th at 177. The Fourth Circuit acknowledged that *dicta* from one of its previous decisions could be misunderstood as endorsing the Second Circuit's mistaken view. But, in *Daulatzai*, the Fourth Circuit emphatically rejected that approach. *Id.* Instead, the Fourth Circuit held that the "more restrictive standard" for granting a Rule 60(b) motion "must be satisfied *before* consideration can be given to a motion to amend." *Id.* at 179 (emphasis added). There is no way to square that rule with the Second Circuit's contrary rule that district courts are "required to consider Rule 60(b) finality and Rule 15(a) liberality *in tandem*." Pet.App.7 (emphasis added).

The Sixth Circuit has likewise rejected the Second Circuit's approach. It has held that, in this situation, "[i]nstead of meeting only the modest requirements of Rule 15, [a plaintiff] must meet the requirements for reopening a case established by Rule [60]." *Moreland v. Robinson*, 813 F.3d 315, 327 (6th Cir. 2016) (citation omitted). And it has appropriately treated the Rule 60 and Rule 15 requirements as distinct hurdles. *See id.* That is, plaintiffs "must first meet the threshold requirement of 60(b)(6)'s extraordinary or exceptional

circumstances to vacate the judgment before seeking" to amend their pleadings. *In re Ferro Corp. Deriv. Litig.*, 511 F.3d 611, 624 (6th Cir. 2008). Otherwise, as Judge Sutton has explained, plaintiffs could "sidestep the narrow grounds for obtaining post-judgment relief" under Rule 60, "make the finality of judgments an interim concept," and risk turning Rule 60 into a "nullit[y]." *Leisure Caviar*, 616 F.3d at 616.

The Third Circuit has also rejected the Second Circuit's approach. Instead, the Third Circuit has held that, when a plaintiff seeks to "reopen a final judgment," as here, "the policy favoring the finality of judgments [is] implicated," and "[t]he permissive policy favoring amendment under Rule 15 [is] *simply not relevant*." *Garrett v. Wexford Health*, 938 F.3d 69, 86 (3d Cir. 2019) (emphasis added). Indeed, the Third Circuit has repeatedly applied those principles to deny post-judgment relief in cases like this one. For instance, in *Dominos Pizza LLC v. Deak*, 534 F. App'x 171 (3d Cir. 2013), the district court dismissed a defendant's amended counterclaim without prejudice but the defendant—like the Respondents here—made the deliberate decision not to file a second amended counterclaim. *Id.* at 173. The defendant instead appealed to the Third Circuit, where he lost. *Id.*

After failing on appeal, the *Deak* defendant moved under Rules 15(a) and 60(b)(6) to reopen proceedings so he could amend his counterclaim. *Id.* at 173-74. But the district court denied that request because the defendant "had ample opportunity to attempt to reassert his counterclaim . . . while the case was open, but he failed to do so." *Id.* The Third Circuit affirmed, holding that "courts must deny relief under Rule

60(b)(6) unless extraordinary circumstances are present," while emphasizing that "the liberal standards of Rule 15" do not "demonstrate extraordinary circumstances justifying relief under Rule 60(b)(6)." *Id.* at 174. The court also agreed that the plaintiff had "ample opportunity" to amend his complaint but "did not move to do so until after the case was closed," and suggested that it was the plaintiff's "deliberate choices" that resulted in the closing of the case. *Id.* at 174, 175. The Third Circuit thus applied "the framework of Rule 60(b)(6)" to deny post-judgment relief. *Id.* at 174; *see also Atkinson v. Middlesex Cnty.*, 610 F. App'x 109, 112 n.6 (3d Cir. 2015). That case would have come out the other way under the Second Circuit's approach.

The Eleventh Circuit recently rejected the approach taken by the Second Circuit. In *MacPhee v. MiMedx Group, Inc.*, 73 F.4th 1220 (11th Cir. 2023), that court held that applying Rule 15(a)(2)'s standard is "inappropriate . . . [if] dismissal of the complaint also constitutes dismissal of the action." *Id.* at 1249-50 (citation omitted). That is because Rule 60(b)(6) "is an extraordinary remedy and requires a showing of 'extraordinary circumstances' to justify the reopening of a final judgment." *Id.* at 1251. And the court explicitly clarified that this held true even for "post-judgment motions to amend where the plaintiff has not exercised its right under Rule 15(a)(1) to amend as a matter of course." *Id.* at 1250; *see also Caterpillar Fin. Servs. Corp. v. Venequip Mach. Sales Corp.*, 2023 WL 8258886, at *1-2, 4 (S.D. Fla. Nov. 29, 2023) (applying *MacPhee* and refusing to allow post-judgment amendment "based on [plaintiff's] good faith belief that it had advanced an actionable complaint").

