No. 23-1259

IN THE

Supreme Court of the United States

BLOM BANK SAL

Petitioner,

v.

MICHAL HONICKMAN, ET AL.

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether declining a district court's invitations to amend a complaint to meet the erroneous and nearly impossible pleading standard urged by the defendant, adopted by the district court, and then rejected by the circuit court, waives the right to amend the complaint once the circuit clarifies the appropriate pleading standard.

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INTRODUCTION

Petitioner BLOM Bank, SAL ("Petitioner" or "BLOM") asks this Court to review an unpublished, substantively four-page-long, interlocutory summary order, remanding a motion to vacate to the district court for further consideration. The summary order does not even take a position on what the outcome of the underlying motion to vacate should be—it only directs the district court "to reconsider Plaintiffs' motion" in light of pre-existing Supreme Court and Second Circuit precedents. Pet. App. 8.

BLOM ignores each of these precedents but one—a case, unrelated to this one, called *Mandala v. NTT Data, Inc.*, 88 F.4th 353 (2d Cir. 2023). BLOM is in fact seeking this Court's review of *Mandala*, which it erroneously suggests permits plaintiffs to seek post-judgment amendment under Rule 15(a)'s liberal standards, purportedly "eviscerat[ing] the finality principles embodied in Rule 60(b)" and all but guaranteeing gamesmanship. Pet. 2. In reality, *Mandala* reaffirmed that "[r]elief under Rule 60(b)(6) is reserved for cases that present 'extraordinary circumstances.'" 88 F.4th at 361. *Mandala* and this case are "among the few that justifies relief from final judgment under 60(b)(6)." *Id.* at 356.

This Court should decline Petitioner's request for interlocutory review of the summary order below. Even if *Mandala*'s recitation of the vacatur standards was worth review (it is not), *Honickman* is a poor vehicle to do so—the facts here are more extreme than those in *Mandala*, and the grounds for vacatur therefore much stronger.

Here, the district court applied the wrong standards in dismissing Respondents' (or "Plaintiffs")

claims under the Justice Against Sponsors of Terrorism Act ("JASTA"). These erroneous standards were also essentially impossible for Plaintiffs to meet on amendment. Plaintiffs appealed the dismissal, and the Second Circuit "agree[d] that the [district] court did not apply the proper standard." Pet. App. 25. The circuit set forth a clarified standard for pleading JASTA claims, and only affirmed dismissal "on other grounds," Pet. App. 10—in fact, the circuit identified a single pleading deficiency that *could* be remedied on amendment. Conversely, in *Mandala* the circuit *agreed* with the district court's reasoning, but thought the deficiency the district court identified could be corrected with the right amendment.

As the circuit explained in the summary order below, once "[a]rmed with this Court's clarifications, Plaintiffs returned to the district court and moved under Federal Rules of Civil Procedure 60(b)(6) and 15(a)(2) to vacate the judgment of dismissal and grant them leave to file a first amended complaint." Pet. App. 5. But the district court denied the motion, arguing that Plaintiffs waived the chance to amend when they declined its two prior invitations to amend "in response to the arguments raised by Defendant," Pet. App. 16-17—even though Plaintiffs *correctly* viewed these "arguments" as wrong (and unmeetable on amendment). In the subsequent appeal, the circuit vacated that denial and remanded for the district court to consider the motion again in light of prior precedents, including this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962), and Second Circuit precedent, including *Mandala*.

BLOM incorrectly argues that *Mandala* (and thus *Honickman*) conflicts with the cases BLOM has raised in its petition. They do not—the precedents cited in

Honickman (and *Mandala*) balance Rule 60's finality with this Court's rule that it is an "abuse of … discretion" to deny a post-judgment motion to amend "without any justifying reason," such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman*, 371 U.S. at 182. Notably, BLOM does not cite this "seminal" case once in its petition.

Moreover, none of the cases BLOM cites involve the "exceptional" circumstances at issue here, much less in *Mandala*. And despite BLOM's assurance that gamesmanship will surely follow, this case is clearly limited to the scenario where a district court has denied a plaintiff a meaningful opportunity to amend, a clear inequity. This Court should deny certiorari.

STATEMENT

I. The Complaint and Pre-Motion Conference for BLOM's Motion to Dismiss

Plaintiffs filed their complaint on January 1, 2019. That complaint alleged that BLOM aided and abetted a series of terrorist attacks committed by the Palestinian terrorist group Hamas, injuring Plaintiffs. Specifically, Plaintiffs alleged that BLOM knowingly provided substantial assistance to three Hamas fronts (the "Three Customers")—principally the purported charitable institution Sanabil, which the United States designated a "Specially Designated Global Terrorist" in 2003. BLOM assisted Sanabil in converting donations from Hamas supporters abroad into cash, which Sanabil handed out to recruit Palestinians living in Lebanon to join Hamas.

On May 3, 2019, BLOM filed a letter requesting a pre-motion conference to initiate a motion to dismiss the complaint for failure to state a claim, setting forth a summary of its anticipated arguments. A-188-91.[1] These arguments, which the district court later adopted in dismissing the complaint, were inconsistent with JASTA's plain language, the interpretative guidance in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)—which Congress set as the interpretive framework for JASTA—and the Second Circuit's then-only prior JASTA ruling in *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018).

