No. 23-1259

IN THE
# Supreme Court of the United States

BLOM BANK SAL

*Petitioner*,

v.

MICHAL HONICKMAN, ET AL.

*Respondents.*

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

## BRIEF FOR RESPONDENTS

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## QUESTION PRESENTED

The preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits requires giving parties at least one meaningful opportunity to amend their pleadings. Circuit courts generally hold that means providing an opportunity to amend once a ruling identifies remediable defects, if any, in a pleading. Failing to provide that opportunity may constitute an "extraordinary circumstance" and a basis to vacate a judgment under Rule 60(b)(6).

Here, the Second Circuit found that the district court dismissed Respondents' complaint by applying the "wrong legal standard" for pleading an aiding and abetting claim (in the Second Circuit) under the Justice Against Sponsors of Terrorism Act, as well as a standard for pleading knowledge that was "too exacting" and all but impossible to meet by amendment. The circuit court provided clarified pleading standards and identified specific, remediable defects in the complaint. Respondents then promptly moved to vacate the district court's judgment in order to meet those clarified standards in an amended complaint—their first in this litigation. The district court refused and, after Respondents appealed again, the circuit issued a non-precedential summary order remanding the case for "reconsider[ation]."

The question presented is thus whether the circuit court erred in directing the district court to reconsider its refusal to grant Respondents an opportunity to meet the pleading standards the circuit corrected in the prior appeal.

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## INTRODUCTION

In the summary order below, the Second Circuit directed the district court to reconsider whether it properly denied Respondents' ("Plaintiffs") motion to vacate judgment and amend their complaint to meet the "clarified" pleading standards the circuit court issued in Plaintiffs' prior appeal of dismissal. The district court had denied vacatur because Plaintiffs declined its pre-dismissal invitations to amend their complaint—but the circuit court found the district court was applying the "wrong" pleading standards, Pet.App.5, which were so overly "exacting" that Plaintiffs could not meet them before discovery, Pet.App.49.

Petitioner ("BLOM") argues that by making this straightforward remand, the Second Circuit has effectively "abandon[ed] the 'extraordinary circumstances' standard in favor of a nebulous 'balanc[ing]' inquiry that pits Rule 60(b)(6)'s protection of 'finality' against 'Rule 15(a)'s liberal amendment policies.'" Pet.Br.25 (quoting Pet.App.8). In BLOM's telling, the Second Circuit has "jettisoned" Rule 60(b)(6)'s guardrails, Pet.Br.14., and motions for post-judgment amendments will now be all but rubber-stamped in the circuit. This is incorrect.

First of all, this conclusion is not supported by the spare language of the summary order, which simply directs the district court to "reconsider" denying vacatur given Second Circuit and Supreme Court precedents. Nothing has been "abandoned"—consistent with decisions from this Court, "[r]elief under Rule 60(b)(6)" in the Second Circuit "is reserved for cases that present 'extraordinary circumstances,'" including where a party seeks post-judgment amendment. *Mandala v. NTT Data, Inc.*, 88 F.4th 353, 361 (2d Cir. 2023) (citation omitted). Indeed, the standards the Second

Circuit has "developed"—and reaffirmed by the summary order below—"for evaluating postjudgment motions generally place significant emphasis on the 'value of finality and repose.'" *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011) (citation omitted).

Second, balancing finality and justice is not "nebulous," as BLOM calls it, but rather inherent to Rule 60(b)(6) jurisprudence: The rule's "extraordinary circumstances" requirement "exists in order to balance the broad language of Rule 60(b)(6), which allows courts to set aside judgments for 'any' reason justifying relief, with the interest in the finality of judgments." *Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 (3d Cir. 2008). When considering a motion to amend a complaint, finality interests are "balance[d] . . . with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits." *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 550 (2010).

Third, this case *does* involve truly "extraordinary circumstances" because (1) the district court dismissed the complaint using a set of "wrong legal standards," including the nearly impossible requirement of alleging, without the opportunity for any discovery, "acts or statements" of "BLOM employees" to demonstrate the bank's knowledge; (2) the circuit court rejected those standards on appeal—including the direct evidence requirement—and "clarified" the correct ones; (3) the circuit court found that Plaintiffs' allegations were nonetheless too "limited" to meet the clarified standards, drawing a newly announced distinction between Plaintiffs' "publicly available" evidence and "public sources such as media articles," Pet.App.50 & n.18; (4) the circuit court identified several *remediable* defects

in the complaint that the district court had not, such as clarifying that cash withdrawals are untraceable and alleging the degree to which Israeli terrorism designations were publicized; and (5) Plaintiffs had not yet amended their complaint even once. In these one-of-a-kind circumstances, the Rules' strong preference for deciding cases on their merits entitles Plaintiffs to have at least one opportunity to cure those defects.