The D.C. Circuit has long concluded that "Rule 60(b)(6) is not an opportunity for unsuccessful litigants to take a mulligan." *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007). In *Building Industrial Association of Superior California v. Norton*, that court reasoned that "[o]rdinarily postjudgment amendment of a complaint under Rule 15(a) requires reopening of the judgment pursuant to Rule 59(e) or 60(b)." 247 F.3d 1241, 1245 (D.C. Cir. 2001) (Silberman, J.). And it explained that this approach "prevents litigants from resurrecting claims on which they have lost." *Id.*; *see also Black Lives Matter D.C. v. Trump*, --- F. Supp. 3d ---, 2024 WL 1091730, at *6-7 (D.D.C. Mar. 13, 2024) (Friedrich, J.).

The Ninth Circuit agrees, too. In *Lindauer v. Rogers*, 91 F.3d 1355 (9th Cir. 1996), that court "adopt[ed] the requirement that, once judgment has been entered in a case, a motion to amend the complaint can only be entertained if the judgment is first reopened under a motion brought under Rule 59 or 60." *Id.* at 1357. That is because, "[i]n contrast to the 'freely give[n] dispensation to amend in Rule 15, Rule 60(b) relief should be granted 'sparingly' to avoid 'manifest injustice' and '*only* where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.'" *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). Recently in *3WL, LLC v. Master Protection, LP*, 851 F. App'x 4 (9th Cir. 2021), the Ninth Circuit applied that rule to conclude that a "district court properly denied [a] motion" to vacate the judgment where the movant had "paid only lip service to this

important distinction" between Rule 60 and Rule 15. *Id.* at 8. Because the movant had not satisfied Rule 60, "there was no basis to reach the Rule 15 issue." *Id.*; *see also In re Netflix, Inc. Secs. Litig*, 647 F. App'x 813, 816 (9th Cir. 2016) ("[B]ecause Plaintiffs have not cleared the high bar necessary to warrant relief under Rule[] 59 or Rule 60, the district court had no need to even consider Plaintiffs' Rule 15 motion.").

Other Circuits have reached similar conclusions. The Seventh Circuit has held that "the relative merits of [a] Rule 15(a) motion will not affect the judge's decision with regard to [a] Rule [60(b)] motion." *Helm v. Resol. Tr. Corp.*, 84 F.3d 874, 879 (7th Cir. 1996). The Tenth Circuit has concluded that a post-judgment motion to amend under Rule 15(a) "would not be allowed until the judgment was set aside or vacated pursuant to Fed. R. Civ. P. 59 or 60." *Cooper v. Shumway*, 780 F.2d 27, 28 (10th Cir. 1985) (per curiam). The Eighth Circuit has also recently stressed that leave to amend may be granted only if "consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief." *UMB Bank, N.A. v. Guerin*, 89 F.4th 1047, 1057 (8th Cir. 2024) (citation omitted). The Fifth Circuit has held that "[w]hen a district court dismisses an action and enters a final judgment . . . a plaintiff may request leave to amend only by either appealing the judgment, or seeking to alter or reopen the judgment under Rule 59 or 60." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003); *see also Briddle v. Scott*, 63 F.3d 364, 379-80 (5th Cir. 1995). And the First Circuit has long refused to "allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision."

James v. Watt, 716 F.2d 71, 78 (1st Cir. 1983) (Breyer, J.). As then-Judge Breyer explained, permitting "[s]uch a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions." *Id.*; *see also Fisher v. Kadant, Inc.*, 589 F.3d 505, 509, 512-14 (1st Cir. 2009).

The Second Circuit's decision cannot be reconciled with this wall of contrary precedents from the other Circuits.[1] And, by denying *en banc* review in *Mandala* and applying the rule in this case, that court has left no doubt that the circuit split will persist absent this Court's immediate intervention and correction. Pet.App.193-94.