Plaintiffs responded on May 8, 2019, providing a summary of their anticipated opposition. A-192-95. In their response, Plaintiffs argued that the scienter standard from *Halberstam* governed their claims, noting that foreseeability was the key factor in assessing a defendant's wrongful conduct. As shown below, the circuit ultimately vindicated this analysis.

The district court held a pre-motion conference on May 15, 2019. After raising *sua sponte* whether BLOM had an affirmative defense based on the statute of limitations, A-199, it then stated:

> I am just wondering if it might be prudent to allow the plaintiffs to amend their complaint, not to add more claims, not to add more parties, but rather to factually support some of the claims that [defense counsel] have identified as being deficient regarding the standards that were adopted by the Second Circuit from the D.C. Circuit. [Plaintiff's counsel], do you want that opportunity?

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[1] Citations to A-____ are to the joint appendix in the court of appeals.

A-200-01. As Defendant's pre-motion letter makes clear, these Second and D.C. Circuit "standards" referred to the *Linde* and *Halberstam* decisions, respectively.

Plaintiffs' counsel responded, "No, I think we are prepared to brief it based on the arguments presented in [our] pre-motion letter." A-201. This was entirely appropriate given that Plaintiffs' readings of *Linde* and *Halberstam* were both substantively correct and significantly different from those asserted by BLOM and later adopted by the district court.

Following the pre-motion conference, the district court issued a Minute Entry and Scheduling Order noting that: "The parties discussed Defendant's proposed motion to dismiss. The Court offered Plaintiffs an opportunity to amend their complaint to add additional information *in response to the arguments raised by Defendant*. Plaintiffs declined to do so and represented that they would not be seeking to amend their Complaint in this regard." A-78 (emphasis added). That is, the district court offered Plaintiffs the opportunity to meet BLOM's urged standards, which they declined.

II. The Motion to Dismiss

The parties then briefed the motion to dismiss, in which they presented arguments largely consistent with the summaries set forth in their pre-motion letters. BLOM again made a series of erroneous arguments as to why Plaintiffs' complaint failed to state a claim.

During oral argument on the motion to dismiss, BLOM's counsel relied heavily on the district court decision in *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525 (S.D.N.Y. 2019) ("*Kaplan I*"), *vac'd*

in relevant part, 999 F.3d 842 (2d Cir. 2021) ("*Kaplan II*"). *Kaplan I* dismissed JASTA allegations against Lebanese Canadian Bank ("LCB") for providing financial services for the terrorist group Hezbollah. A-286-87. As BLOM pointed out, LCB provided those financial services for fronts for Hezbollah, much as BLOM allegedly did for Hamas.

BLOM urged the district court to adopt *Kaplan I*'s erroneous pleading standards—including its unworkable standard for pleading scienter. In *Kaplan I*, the district court acknowledged that the plaintiffs alleged a litany of public sources, including statements from Hezbollah itself, tying five of LCB's customers to Hezbollah. But, as the Second Circuit later explained in reversing the decision, the district court "found these to be insufficient because 'Plaintiffs nowhere allege . . . that Defendant read or was aware of such sources.'" 999 F.3d at 852 (quoting *Kaplan I*, 405 F. Supp. 3d at 535). Naturally, before discovery, a plaintiff will rarely be able to find support for what sources a defendant has actually read or was aware of. Nonetheless, BLOM's counsel argued:

> Finally, I wanted to point out that the level of knowledge that Judge Daniels rejected in *Kaplan [I]* was very much what's claimed here, where it said that it was notorious that there were links between the accounts at issue there, between those persons and in that case, Hezbollah. And that's exactly what's said here. It was apparently notorious that BLOM should have known that these accounts were linked to HAMAS, but there's no direct allegation of why BLOM should have known that.

A-306-07.

Responding to Defendant's argument that *Kaplan I* correctly applied JASTA to the facts pleaded in that case, Plaintiffs' counsel stated:

> *Kaplan [I]* requires a level of proof that is out of step with JASTA, out of step with *Linde* and would be impossible to meet.
>
> . . .
>
> Respectfully, a case that requires [allegations that the bank possessed] knowledge of [Hezbollah's] purchasing of rockets [specifically] is, a[t] a minimum, is going to render the ATA a dead letter, and certainly make *Halberstam* irrelevant to the analysis.

A-302-03.

During the oral argument, the district court reiterated Plaintiffs' decision not to amend their complaint made at the pre-motion conference: "There are no facts that you would have to offer to address some of the contentions of the defendants regarding knowledge, especially?" A-300. Plaintiffs' counsel responded, "I think we could always add allegations, but . . . we believe the complaint goes far enough in saying that BLOM holding accounts for Specially Designated Global Terrorists designated for . . . financing HAMAS, was generally aware of its role in that [il]licit conduct, and . . . the violence that resulted from it was foreseeable, as was the case in *Linde*." *Id.*

Thus, Plaintiffs declined the district court's two invitations to replead based on their (largely correct and entirely reasonable) understanding at that time of the pleading standard and elements of aiding and abetting under JASTA. Plaintiffs did not believe they should *or could* amend their complaint to meet "the contentions

of the defendant[] regarding knowledge," *id.*, which was that Plaintiffs must allege the "level of knowledge" required in *Kaplan I*. That is, Plaintiffs did not believe they should or could allege that BLOM employees "read or were aware" of specific pieces of information before discovery. *See* A-306-07.

