No. 23-1259

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents' brief in opposition confirms the need for this Court's review. Respondents do not seriously dispute that the Second Circuit's dilution of Rule 60(b)'s stringent standard places it on the short end of a lopsided circuit split. In fact, Respondents entirely ignore the conflicting decisions of several Courts of Appeals. And they get no further with their efforts to distinguish a few bricks in the wall of precedents from every other Circuit that has rejected the Second Circuit's outlier approach. Those decisions make clear that the Second Circuit is now "alone in the Nation in collapsing the Rule 60(b) standard with the standard for Rule 15(a)." *Daulatzai v. Maryland*, 97 F.4th 166, 177 (4th Cir. 2024).

Respondents similarly do not dispute that, "[t]o justify relief under [Rule 60(b)(6)], a party must show 'extraordinary circumstances' suggesting that the party is faultless." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). Nor do they dispute that, in this case, their repeated decisions not to amend were "free, calculated, [and] deliberate." *Ackermann v. United States*, 340 U.S. 193, 198 (1950). That should foreclose the extraordinary relief Respondents seek here.

Instead, Respondents' primary response is to fault the Petition for not discussing *Foman v. Davis*, 371 U.S. 178 (1962). But there is a very good reason for that: *Foman* involved a Rule 59(e) motion, while this case concerns a Rule 60(b) motion. "The difference between the two rules . . . is material, both in scope and purpose, and, by their own terms, different standards apply." *Daulatzai*, 97 F.4th at 177. Indeed,

this Court recently emphasized that very point in *Banister v. Davis*, 590 U.S. 504 (2020), when it refused to conflate the two Rules in the habeas context. Thus, *Foman*'s discussion of Rule 59(e) does not affect the Rule 60(b)(6) analysis here.

Instead, the relevant precedent is this Court's decision in *Gonzalez v. Crosby*, which held that a 60(b)(6) motion "requires a showing of 'extraordinary circumstances.'" 545 U.S. 524, 536 (2005). The Second Circuit's decisions squarely conflict with *Gonzalez* by eschewing Rule 60(b)(6)'s stringent rule in favor of a "liberal repleading policy." Pet.App.8. No other Circuit has adopted that misguided approach.

Unable to wash away the circuit split or the Second Circuit's disregard for this Court's precedent, Respondents try to ward off review by labeling this case "interlocutory." But that is patently incorrect. This appeal arises from Respondents' attempt to vacate a *final judgment* that was entered nearly five years ago. And the ruling denying that motion was itself a final order. Relief from this Court would thus finally end this case, while denying review would thwart the efficiency and finality principles that animate the Federal Rules.

In the end, the Second Circuit's unprecedented dilution of Rule 60(b)(6) conflicts with this Court's decisions and those of every other Circuit. It threatens to undermine the finality of judgments. It encourages wasteful litigation tactics. And, as a matter of law, the decision below is simply wrong. This Court should grant review and reverse.

ARGUMENT

I. The Second Circuit's Approach Conflicts With That Of Eleven Other Circuits.

Respondents concede the existence of a circuit split by failing to address the conflicting decisions Petitioner identified from the First, Third, Eighth, Eleventh, and D.C. Circuits. Although Respondents cherry-pick quotes from some of the others, a review of those decisions confirms an irreconcilable split between the Second Circuit's newly developed test for Rule 60(b) motions and the correct test used in the rest of the Courts of Appeals.

A. Respondents Concede that a Circuit Split Exists.

Respondents completely ignore then-Judge Breyer's decision for the First Circuit in *James v. Watt*, 716 F.2d 71 (1983). There, as here, the First Circuit confronted a district court's denial of a post-judgment motion to amend a dismissed complaint. *Id.* at 77. In affirming, then-Judge Breyer explained that "to require the district court to permit amendment here would 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." *Id.* at 78. The First Circuit rebuked that approach because it "would dramatically undermine the ordinary rules governing the finality of judicial decisions." *Id.* That reasoning flatly contradicts the "liberal amendment policy" endorsed by the Second Circuit. Pet.App.7. But Respondents do not even acknowledge the case.