BLOM's argument is therefore premised on construing the case's procedural history to suggest the Second Circuit found that Plaintiffs "waived" their right to amend post-judgment but nevertheless "directed district courts to override and rescue parties from their 'free, calculated, [and] deliberate choices,'" such as "when the movant has consistently and consciously rejected numerous invitations and opportunities to amend." Pet.Br.28-29 (citations omitted).

But the Second Circuit never accepted BLOM's "waiver" argument. To the contrary, it recognized that Plaintiffs did not have a meaningful opportunity to amend at all because "the district court applied the wrong legal standard for aiding-and-abetting liability under JASTA," Pet.App.5, and a standard for pleading knowledge that was "too exacting," Pet.App.49. In fact, the district court's knowledge pleading standard was unmeetable—as Circuit Court Judge Wesley noted in response to BLOM's insistence at oral argument that Plaintiffs waived opportunities to amend: "What are they supposed to do? They know they can't amend [to] . . . meet that." Oral Arg. at 11:52-:56, *Honickman*, No. 22-1039 (2d Cir. Oct. 5, 2023), https://ww3.ca2.uscourts.gov/decisions/isysquery/6a33dfa3-27c7-4b0a-82ee-86c41553c09a/1/doc/22-1039.mp3.

Ignoring this, BLOM further insists that "the Second Circuit affirmed the dismissal on grounds that the

District Court had relied on," Pet.Br. 40—but the district court *itself* acknowledged that the decision was affirmed "on other grounds." Pet.App.10. Most importantly, BLOM's reading of the record is irrelevant to the question presented—the summary order below was not premised on any such finding and thus did not direct district courts to "override" waivers.

The unusual procedural history of this case makes clear that no *meaningful* opportunities to satisfy the correct legal standards were available to Plaintiffs and therefore the remand to the district court was not a departure from Rule 60(b)(6)'s long-recognized standards. Rather, in the Second Circuit parties who declined meaningful invitations "are not entitled to relief from the judgment." *Metzler Inv. GmbH v. Chipotle Mexican Grill*, Inc., 970 F.3d 133, 148 (2d Cir. 2020).

This is not unusual—the circuits broadly require district courts to provide at least one opportunity to amend, often after dismissal when the complaint's remediable defects, if any, are correctly identified by a court ruling. Refusing leave to amend after dismissal is thus often an abuse of discretion—the result is no different here, except that Plaintiffs were compelled to appeal the district court's erroneous decision first.

## STATEMENT

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

Plaintiffs filed their complaint on January 1, 2019, asserting claims under the Anti-Terrorism Act ("ATA"), as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), and alleging that BLOM aided and abetted a series of terrorist attacks committed by the Palestinian foreign terrorist organization ("FTO") Hamas (or "HAMAS") that injured Plaintiffs.

Specifically, Plaintiffs alleged that BLOM knowingly provided substantial assistance to three Hamas fundraisers (the "Three Customers"), including the purported charitable institution Sanabil, which the United States designated a Specially Designated Global Terrorist ("SDGT") in 2003. Relying in part on financial records disclosed during the criminal trial of the Holy Land Foundation ("HLF," a notorious Hamas fundraiser) in Texas, Plaintiffs alleged that BLOM assisted the Three Customers in converting millions of dollars of donations from HLF and other Hamas supporters abroad into cash (notwithstanding BLOM's description of its services as "routine," Pet.Br.5-6), which they used, *inter alia*, to recruit Palestinians living in Lebanon to join and support Hamas before and during the "Second Intifada," when the acts of terrorism at issue here occurred.

Plaintiffs alleged BLOM's knowledge by "references to media articles and publications on the Three Customers' connection to Hamas." Pet.App.49. Plaintiffs also alleged that Sanabil's board included contemporaneous Hamas leaders in Lebanon. JA.105, 114. Plaintiffs alleged that Israel designated another one of the Three Customers, the Union of Good, as "part of the Hamas organization" in 2002, during the relevant period (1998-2004, JA.82). JA.118. The Union of Good's infamous leader, Sheikh Qaradawi, regularly appeared on television during that period extolling the virtues of suicide bombings against Israel. JA.120.

Plaintiffs also alleged that BLOM converted millions of dollars for the Three Customers from not only HLF, but also from its successor KindHearts after the United States designated HLF an SDGT in 2001, JA.99-100, 106-13, 117, and from Al Aqsa Foundation *after* Israel designated it a Hamas entity and its

headquarters were shuttered by the German government—and one transaction after the United States designated it an SDGT. JA.95-96, 113.