III. The District Court's Decision on the Motion to Dismiss and First Appeal

The district court granted BLOM's motion to dismiss, largely on the grounds BLOM raised and, as BLOM urged, by relying heavily on *Kaplan I*. The district court called *Kaplan I* "a more appropriate comparison" and "a more appropriate point of reference" than other JASTA and ATA cases to which Plaintiffs analogized their complaint. *Honickman I*, 432 F. Supp. 3d 253, 266, 269 (E.D.N.Y. 2020).

For example, and of particular importance to the question presented here, the district court adopted *Kaplan I*'s standard for pleading knowledge. The district court explained that in *Kaplan I*:

> although the plaintiffs argued that the entities' connections to Hizbollah "was [*sic*] openly, publicly and repeatedly acknowledged and publicized by Hizbollah [through its own sources]" and "in various English-language publications," the plaintiffs "nowhere allege[d] . . . that [LCB] read or was aware of such sources." The same analysis applies even more strongly here, given the relatively greater strength of the allegations in *Kaplan*.

Id. at 267 (quoting *Kaplan I*, 405 F. Supp. 3d at 535). Having adopted this position, the district court then faulted Plaintiffs for not alleging "any acts or statements by BLOM or BLOM's employees which suggest

any awareness on its part of a connection between any of the Three Customers and Hamas," and for relying on "press articles, government actions, and allegedly 'public knowledge' discussing" such a connection. *Id.* at 265.

As explained further in the next section, this error is especially important here because, like most victims of terrorism who bring suit under JASTA, Plaintiffs did not have access to "acts or statements of BLOM or BLOM's employees" before discovery. Moving to amend after dismissal—or accepting the district court's invitations to amend, such as during oral argument where BLOM demanded "direct allegation[s]" of its knowledge—would have been pointless. And while the Second Circuit also found Plaintiffs' allegations of BLOM's knowledge of the Three Customers' Hamas affiliations insufficient, it did so for *remediable* reasons—not because it required plausible allegations of BLOM's internal communications or deliberations.

Finally, although Plaintiffs did not request leave to amend, the district court noted that "[i]n light of Plaintiffs' rejection of the opportunity to amend their pleading at the pre-motion conference, and the fact that they have not identified any additional facts they could allege which would address the deficiencies in their complaint, the Court finds that it need not grant Plaintiffs leave to amend." *Id.* at 270-71.

Plaintiffs timely appealed the district court's dismissal decision as applying the wrong pleading standards. Petitioner faults Plaintiffs for not moving for vacatur instead of appealing, or not appealing the with-prejudice nature of the dismissal. But, again, Plaintiffs did not *want* leave to amend in order to meet the district court's erroneous standards, nor did they have evidence to support allegations to do so.

After briefing and argument on the appeal was complete, the Second Circuit issued its decision vacating *Kaplan I* as to its dismissal of the plaintiffs' JASTA aiding and abetting claims against LCB. At the circuit's direction, the *Honickman* parties submitted supplemental briefs on the effect of *Kaplan II*. Petitioners again fault Plaintiffs for not asking the circuit court for leave to amend in their supplemental brief, but in the Second Circuit, that is a decision for the district court to make "in the first instance." *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009). The circuit then issued its decision in *Honickman* on July 29, 2021.

IV. The Second Circuit's Assessment of the District Court's Dismissal Decision

The Second Court "agree[d]" with Plaintiffs "that the [district] court did not apply the proper standard . . . ." *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 490 (2d Cir. 2021) ("*Honickman II*"). Specifically, the circuit rejected every standard the district court applied as grounds for dismissal, including the standard for alleging BLOM's knowledge of the Three Customers' affiliation with Hamas and for alleging the general awareness and substantial assistance elements, which together "form the crux of most JASTA aiding-and-abetting cases." *Id.* at 496. These are detailed *infra*.

Petitioner largely elides these rejections. Moreover, Petitioner compares the district court's pleading standards to this Court's analysis in *Twitter v. Taamneh*, 598 U.S. 471 (2023), to suggest those standards were ultimately vindicated. That is not correct, but it is also irrelevant—*Taamneh* was not issued when Plaintiffs sought amendment to meet the Second Circuit's "clarifications" in *Honickman II*. If *Taamneh* did change the pleading standards in a material way, that is only further reason to provide Plaintiffs the

opportunity to meet them in an amended complaint. After all, courts have long observed that "Rule 60(b) is clearly designed to permit a desirable legal objective: that cases may be decided on their merits." *Patapoff v. Vollstedt's, Inc.*, 267 F.2d 863, 865 (9th Cir. 1959).

A. The District Court Applied the Wrong Standard for Pleading Knowledge

The Second Circuit specifically rejected the pleading standard the district court applied to Plaintiffs' knowledge allegations:

> In assessing this element, the district court found that the complaint's references to media articles and publications on the Three Customers' connection to Hamas were insufficient because "Plaintiffs fail[ed] plausibly to allege that BLOM [Bank] . . . actually knew or should have known of any of the cited sources." However, as we explained in *Kaplan [II]*, Plaintiffs did not need to allege that BLOM Bank knew or should have known of the public sources at the pleading stage. Such a requirement at this juncture would be too exacting.