Respondents also ignore the Third Circuit's decision in *Garrett v. Wexford Health*, 938 F.3d 69 (3d Cir. 2019). In *Garrett*, the Third Circuit explained that, when a party seeks "to reopen a final judgment, the policy favoring the finality of judgments" is implicated, and "[t]he permissive policy favoring amendment under Rule 15 [is] simply not relevant." *Id.* at 86. Accordingly, "[i]n the post-judgment context, the narrow grounds for relief set forth" in Rule 60(b) "must guide a District Court's decision about whether an otherwise-final judgment should be disturbed." *Id.* The Third Circuit therefore recognizes—unlike the Second Circuit—that "a different set of rules emphasizing vastly different policies" pertain to a motion seeking to vacate a final judgment for the purposes of amending a complaint. *Id.*

Respondents likewise ignore the Eleventh Circuit's decision in *MacPhee v. MiMedx Grp., Inc.*, 73 F.4th 1220 (11th Cir. 2023). As in this case, the district court there denied the plaintiff's motion for post-judgment vacatur-for-amendment, "explaining that because [the plaintiff] waited until after judgment was entered to seek such relief, Rule 15(a) did not apply." *Id.* at 1238. Unless the plaintiff could first show "entitle[ment] to relief under Rule 59(e) or 60(b)," it "was not entitled to leave to amend post-judgment." *Id.* The Eleventh Circuit affirmed, embracing this restrictive approach even "where the plaintiff has not exercised its right under Rule 15(a)(1) to amend as a matter of course." *Id.* at 1250. Again, that is directly at odds with the Second Circuit's belief that plaintiffs need not "navigate Rule 60(b)'s finality gauntlet before they [can] invoke Rule 15(a)'s liberal repleading

policy." Pet.App.8. And, again, Respondents conspicuously fail to address it.

The same goes for *UMB Bank, N.A. v. Guerin*, 89 F.4th 1047 (8th Cir. 2024). As the Eighth Circuit held there, "the liberal amendment standard in Rule 15(a)(2) does not govern" for post-judgment motions seeking to amend a complaint. *Id.* at 1057. Instead, "a more restrictive standard reflecting interests of finality applies." *Id.* (citation omitted). That is, "[l]eave to amend will be granted if"—and only if—"it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief." *Id.* (cleaned up). Respondents once again ignore this decision, which squarely conflicts with the Second Circuit's requirement that district courts "balance Rule 60(b)'s finality principles and Rule 15(a)'s liberal pleading principles." Pet.App.7; *see also Mandala v. NTT Data*, 88 F.4th 353, 361 (2d Cir. 2023).

Respondents similarly ignore the D.C. Circuit's holding 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). To be sure, Respondents obliquely note that the D.C. Circuit has allowed post-judgment amendment in "certain circumstances." BIO.27. But those are where the movant has "*prevailed* on the claim in question." *Bldg. Indus. Ass'n v. Norton*, 247 F.3d 1241, 1245 (D.C. Cir. 2007) (emphasis added). That is not the case here. Respondents' claims were dismissed with prejudice, and that dismissal was affirmed on appeal.

In short, by their own omissions, Respondents concede the decision below conflicts with decisions from the First, Third, Eighth, Eleventh, and D.C. Circuits. That alone should warrant review.

B. Respondents' Discussion of Other Circuit Decisions Confirms that the Second Circuit Has Adopted an Outlier Approach.

The circuit split extends far beyond the cases Respondents ignore.

Most notably, in *Daulatzai*, the Fourth Circuit specifically rejected the Second Circuit's approach in a thoroughly reasoned opinion. *See* 97 F.4th at 180. The Fourth Circuit affirmed the district court's denial of a Rule 60(b) motion. In so doing, the Fourth Circuit confronted the exact error that the Second Circuit committed in *Mandala* and this case. It expressly "reject[ed] Daulatzai's argument" that earlier precedents "collapsing . . . the standards under *Rule 59(e)* and Rule 15(a) should also apply when the motion seeks relief from the judgment under *Rule 60(b)*." *Id.* at 179 (emphases added). Thus, unlike the Second Circuit, the Fourth Circuit has correctly held that, "when the motion to vacate is filed under Rule 60(b), the more restrictive standard for granting that motion must be satisfied *before* consideration can be given to the motion to amend." *Id.* at 179 (emphasis added). By contrast, the Second Circuit here faulted the District Court for "treat[ing] Plaintiffs' motion to vacate and amend as calling for two distinct analyses" under Rule 60(b) and then Rule 15(a). Pet.App.7-8; *see*

also Mandala 88 F.4th at 361. The two approaches are impossible to square.[1]