II. The Second Circuit's Rule Conflicts With This Court's Precedents.

Not only does the Second Circuit's outlier approach conflict with the decisions of other Circuits, but it is at odds with over a century of this Court's jurisprudence protecting the finality of judgments.

In 1897, this Court explained that "the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if . . . conclusiveness did not attend the judgments of such tribunals." *S. Pac. R.R. v. United States*, 168 U.S. 1, 49 (1897). In the 127 years since, this Court has repeatedly emphasized that finality of judgments is critical to any effective and orderly judicial system. *See, e.g.*, *Yeager v. United States*, 557 U.S. 110, 118

[1] Because the Federal Circuit "applies the law of the respective regional circuit on questions of procedure," *Gen. Protecht Trp., Inc. v. Leviton Mfg. Co.*, 651 F.3d 1355, 1359 (Fed. Cir. 2011), the Second Circuit's view conflicts with *all* other Circuits.

(2009) (reiterating "interest [in] the preservation of 'the finality of judgments.'") (quoting *Crist v. Bretz*, 437 U.S. 28, 33 (1978)); *United States v. Denedo*, 556 U.S. 904, 916 (2009) ("[J]udgment finality is not to be lightly cast aside.").

That respect for finality applies with particular force when evaluating motions for relief from judgments under Rule 60. "There must be an end to litigation someday, and free, calculated, deliberate choices" that result in a final judgment are thus "not to be relieved from." *Ackermann*, 340 U.S. at 198. Because Rule 60(b)(6) is a catchall for relief on bases other than those in Rule 60(b)(1)-(5), "extraordinary circumstances must justify reopening." *Kemp v. United States*, 596 U.S. 528, 533 (2022) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988) (cleaned up)). This Court has emphasized that principle time and again. *See, e.g.*, *Tharpe v. Sellers*, 583 U.S. 33, 35 (2018); *Buck v. Davis*, 580 U.S. 100, 123 (2017); *Pioneer Inv. Servs.*, 507 U.S. at 393; *Liljeberg*, 486 U.S. 863 & n.11; *Klapprott v. United States*, 335 U.S. 601, 613–14 (1949). And this Court has left no room for Rule 15's liberal amendment policy to creep into that equation. For good reason: The "drafters of the rules included Rules 59(e) and 60(b) specifically to provide a mechanism for those situations in which relief must be obtained after judgment and the broad amendment policy of Rule 15(a) should not be construed in a manner that would render those provisions meaningless." 6 Wright & Miller, Fed. Prac. & Proc. Civ. § 1489 (3d ed.). "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy

favoring finality of judgments and the expeditious termination of litigation." *Id.*

In addition, this Court has likewise stressed that, to qualify for relief, the "'extraordinary circumstances'" must "suggest[] that the party is faultless in the delay." *Pioneer Inv. Servs.*, 507 U.S. at 393 (citation omitted). Parties "cannot be relieved of [their] choice[s]" simply "because hindsight seems to indicate" the improvidence of such decisions. *Ackermann*, 340 U.S. at 198; *see also* 11 Wright & Miller, Fed. Prac. & Proc. Civ. § 2857 (3d ed.) ("The cases show that although the courts have sought to accomplish justice, they have administered Rule 60(b) with a scrupulous regard for the aims of finality.").

The Second Circuit's novel approach is squarely at odds with this Court's decisions. By requiring district courts to consider Rule 15's liberality policy "in tandem" with Rule 60's finality principles—even when a movant has rejected numerous opportunities to amend before final judgment (and during appeal)—the Second Circuit is instructing district courts to relieve movants of their "free, calculated, deliberate choices." *Ackermann*, 340 U.S. at 198. That is precisely the sort of unfair and inefficient feedback loop that this Court has repeatedly warned against. This Court should grant certiorari to confirm the importance of the finality of judgments and restore the universal rule that Rule 60(b)(6) relief may not be used as a do-over to remedy poor litigation decisions.