Honickman II, 6 F.4th at 501 (citations omitted).

In *Kaplan II*, the circuit explained that "[a] complaint is allowed to contain general allegations as to a defendant's knowledge because 'a plaintiff realistically cannot be expected to plead a defendant's actual state of mind,'" although plaintiffs must "include allegations of the facts or events they claim give rise to an inference of knowledge." 999 F.3d at 864 (citations omitted). Accordingly, the district court was required "to accept as true the . . . factual allegations as to the repeated multimedia statements by Hizbollah, to consider all of the complaint's allegations, rather than

considering each in isolation, and to accept as true all permissible inferences that could be drawn from the complaint as a whole." *Id.* at 865.[2]

This correction is critical because while a proposed amended complaint could add numerous allegations and cite various publications and websites in English, French and Arabic—all of which would add to the "permissible inferences" of BLOM's contemporaneous knowledge that it was providing substantial assistance to Hamas—those allegations would satisfy the Second Circuit's "clarified" pleading standard, but not *Kaplan I*'s "read or was aware of" requirement adopted by the district court below.

B. The District Court Applied the Wrong JASTA Standards

The Second Circuit also explained that the district court applied the wrong standards for assessing the JASTA elements.

As to general awareness, the Second Circuit first set forth the standard given in *Halberstam* and acknowledged in *Linde*: "[t]he defendant need not be generally aware of its role in the specific act that caused the plaintiff's injury; instead, it must be generally aware of its role in an overall illegal activity from which the act that caused the plaintiff's injury was *foreseeable*." *Honickman II*, 6 F.4th at 496 (citing

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[2] The *Honickman* district court also echoed *Kaplan I* in pointing out that the U.S. did not designate the Three Customers or their counterparties until after the transfers at issue (although Israel did). *See* 432 F. Supp. 3d at 265. The circuit rejected this standard in *Kaplan II* as well, writing: "The [*Kaplan I*] court cited no authority for such a prerequisite for knowledge, and we know of none; and it would defy common sense to hold that such knowledge could be gained in no other way." 999 F.3d at 864.

Halberstam, 705 F.2d at 477, 488). It then explained that the district court did not apply this standard:

> The district court, however, rejected the foreseeability principle, holding that "it is not enough for Plaintiffs to plausibl[y] allege that BLOM [Bank] was generally aware of [its] role in terrorist activities, from which terrorist attacks were a natural and foreseeable consequence." The court's conclusion contravenes both *Halberstam* and *Linde*, one of the first cases in which we interpreted aiding-and-abetting liability under JASTA.

Id. at 497 (quoting *Honickman I*, 432 F. Supp. 3d at 264).

In *Taamneh*, the Court confirmed that:

> As *Halberstam* makes clear, people who aid and abet a tort can be held liable for other torts that were "a foreseeable risk" of the intended tort. Accordingly, a close nexus between the assistance and the tort might help establish that the defendant aided and abetted the tort, but even more remote support can still constitute aiding and abetting in the right case.

598 U.S. at 496 (quoting *Halberstam*, 705 F.2d at 488).

The Second Circuit rejected other arguments made by the district court and BLOM, as well. For example, the circuit rejected BLOM's argument that providing indirect assistance changes the standard for pleading knowledge, explaining that "*Kaplan [II]* did not so hold; instead, it asserted 'the actual knowledge component of the *Halberstam* standard requires that the defendant "know[ ]" that it is providing "assistance," . . . whether directly to the FTO or indirectly through an

intermediary.'" *Id.* at 500 n.16 (quoting *Kaplan II*, 999 F.3d at 863-64). *See also id.* at 499 n.15 (rejecting BLOM's argument regarding customer activities).

The circuit's *Honickman II* and *Kaplan II* decisions also rejected the district court's assertion that "the mere provision of routine banking services to an FTO [Foreign Terrorist Organization] does not render a bank liable for civil aiding and abetting." *Honickman I*, 432 F. Supp. 3d at 264. The *Kaplan II* court explained that so-called "routine" services could suffice depending on the circumstances, and that, under *Linde*, "whether a defendant bank's 'financial services to [an FTO or its affiliates should or] should not be viewed as routine' is a 'question[ ] of fact for a jury to decide.'" 999 F.3d at 858 (quoting *Linde*, 882 F.3d at 327) (alterations original to *Kaplan II*). *See also Taamneh*, 598 U.S. at 502 (noting circumstances "where the provider of routine services" could be liable for "aiding and abetting a foreseeable terror attack").

The Second Circuit also held that the district court imposed "a higher standard on the '*knowing*' prong of 'knowingly and substantially assisted' than required . . . ." *Honickman II*, 6 F.4th at 499-500. Finally, the circuit also found that the district court misapplied several of the *Halberstam* substantial assistance factors. *Id.* at 500-01.

C. The Second Circuit Affirmed the District Court Decision Only on Another Ground

The Second Circuit affirmed the dismissal decision entirely on one ground: "We conclude that Plaintiffs' aiding-and-abetting claim fails because the allegations do not support an inference that BLOM Bank was aware of the Three Customers' ties with Hamas prior to the relevant attacks, thereby undermining the

second element of general awareness." *Id.* at 501. But whereas the district court required allegations of "acts or statements" from "BLOM employees" demonstrating their actual knowledge (which Plaintiffs naturally did not have), the Second Circuit identified a narrow set of *specific and remediable* deficiencies in Plaintiffs' knowledge allegations.