Respondents only further underscore this error by trying to leverage a pair of Second Circuit decisions addressing *Rule 59(e)* to suggest its approach is consistent with the law of other Circuits. *See* BIO.21-23 (discussing *Metzler Investment Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133 (2d Cir. 2020) and *Williams v. Citigroup Inc.*, 659 F.3d 208 (2d Cir. 2011) (per curiam)). But whether those earlier cases are consistent with other Circuits' Rule 59(e) cases does not alter the fact that the Second Circuit's treatment of *Rule 60(b)* motions seeking to replead sharply conflicts with the decisions of every other Circuit applying Rule 60(b). On that latter issue, which is the question presented here, the Second Circuit has abandoned the extraordinary-circumstances standard to require district courts "to consider Rule 60(b) finality and Rule 15(a) liberality in tandem." Pet.App.7. In other words, it has forbade district courts from analyzing Rule 60(b) motions "under only Rule 60(b)'s standard." *Id.*

That clashes with the otherwise unanimous view of the Courts of Appeals, which have consistently held that plaintiffs "must *first* meet the threshold

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[1] Rather than confront the Fourth Circuit's thoughtful analysis in *Daulatzai*, Respondents suggest the Fourth Circuit must have been aware of the Second Circuit's decisions in *Mandala* and *Honickman*. BIO.23. But the Second Circuit issued its mistaken opinions after *Daulatzai* was argued on October 24, 2023. And the docket in *Daulatzai* reflects that neither party filed a Rule 28(j) letter bringing either *Mandala* or this case to the Fourth Circuit's attention. It is thus no surprise that the Fourth Circuit did not mention the Second Circuit's erroneous decisions.

requirement of 60(b)(6)'s extraordinary or exceptional circumstances to vacate the judgment before" invoking Rule 15(a)'s liberal amendment policy. *In re Ferro Corp. Deriv. Litig.*, 511 F.3d 611, 624 (6th Cir. 2008) (emphasis added); *see also, e.g.*, *Ewing v. 1645 W. Farragut LLC*, 90 F.4th 876, 893 (7th Cir. 2024); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003); *Cooper v. Shumway*, 780 F.2d 27, 28 (10th Cir. 1985) (per curiam).

This Court should thus grant certiorari to remedy the split and confirm that losing litigants may not deploy the policies of Rule 15(a) to bypass Rule 60(b)'s exacting requirements for relief.

II. Respondents' Reliance On *Foman* Only Reinforces The Fundament Flaws In The Second Circuit's Approach.

Not only are Respondents' efforts to obscure the circuit split unavailing, but their attempt to defend the decision below only further reveals the fundamental legal error in the Second Circuit's outlier approach. Respondents rely principally on this Court's decision in *Foman*, and they emphasize that the Second Circuit's precedents have done the same. But *Foman* is categorically inapt, and the Second Circuit's reliance on it was the very legal error that caused it to split with every other Circuit and violate this Court's relevant precedents.

Critically, the *Foman* decision did not address a Rule 60(b)(6) motion. This court instead recognized the motion "as one under Rule 59(e)." 371 U.S. at 181. As a result, *Foman* is simply irrelevant to this case.

Rather, the controlling precedent is this Court's decision in *Gonzalez v. Crosby*, which held that a Rule 60(b)(6) motion "requires a showing of 'extraordinary circumstances.'" 545 U.S. at 536. Respondents and the Second Circuit thus have the analysis backwards.

Indeed, in *Banister v. Davis*, this Court emphasized the critical distinctions between Rule 59(e) and Rule 60(b). A Rule 59(e) motion "is a one-time effort to bring alleged errors in a just-issued decision to a [district] court's attention, before taking a single appeal." 590 U.S. at 521. Accordingly, the time for bringing a Rule 59(e) motion "is short—28 days from entry of the judgment, with no possibility of an extension." *Id.* And, because "[i]t is a limited continuation of the original proceeding," a Rule 59(e) motion "'suspend[s] the finality' of any judgment." *Id.* at 514 (cleaned up). By contrast, "[a] Rule 60(b) motion—often distant in time and scope and always giving rise to a separate appeal—attacks an already completed judgment." *Id.* at 520-21. Rather than "aid[ing] the trial court to get its decision right in the first instance," a Rule 60(b) motion "serve[s] to collaterally attack [an] already completed judgment." *Id.* at 518-19. It therefore uniquely "threaten[s] an already final judgment with successive litigation." *Id.* And for that reason, the "standard for granting a Rule 59(e) motion" is more "broad and open ended" than Rule 60(b)(6)'s strict standard for relief. *Daulatzai*, 97 F.4th at 177. In short, "Rule 60(b) differs from Rule 59(e) in just about every way that matters to the inquiry here." *Banister*, 590 U.S. at 518; *see Daulatzai*, 97 F.4th at 177-78.