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. JA.142-47. 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 legal 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 provided a summary of their anticipated opposition in a letter on May 8, 2019. JA.148-55. Specifically, Plaintiffs relied on the standards from both *Linde* and *Halberstam* and noted that foreseeability was the key factor in assessing a defendant's wrongful conduct under JASTA. As shown below, the district court ultimately adopted BLOM's arguments and rejected foreseeability. *See* Pet.App.71-72. The Second Circuit subsequently vindicated Plaintiffs' analysis, as did this Court four years later. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 496 (2023).

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, Pet.App.91, the court 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 [*Linde*] from [*Halberstam*]. [Plaintiffs' counsel], do you want that opportunity?

Pet.App.93. Plaintiffs' counsel responded, "No, I think we are prepared to brief it based on the arguments presented in [our] pre-motion letter." *Id.* This position was appropriate given that Plaintiffs' readings of *Linde* and *Halberstam* were substantively correct, whereas BLOM's contrary positions were not.

Following the pre-motion conference, the district court issued a Minute Entry and Scheduling Order noting: "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 amend their Complaint in this regard." JA.156 (emphasis added). That is, the district court offered Plaintiffs the opportunity to meet BLOM's urged legal standards, which they reasonably declined—as shown by the circuit's later "clarification" of the applicable standards.

## 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.

During oral argument on the motion to dismiss, BLOM's counsel relied heavily on a district court decision, *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 claims against Lebanese Canadian Bank ("LCB"), premised on allegations that

LCB provided financial services for the terrorist group Hezbollah. As BLOM pointed out, BLOM allegedly provided financial services for Hamas fundraisers in Lebanon much as LCB did for entities controlled by Hezbollah. Pet.App.131.

BLOM urged the district court to adopt *Kaplan I*'s erroneous pleading standards—including its unworkable standard for pleading scienter. Under that standard, the *Kaplan I* district court held that public statements and media reports tying five of LCB's customers to Hezbollah could not support an inference of LCB's knowledge of those ties because "Plaintiffs nowhere allege . . . that Defendant read or was aware of such sources." 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. *See* Pet.App.50 n.18 ("public sources" can "plausibly suggest a defendant's knowledge which can be confirmed *during discovery*") (emphasis added).

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.

Pet.App.131. Plaintiffs' counsel disagreed, arguing "*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." Pet.App.126.

During the oral argument, the district court again asked: "There are no facts that you would have to offer *to address some of the contentions of the defendants regarding knowledge*, especially?" Pet.App.125 (emphasis added). But these "contentions" premised on *Kaplan I* were impossible to meet on amendment—Plaintiffs possessed no evidence that any BLOM employee "read or was aware of" any specific piece of information. Plaintiffs' counsel explained that while they "could always add allegations, . . . 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 set forth in *Linde*. *Id.*

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

The district court granted BLOM's motion to dismiss on January 14, 2020 ("*Honickman I*"), largely on the grounds BLOM raised, including—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. Pet.App.77, 84.

For example, and of particular importance to the question presented here, the district court adopted *Kaplan I*'s "read-or-was-aware-of" 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 [I]*.

Pet.App.79 (quoting *Kaplan I*, 405 F. Supp. 3d at 535) (emphasis added). Having adopted this position, the district court then faulted Plaintiffs' complaint for lacking allegations citing "acts or statements by BLOM or BLOM's employees" regarding its customers' affiliations with Hamas, instead relying on "press articles, government actions, and allegedly 'public knowledge' discussing" such connections. Pet.App.73-74.

Unsurprisingly, financial institutions do not often publicly admit their knowledge of their roles in assisting terrorism. Therefore, moving to amend after dismissal in this case—or accepting the district court's invitations to amend, such as during oral argument where BLOM demanded "direct allegation[s]" of its knowledge, Pet.App.131—would have been pointless. And while the Second Circuit also ultimately found Plaintiffs' allegations of BLOM's knowledge of the Three Customers' Hamas affiliations insufficient, it did so for reasons that could be remedied by repleading—such as by pleading more allegations of (1) "public sources" demonstrating that Israeli terrorism designations were made public, (2) banks' policies for monitoring counterparties, and (3) the untraceable nature of cash. None of those grounds required alleging

BLOM's internal communications or deliberations at the pleading stage showing that BLOM "read or was aware" of such sources.

Plaintiffs timely appealed the district court's dismissal decision. Because *Kaplan I* was also on appeal, the Second Circuit held *Honickman* in abeyance and directed the parties to submit supplemental briefs on the "issue of how [*Kaplan*] applies to this case," once decided. JA.257-258. The circuit subsequently issued *Kaplan II*, vacating *Kaplan I*'s dismissal of JASTA aiding and abetting claims against LCB. *See* 999 F.3d 842. *Kaplan II* largely clarified the standards for JASTA liability, as Plaintiffs explained in their supplemental brief. JA.259-281. BLOM, however, argued that *Kaplan II* somehow "underscore[d] the soundness of the District Court's legal analysis," despite vacating its primary support—*Kaplan I*. JA.294. The circuit then issued its first decision in *Honickman* on July 29, 2021 ("*Honickman II*").