For example, the circuit discounted Plaintiffs' assertion that BLOM must have noticed that the Three Customers were receiving funds from designated terrorist entities. The circuit noted that the complaint alleged that Sanabil received transfers from the "Al-Aqsa Foundation" after Israel designated it as a terrorist organization, but not "whether and where this [designation] was made public." *id.* at 502 n.20. The circuit also noted that the complaint needed "further allegations" to show that a defendant-bank would know about "transfers of funds from *non-customers* associated with an FTO to the defendant's customers." *Id.* These deficiencies are easily remedied in an amended complaint by including media reports on Israeli designations and BLOM's own customer due diligence procedures, such as monitoring incoming transfers—whereas Plaintiffs cannot show that BLOM "read or was aware" of those public sources without discovery.

Similarly, although Plaintiffs repeatedly emphasized the suspicious nature of Sanabil making large cash withdrawals from its BLOM account, the circuit noted that Plaintiffs only described the cash transactions "as 'untraceable' for the first time in their post-argument letter brief" suggesting that Plaintiffs should be more explicit in alleging that cash is untraceable. *Id.* at 502 n.19. Although Plaintiffs took that characteristic of cash to be a reasonable inference,

rather than a necessary allegation, that is easily remedied.

V. Plaintiffs' Motion to Vacate and Amend and the Second Appeal

As the Second Circuit explained, "[a]rmed with this Court's clarifications, Plaintiffs returned to the district court and moved under Federal Rules of Civil Procedure 60(b)(6) and 15(a)(2) to vacate the judgment of dismissal and grant them leave to file a first amended complaint." Pet. App. 5. The district court denied the motion, concluding that Plaintiffs waived the chance to amend when it declined the district court's two prior invitations to meet the erroneous pleading standard BLOM urged and the district court adopted.

Plaintiffs appealed. During argument, Judge Wesley—who also authored *Honickman II*—noted the case constituted an "unusual circumstance" and "a curious situation," and was "quirky." And as he recognized, Plaintiffs faced "a wrong standard" "that's even harder for them to meet. What are they supposed to do? They know they can't amend [to] . . . meet that." The dismissal was "[a]ffirmed for a different reason," as a result of a series of cases "where the law was really recasting itself."

After that argument, the Second Circuit decided *Mandala*, another "one of the exceptional cases necessitating relief from judgment." *Mandala*, 88 F.4th at 365. In *Mandala*, the plaintiffs brought a putative class action alleging that defendant NTT Data's policy of not hiring people with felony convictions disproportionately harms Black applicants. *Id.* at 357. The plaintiffs cited government reports showing "Black people are arrested and incarcerated at higher rates than others." *Id.* The district court dismissed the

complaint because it did not show if there was a similar disparity among Black applicants for NTT's positions, specifically.

The Second Circuit affirmed, "agree[ing] with the district court" that the complaint's statistics did not focus on "appropriate comparator groups." *Id.* at 357-58 (citation omitted). However, the circuit recognized "that such granular data may be impossible to collect without discovery," and that "the Complaint might have survived dismissal if it had contained allegations explaining 'why their chosen national statistics are in fact likely to be representative of NTT's qualified applicant pool.'" *Id.* at 358. The plaintiffs petitioned for rehearing *en banc*, and although it was denied, the dissenting judges urged the plaintiffs to move for vacatur and amendment. The plaintiffs did, and the district court denied the motion.

On appeal, the second *Mandala* panel acknowledged that "[i]t wasn't until this Court's decision on appeal that it became clear what other types of information might suffice at the pleading stage." *Id.* at 365. As a result, the panel vacated that denial and remanded the motion for reconsideration given *Foman*, the Second Circuit cases *Metzler Inv. GmbH v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133 (2d Cir. 2020), *Williams v. Citigroup Inc.*, 659 F.3d 208 (2d Cir. 2011), and other precedents. On February 29, 2024, the Second Circuit issued the summary order at issue here, likewise citing *Foman* and *Metzler*, along with *Mandala*.

REASONS FOR DENYING THE PETITION

I. The Interlocutory Posture of this Case Presents a Poor Vehicle to Consider the Question Presented.

The interlocutory posture of this appeal makes it a poor vehicle to consider the question presented. *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., respecting denial of certiorari) ("the interlocutory posture is a factor counseling against this Court's review at this time"); *Abbott v. Veasey*, 580 U.S. 1104 (2017) (Roberts, C.J., respecting denial of certiorari) (same); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J., respecting denial of certiorari) (same). This Court has recognized that "review of a nonfinal order may induce inconvenience, litigation costs, and delay in determining ultimate justice." Stephen M. Shapiro *et al.*, Supreme Court Practice Ch. 2.3, at 2-15 (11th ed. 2019) (citing *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152–53 (1964)).