The Second Circuit's approach fails to grasp these crucial differences. Instead, it wrongly treats Rule 59(e) and Rule 60(b)(6) motions as fungible, and then relies on *Foman*'s more forgiving Rule 59(e) standard to override the strict requirements of Rule 60(b)(6) set forth in *Gonzalez*. Thus, Respondents' effort to chide BLOM for not citing *Foman* only confirms that their approach—which the Second Circuit adopted—obliterates the critical distinction between Rule 59(e) and Rule 60(b)(6). No other Circuit has adopted that category error. To the contrary, they have all rejected it. And the Fourth Circuit's recent decision in *Daulatzai* thoroughly debunks it.

Moreover, even if *Foman* somehow applied, the District Court's denial of Respondents' motion clearly satisfied its requirements. In *Foman*, this Court held only that "outright refusal to grant [plaintiffs] leave [to amend] without any justifying reason" is an abuse of discretion. 371 U.S. at 182. Here, the District Court provided multiple reasons for its denial. For starters, Respondents "had ample opportunity to pursue all legal avenues available to them for relief," yet they engaged in a "series of deliberate choices not to cure the deficiencies identified in their pleading." Pet.App.16; Pet.App.19. In addition, the District Court dismissed their complaint with prejudice, and that decision was affirmed based on one of the grounds identified by the District Court. Pet.App.13; Pet.App.15 n.3. During the appeal, Respondents never challenged the District Court's decision to dismiss *with prejudice*, and they never requested leave to amend—even during supplemental briefing following the Second Circuit's intervening decision in *Kaplan*. Pet.10-11. And, even to the extent the

Second Circuit "clarifi[ed]" the law in its decision, the District Court explained that "a mere change in decisional law does not constitute an 'extraordinary circumstance' for the purposes of Rule 60(b)(6)." Pet.App.14 (citation omitted); *accord Agostini v. Felton*, 521 U.S. 203, 239 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)[.]").

III. This Case Does Not Arise In An Interlocutory Posture.

Faced with an undeniable circuit split and patently incorrect decision, Respondents attempt to label the decision below "interlocutory" to suggest that this case presents a "poor vehicle" for review. BIO.1; BIO.18-19; BIO.28. But that is wrong as well. Far from being interlocutory, there is undeniably a final judgment in this action. *See Honickman v. BLOM Bank SAL*, 432 F. Supp. 3d 253 (E.D.N.Y. 2020), *aff'd*, 6 F.4th 487 (2d Cir. 2021). Indeed, this appeal exists only because Respondents have sought to vacate that final judgment. Respondents also ignore that an order denying a Rule 60(b) motion is "appealed as 'a separate final order.'" *Banister*, 590 U.S. at 520 (quoting *Stone v. INS*, 514 U.S. 386, 401 (1995)). And they do not dispute that reversing the Second Circuit's decision would finally end this case for good. There is thus nothing interlocutory about this appeal.

What Respondents seem to really mean is that BLOM may still win yet again on remand. On that basis, Respondents suggest that review now may be unnecessary and inefficient. BIO.18. But that assertion is indicative of Respondents' abusive

attitude toward the Federal Rules. After Respondents declined multiple opportunities to amend their complaint, BLOM secured dismissal with prejudice. Rather than move at that time to amend under Rule 59(e), Respondents chose to appeal. Even during supplemental briefing on appeal, Respondents never asked the Second Circuit to remand so they could replead. And when the Second Circuit affirmed, Respondents did not seek rehearing. Instead, they filed a Rule 60(b)(6) motion that sought to start the process all over again—on the sole basis that they wished to plead new facts (of which they were previously aware) in light of the Second Circuit's decision. Applying this Court's standards under Rule 60(b)(6), the District Court properly denied the motion. Had the Second Circuit similarly applied Rule 60(b)(6)—or had this case arisen in any other Circuit—this loop of relitigation would already be over.

Rather than allow this inefficient distortion of the Federal Rules to continue, this Court should grant review and restore uniformity in the law.

CONCLUSION

For the foregoing reasons, and those set forth in BLOM's Petition, certiorari should be granted.

Respectfully submitted,

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