III. The Question Presented Is Exceptionally Important, And This Case Is A Clean Vehicle For Resolving It.

The question presented is of critical importance to the principles of fairness, efficiency, and finality that animate the Federal Rules of Civil Procedure. The majority approach rightly requires plaintiffs to put their best complaint forward *before* judgment—or risk an end to their lawsuit. That emphasis on finality "increases the efficiency of the judicial system" and "increases the integrity of the system by maintaining respect for the judicial process." Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 591 (1991). It also furthers the guiding principle of the Federal Rules of Civil Procedure—"to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

The Second Circuit's standard flips those deeply rooted tenets on their head. It eschews finality and undermines confidence in the outcome of litigation. Plaintiffs in the Second Circuit can now "use the court as a sounding board to discover holes in their arguments, then reopen the case by amending their complaint to take account of the court's decisions," even after testing the complaint against a full appeal and after repeatedly declining earlier opportunities to amend. *Leisure Caviar*, 616 F.3d at 616 (cleaned up). Such gamesmanship will inevitably draw out litigation and waste scarce judicial resources. *See* Pet.App.192 (Sullivan, J., dissenting). That is why courts have long rejected such belated attempts at

amendment and reserved Rule 60(b)(6) relief for only truly "compelling circumstances." *Watt*, 716 F.2d at 78 (Breyer, J.).

It is thus essential for this Court to clarify the legal framework that governs a Rule 60(b)(6) motion seeking to reboot a case with a post-judgment (and post-appeal) amendment to the complaint. As it stands now, litigants in all but three States are held to Rule 60(b)(6)'s strict standard when seeking post-judgment relief. Litigants within the Second Circuit, however, face a dramatically lower burden. The finality of a judgment should not change based on the mere happenstance of geography.

Moreover, the volume and significance of cases filed within the Second Circuit exacerbates that threat to orderly and efficient litigation. That is because "[t]he Second Circuit—surely owing to its location in major business centers—sees a greater percentage of private civil cases than any of its sister circuits." Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137, 1184 (2022).

One prime example is the universe of lawsuits invoking the ATA and JASTA. Based on Petitioner's research, there appear to be 90 civil actions that have asserted claims under the ATA, and 55 of them have been filed in district courts in the Second Circuit. Of note, the law firm representing plaintiffs in this case is responsible for at least 17 of those cases—nearly 19%.[2] ATA complaints frequently run hundreds of

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[2] Tellingly, in many of the other ATA cases brought by Respondents' counsel, they have filed amended complaints in the ordinary course of litigation. *See, e.g.*, *Bonacasa v. Standard Chartered PLC*, Case No. 1:22-cv-03320-ER, ECF No. 65

pages, with some nearing 1,000 pages. *See, e.g.*, *Bartlett v. Société Générale de Banque au Liban S.A.L.,* Case No. 1:19-cv-00007-CBA-TAM, ECF No. 362 (E.D.N.Y. Nov. 7, 2023). As a result of the Second Circuit's decision, the high volume of ATA cases, most frequently filed in the Second Circuit, will now be amenable to enhanced gamesmanship through a potentially endless loop of judgment, appeal, and amendment.

(S.D.N.Y. Aug. 31, 2023); *Estate of Henkin v. Kuveyt Türk Katilimi Bankas, A.Ş.,* Case No. 1:19-cv-05394-BMC, ECF No. 48 (E.D.N.Y. Oct. 28, 2022); *Brown v. Nat'l Bank of Pakistan*, Case No. 1:19-cv-11876-AKH, ECF No. 69 (S.D.N.Y. Nov. 18, 2021); *Bowman v. HSBC Holdings PLC*, Case No. 1:19-cv-02146-PKC-CLP, ECF No. 79 (E.D.N.Y. Dec. 27, 2023); *Singer v. Bank of Palestine*, Case No. 1:19-cv-00006-ENV-RML, ECF No. 33 (E.D.N.Y. Sept. 6, 2019); *Bartlett v. Société Générale de Banque au Liban S.A.L.,* Case No. 1:19-cv-00007-CBA-TAM, ECF No. 362 (E.D.N.Y. Nov. 7, 2023); *Spetner v. Palestine Inv. Bank*, Case No. 1:19-cv-00005-EK-JAM, ECF No. 68 (E.D.N.Y. Nov. 1, 2023); *Averbach v. Cairo Amman Bank*, Case No. 1:19-cv-00004-GHW-KHP, ECF No. 96 (S.D.N.Y. Sept. 3, 2021); *Lelchook v. Lebanese Canadian Bank, SAL*, Case No. 1:18-cv-12401-GBD-KHP, ECF No. 66 (S.D.N.Y. May 9, 2022); *Freeman v. HSBC Holdings PLC*, Case No. 1:18-cv-07359-PKC-CLP, ECF No. 118 (E.D.N.Y. Dec. 28, 2023); *Miller v. Arab Bank, PLC*, Case No. 1:18-cv-02192-HG-PK, ECF No. 25 (E.D.N.Y. July 5, 2018); *Freeman v. HSBC Holdings PLC*, Case No. 1:14-cv-06601-PKC-CLP, ECF No. 115 (E.D.N.Y. Aug. 17, 2016); *Strauss v. Credit Lyonnais, S.A.*, Case No. 1:06-cv-00702-DLI-RML, ECF No. 408 (E.D.N.Y. June 17, 2016); *Weiss v. Na'l Westminster Bank*, Case No. 1:05-cv-04622-DLI-RML, ECF No. 345 (E.D.N.Y. June 17, 2016); *Linde v. Arab Bank, PLC*, Case No. 1:04-cv-2799-BMC-PK, ECF No. 1236 (E.D.N.Y. Mar. 13, 2015). In the *Bartlett* litigation cited above, where BLOM Bank is a defendant and where Respondents' counsel represents the plaintiffs, there have been three amended complaints.