This concern is particularly apparent here, where the Second Circuit did not even suggest what the outcome of the district court's re-review of the motion should be. Nor did the circuit make factual findings that Petitioner suggests are necessary to deciding whether vacatur is appropriate here, such as whether Plaintiffs made "'free, calculated, deliberate choices'" resulting in judgment with prejudice that are "'not to be relieved from.'" Pet. 20 (quoting *Ackermann v. United States*, 340 U.S. 193, 198 (1950)). Alternatively, the district court may find that Plaintiffs' proposed amended complaint would be futile for other reasons, even under the correct pleading standard. Indeed, Petitioner's counsel informed the district court that "we are not at all concerned by the allegations

raised in the proposed amended complaint. We think that they are futile . . . ." A-455.

This case is an even worse vehicle to review the purported question presented than *Mandala*, where the Second Circuit affirmatively found that the facts "*necessitat[ed]* relief from judgment" and the "Plaintiffs' proposed amendments address the sole pleading deficiency identified by the district court." 88 F.4th at 365 (emphasis added). A certiorari petition in *Mandala*, which was never brought, would also have been interlocutory, but at least there the defendant knew it had to move against or answer a new complaint.

There also is no reason to rush to review the question presented on an interlocutory basis. As noted below, *infra* § III, the arrangement of facts in this case, constituting "one of the exceptional cases necessitating relief from judgment," is exceedingly rare. Indeed, BLOM did not identify a *single* case raising similar facts. Thus, there are clearly not a large number of pending cases that would benefit from the Court's expedited resolution of the question presented. And BLOM's greatest potential harm here is facing an improved complaint—and as noted *supra* p. 11, deciding cases on their merits is "a desirable legal objective."

This case is also an especially poor vehicle for collaterally reviewing the *Mandala* decision, as Petitioner is ultimately asking this Court to do. Unlike in *Mandala*, the district court here applied the wrong standard, and demanded that Plaintiffs attempt to meet its erroneous and largely impossible standard or waive amendment forever. Its denial of vacatur was thus particularly inequitable, whereas granting it would be appropriate under any standard urged by Petitioner. A better case to test the "rule" in *Mandala*

would involve a less clear-cut set of facts favoring vacatur.

This issue is also apparent from the *Mandala* dissent, notwithstanding Petitioner's reliance on it. *See* Pet. 3, 12, 22. In *Mandala*, the plaintiffs not only incorrectly argued that the district court applied an erroneous standard, but they also then argued the *circuit* erred in affirming it. In his dissent, Judge Sullivan explained that, "[r]ather than seek vacatur and leave to amend at that juncture, Plaintiffs instead opted to file a petition for rehearing *en banc*—a strategic choice that plainly undermines any argument that some aspect of the district court's order was an 'extraordinary circumstance' preventing Plaintiffs from pursuing their claims." 88 F.4th at 368 (Sullivan, J., dissenting). *See also id.* (noting that the plaintiffs "doubled down on their strategy by filing an *en banc* petition instead of a motion to amend"). Here, however, the district court did err, the circuit did clarify the standard for pleading JASTA claims and Plaintiffs did precisely as Judge Sullivan suggested—once the circuit court ruled, they sought "vacatur and leave to amend at that juncture."

Petitioner argues that the dissent shows disagreement on the applicable standard. But Judge Sullivan's argument was that where plaintiffs "were repeatedly apprised . . . of the precise pleading defect that Plaintiffs now seek to remedy," seeking an amendment is not an "extraordinary circumstance" for Rule 60 relief. *Id.* at 368. Plaintiffs here were not so apprised, and only later were they "[a]rmed" with the circuit's clarifications—constituting, even for Judge Sullivan, an exceptional circumstance. (Notably, Judge Sullivan does not suggest any other circuits provide a con-

flicting view of vacatur-for-amendment, or support his reasoning.)

II. The Decision Below Is Correct and Does Not Conflict with Supreme Court or Other Circuit Precedents.

The summary order below does not "hold" anything—it only directs the district court to "reconsider Plaintiffs' motion" in light of pre-existing Supreme Court and Second Circuit standards for reviewing motions for vacatur in the amendment context. But those standards and cases it refers to are correct. And they do not conflict with other Supreme Court precedent or other circuit precedents. The order below only substantively cites three cases: *Metzler*, *Mandala* and this Court's seminal decision in *Foman*, which is extensively quoted in both *Metzler* and *Mandala*.

To give the impression that the summary order below raises a circuit split that was not previously apparent in Second Circuit law, Petitioner erroneously argues that the circuit adopted "a newly crafted test" in *Mandala*. Pet. 2. That "test" is when reviewing a postjudgment motion to amend, "'due regard' must be given to *both* the 'philosophy favoring finality of judgments and the expeditious termination of litigation,' and the 'liberal amendment policy of Rule 15(a).'" *Mandala*, 88 F.4th at 361 (quoting *Williams*, 659 F.3d at 213). That standard is not "new"—BLOM omits that the holding is taken directly from a 13-year-old decision, *Williams*, which states that "postjudgment motions for leave to replead must be evaluated with due regard to both the value of finality and the policies embodied in Rule 15." 659 F.3d at 213. *Williams*, as shown below, relies on *Foman*.

These cases do not conflict with this Court's or other circuits' precedents. Tellingly, Petitioner does not mention *Foman*, *Metzler*, or *Williams* even once.