ATA cases are no isolated example. The volume and complexity of cases within the Second Circuit cuts across all areas of civil litigation. For instance, as of 2018, "[s]tudies indicate that the highest volume of securities cases filed in the United States is recorded in the" Southern District of New York. Victor Marrero, *Mission to Dismiss: A Dismissal of Rule 12(b)(6) and the Retirement of* Twombly/Iqbal, 40 Cardozo L. Rev. 1, 14 n.44 (2018); *see also* John Fitzgerald Ready, Note, *Should We Use a Class Action's Impact on Stock Price to Gauge the Reasonableness of Class Counsel's Fee?*, 28 Cornell J.L. & Pub. Pol'y 365, 393 n.166 (2018) (explaining that "the Second Circuit saw more than 1.5x the amount of securities class actions filings than the next highest circuit in 2017"). In the wake of the 2008 financial crisis, a majority of related class actions were filed in the Second Circuit. Denise Mazzeo, Note, *Securities Class Actions, CAFA, and a Countrywide Crisis: A Call For Clarity and Consistency*, 78 Fordham L. Rev. 1433, 1461 & n.216 (2009); Shrey Sharma, Note, *Do the Second Circuit's Legal Standards on Class Certification Incentivize Forum Shopping?: A Comparative Analysis of the Second Circuit's Class Certification Jurisprudence*, 85 Fordham L. Rev. 877, 883 n.43 (2016) ("[T]he Second Circuit naturally may see more securities filings because it encompasses all of New York City.").

The Second Circuit also attracts a significant amount of antitrust lawsuits. *See* Bernadette Berger, Comment, *Shut Up and Pitch: Major League Baseball's Power Struggle With Minor League Players in* Senne v. Kansas City Royals Baseball Corp., 28 Jeffrey S. Moorad Sports L.J. 53, 83 (2021). These

sorts of complex lawsuits are notoriously expensive as it stands. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). The Second Circuit's ill-considered rule promises to multiply that expense and the related burden on judicial resources.

Finally, this case is a good vehicle to decide this straightforward and significant legal question. There is no doubt that the issue is both clearly presented and case-dispositive here. Although the decision below was unpublished, it followed closely behind the published Second Circuit decision that controlled the outcome—which demonstrates that the issue is recurring and confirms that the Second Circuit stands out of step with this Court's precedents and the uniform view of the other Circuits.[3]

Ultimately, this case turns on a clear, case-dispositive issue that is now subject to a lopsided circuit split. Had the Second Circuit followed the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, then Petitioner would have prevailed below. And the facts here—where Respondents *repeatedly* declined to amend their complaint in the normal course—only place the issue in stark relief. This Court should thus grant certiorari and reverse, in order to restore uniformity on this important issue.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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[3] In *Mandala*, the Second Circuit denied the defendant's request for rehearing or rehearing *en banc*. Pet.App.193. The defendant did not seek this Court's review of the split panel decision.

Respectfully submitted,

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