Williams begins with the Second Circuit's longstanding rule: "[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to [Rules] 59(e) or 60(b)." *Id.* (quoting *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008)). This holding is the same as the purportedly "conflicting" holdings quoted by Petitioner. For example, Petitioner writes: "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.'" Pet. 18 (quoting *Cooper v. Shumway*, 780 F.2d 27, 28 (10th Cir. 1985)). And: "'a plaintiff may request leave to amend [post-judgment] only by either appealing the judgment, or seeking to alter or reopen the judgment under Rule 59 or 60." *Id.* (quoting *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003)).

In fact, another of BLOM's cases quotes the same language from the same Second Circuit decision quoted in *Metzler*: "once judgment is entered, the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b)." *In re Ferro Corp. Deriv. Litig.*, 511 F.3d 611, 624 (6th Cir. 2008) (quoting *Nat'l Petrochemical Co. v. M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d Cir. 1991)) (cleaned up).

And, just like BLOM's cited cases, the Second Circuit rejects replacing Rule 59 or 60 standards with Rule 15 standards. *Metzler* explains:

> [We reject the] assertion that the district court was obliged to consider their proposed amendment only under Rule 15(a)(2), effectively replacing the standards under Rules 59(e) and 60(b) with those in Rule 15(a)(2) to decide their post-judgment motion. We conclude that our well-established rule that a plaintiff "seeking to file an amended complaint post[-]judgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b)," stands.

Metzler, 970 F.3d at 145-46 (quoting *Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 92 (2d Cir. 2016)). Moreover, the *Metzler* court refused to "allow the 'liberal amendment policy of Rule 15(a)' to swallow the 'philosophy favoring finality of judgments' whole." *Id.* at 146 (quoting *Nat'l Petrochem.*, 930 F.2d at 245). Thus, the proposition that a motion to vacate for amendment "is governed solely by the legal standard applicable to Rule 15(a)(2) motions therefore is without merit." *Id.* at 146.

These holdings are essentially identical to those Petitioner cites. For example, Petitioner argues that "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).'" Pet. 14 (quoting *Daulatzai v. Maryland*, 97 F.4th 166, 177 (4th Cir. 2024)). But that is not what the Second Circuit did here—again, it held that the argument "is without merit." *Metzler*, 970 F.3d at 146. That is why *Daulatzai*—which postdated every single decision discussed herein, including the summary order at issue here, and did not mention Second Circuit standards at all—would have been "alone in the Nation" if it held otherwise. Neither the Fourth

Circuit nor Petitioner have found a case to the contrary.

One of Petitioner's Sixth Circuit cases likewise holds that "instead of meeting only the modest requirements of Rule 15, the claimant must meet the requirements for reopening a case established by Rules 59 or 60." *Moreland v. Robinson*, 813 F.3d 315, 327 (6th Cir. 2016). And one of its Ninth Circuit cases affirmed denial of a motion for vacatur and amendment that "argu[ed] only that it met the standard under Rule 15." *3WL, LLC v. Master Prot., Ltd. P'ship*, 851 F. App'x 4, 8 (9th Cir. 2021). Even Petitioner's precise citation to Wright & Miller's Federal Practice and Procedure not only restates the standards from *Williams*—it cites it. 6 Wright & Miller, Fed. Prac. & Proc. Civ. § 1489 n.3 (3d ed.) (and *Williams* cites Wright & Miller for this proposition, *see* 659 F.3d at 213).

Nor do these Second Circuit cases conflict with this Court's precedents. Petitioner's cases speak to the policy of preserving the finality of judgments generally—but none go nearly as far as Petitioner suggests. Indeed, in one, this Court rejected the same argument Petitioner makes here: "[T]he State reminds us of the importance of preserving the finality of judgments. But the 'whole purpose' of Rule 60(b) 'is to make an exception to finality.'" *Buck v. Davis*, 580 U.S. 100, 126 (2017) (citations omitted). And as this Court wrote in a case cited by Petitioner: "[W]e give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005).

BLOM's exaggeration of this Court's precedents is clearest from the first one it quotes: "'[t]here must be

an end to litigation someday . . . ." Pet. 1 (quoting *Ackermann*, 340 U.S. at 198). But in *Ackermann*, the petitioners sought vacatur four years after judgments were entered following a trial, in order to bring an extremely late appeal. Here, the case has not even entered discovery, and Plaintiffs sought vacatur and amendment within days of the Second Circuit's decision rejecting the district court's pleading standards and "arming" Plaintiffs with its "clarifications." Pet. App. 15. Dismissal here is hardly what this Court meant by "someday."

BLOM also cites *Ackermann* for the proposition that "free, calculated, deliberate choices are not to be relieved from." Pet. 1 (quoting *Ackermann*, 340 U.S. at 198). *See also* Pet. i, 1, 21 (arguing that *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993) "suggest[s] that the party [must be] faultless in the delay"). But as noted above, Plaintiffs have not erred here—the *district court did* by "contraven[ing]" governing law, as the Second Circuit found. *Honickman II*, 6 F.4th at 497. *See also Mandala*, 88 F.4th at 359 ("insufficient pleading is not categorically a 'mistake,' and Plaintiffs' belief that their Complaint satisfied the standards for pleading a disparate impact claim was well-founded, even if ultimately erroneous"). Anyway, as noted above, whether Plaintiffs also somehow erred would be a factual finding that the decision below did not even make—it is thus among the considerations remanded to the district court. There is nothing for this Court to review in that regard.

That leaves BLOM with the recognition in *Honickman II* that a district court should give "'due regard' to '*both* the philosophy favoring finality of judgments . . . and the liberal amendment policy of Rule 15(a).'" Pet.

App. 7. BLOM asserts that this balancing test conflicts with this Court's and other circuit's precedents.

It does not. As noted above, *Mandala's* balancing test is taken almost verbatim from *Williams*, which in turn took it directly from *Foman*. *See Williams*, 659 F.3d at 213-14. In *Foman*, this Court held it was an abuse of discretion to deny "petitioner's motion to vacate the judgment in order to allow amendment of the complaint," even where "the amendment would have done no more than state an alternative theory for recovery." 371 U.S. at 182.

This Court explained:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. . . . Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. (citations omitted).

BLOM does not mention *Foman* even once—despite contending that the summary order below "is at odds with over a century of this Court's jurisprudence protecting the finality of judgments." Pet. 19. The omission of this "seminal" postjudgment amendment case is telling. *See, e.g.*, *Marley v. Kaiser Found. Health, Plan of the Mid-Atlantic States, Inc.*, No. 17-cv-01902-PWG, 2018 U.S. Dist. LEXIS 195578, at *7

(D. Md. Nov. 15, 2018) ("in the seminal case of *Foman v. Davis*, the Supreme Court held a trial court should have allowed a plaintiff to amend her complaint even after entering a judgment for the defendant on the basis of a motion to dismiss"). *Foman* has been cited in other cases over *44,000 times*, but not once by Petitioner.

Moreover, the balancing standard does not conflict with Petitioner's cited cases. The Second Circuit explained the standard as follows: "courts 'should freely give leave' to amend a complaint 'when justice so requires.' Where, however, a party does not seek leave to file an amended complaint until after judgment is entered, Rule 15's liberality must be tempered by considerations of finality." *Mandala*, 88 F.4th at 361. This line is substantively identical to the holdings of Petitioner's cases: "Rule 15 requests to amend the complaint are . . . generally speaking, 'freely' allowed," but when raised post-judgment, courts then "must 'consider[] the competing interest of protecting the finality of judgments and the expeditious termination of litigation.'" *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615-16 (6th Cir. 2010). *See also Nation v. DOI*, 876 F.3d 1144, 1173 (9th Cir. 2017) ("After judgment, then, 'our policy of promoting the finality of judgments' *somewhat* displaces Rule 15's openhandedness.") (quoting *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996) (emphasis added).

Yet another of Petitioner's cases acknowledges that the policy of "prevent[ing] litigants from resurrecting claims on which they have lost" may be "absent" in certain circumstances. *Bldg. Indus. Ass'n v. Norton*, 247 F.3d 1241, 1245 (D.C. Cir. 2001). And Petitioner's Seventh Circuit case, *Helm v. Resolution Tr. Corp.*, 84 F.3d 874, 879 (7th Cir. 1996), acknowledged a prior

decision stating that while "never address[ing] the merits of the [postjudgment] motion for leave to amend" "might be appropriate in some cases, we believe that, in general, when a party simultaneously files both motions, the district court will have to examine the merits of a motion for leave to amend before it can decide whether or not to grant the party's Rule 59(e) or 60(b) motion." *Paganis v. Blonstein*, 3 F.3d 1067, 1073 n.7 (7th Cir. 1993).

Again, not a single one of BLOM's cases involved circumstances analogous to those at issue here, and none suggest a different result would obtain here. Instead, they largely track the facts in *Metzler*, where the Second Circuit affirmed denying vacatur. There, "the district court issued a thorough opinion that identified defects that a second amended complaint should cure," but "[e]ven with the benefit of that opinion, however, the plaintiffs failed to cure such deficiencies in their Second Amended Complaint." 970 F.3d at 145. Likewise, in *Deak*, which Petitioner also relies on, the Third Circuit affirmed denial of vacatur where the defendant "had ample opportunity to move to amend while the case was open but did not do so until after it was closed." *Dominos Pizza LLC v. Deak*, 534 F. App'x 171, 175 (3d Cir. 2013).

III. The Question Presented Does Not Merit Review

Finally, Petitioner is wrong that the question presented is sufficiently important that it merits the extraordinary assertion of the Court's certiorari jurisdiction over an interlocutory appeal (and without a circuit split). As stated above, this case and *Mandala* are the "exceptional cases necessitating relief from judgment," *Mandala*, 88 F.4th at 365. This case even more so—Petitioner has not cited a single other case where (1)

the district court dismissed a complaint on an incorrect legal basis which was essentially unmeetable by plaintiffs and (2) which the circuit court rejected but (3) the complaint nevertheless failed to meet the clarified standard but (4) the circuit found that failure was remediable in an amendment.

Petitioner promises all manner of gamesmanship will result from the balancing of Rule 60's and Rule 15's principles. But it has not explained how that could occur under the "exceptional circumstances" of *Mandala* or the even more "unusual" ones here. Indeed, it is BLOM's urged result that would result in profound unfairness. In BLOM's view, Rule 60 permits district courts to bar valid claims or counterclaims by demanding they meet erroneous—and unmeetable—standards and then denying litigants the opportunity to amend even after a court of appeals corrects the error.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

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