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

The Second Circuit "agree[d]" with Plaintiffs "that the [district] court did not apply the proper standard . . . ." Pet.App.24. Specifically, the circuit rejected every standard the district court applied as grounds for dismissal, including the direct-evidence standard for alleging BLOM's knowledge of the Three Customers' affiliations with Hamas. It also rejected the district court's standards for alleging the general awareness and substantial assistance elements, which together "form the crux of most JASTA aiding-and-abetting cases." Pet.App.37. These holdings are detailed below.

BLOM largely ignores these holdings. *See* Pet.Br.40. But the district court was more forthcoming—it acknowledged that the circuit court only affirmed on "other grounds." Pet.App.10. BLOM also tries to rehabilitate the district court's dismissal order by suggesting it conforms to this Court's analysis in *Taamneh*. *See* Pet.Br.6-7, 8 n.2. But, of course, *Taamneh* affirmed the foreseeability standard from *Halberstam*—the *Honickman* district court, "however, rejected the foreseeability principle." Pet.App.39.

Moreover, *Taamneh* had not been issued when Plaintiffs sought post-judgment amendment to meet the Second Circuit's "clarifications" in *Kaplan II* and *Honickman II*. The issue in this case is the standard for post-judgment amendment where a district court has misapplied controlling law—that is, the law of the circuit. And even if *Taamneh* had completely repudiated the Second Circuit's interpretation of JASTA, that would only have provided a further reason to afford Plaintiffs an opportunity to meet this Court's newly-articulated standard.

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

The most decisive problem with the district court's dismissal decision was its articulated standard for pleading knowledge, which required Plaintiffs to allege "acts or statements by BLOM or BLOM's employees" showing their knowledge. Pet.App.73. The Second Circuit explained why this standard was incorrect:

> 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.

Pet.App.49 (citations omitted).

The district court had adopted its erroneous standard from *Kaplan I*, before it was vacated in relevant part. 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). Moreover, the district court must "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.[1]

This correction is critical. While Plaintiffs' proposed amended complaint submitted in support of

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[1] The *Honickman* district court also echoed *Kaplan I* in pointing out that with one exception cited in the complaint, the U.S. did not designate the Three Customers or their counterparties as SDGTs until after the transfers at issue (although Israel had designated several of the counterparties as terrorist organizations years before). *See* Pet.App.74-75. 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.

their vacatur motion contained numerous additional "public source" allegations (including publications in English, French and Arabic) to further support the "permissible inferences" of BLOM's contemporaneous knowledge that it was providing substantial assistance to Hamas, JA.315-508, those allegations would *not* satisfy *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*." Pet.App.37 (citing *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.

Pet.App.39 (quoting Pet.App.71-72).

In *Taamneh*, this Court likewise 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 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.'" Pet.App.46 n.16 (quoting *Kaplan II*, 999 F.3d at 863-64). *See also* Pet.App.45 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 does not render a bank liable for civil aiding and abetting." Pet.App.71. 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 found that the district court applied incorrect standards to plead the knowing and substantial assistance element. This included misapprehending the "knowing" prong under circuit law[2] and misapplying each of the *Halberstam* substantial assistance factors it analyzed. Pet.App.45.

The district court "misunderstood the first factor, 'the nature of the act encouraged,' to be a question of whether Plaintiffs plausibly alleged 'that BLOM [Bank] knowingly encouraged Hamas'[s] violent activities, such as those which caused Plaintiffs' injuries.'" Pet.App.46. Indeed, the *Halberstam* defendant did not "encourage" her burglar boyfriend to commit the unplanned murder of Dr. Halberstam, of which she had no knowledge.

The district court also applied too exacting a standard for "the second factor, 'the amount of assistance,'" requiring allegations of *how* the money BLOM moved for Hamas actually made it through the FTO's fronts. To the contrary, "[f]actual allegations that permit a reasonable inference that the defendant recognized the money it transferred to its customers would be received by the FTO would suffice." Pet.App.47.

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[2] The Second Circuit did not, as some JASTA defendants have suggested, "analyze[] the 'knowing' subelement as a carbon copy of the antecedent element of whether the defendants were 'generally aware' of their role in ISIS' overall scheme." *Taamneh*, 598 U.S. at 503 (citations omitted). It only observed that the same facts *could* satisfy both mental state elements: "For instance, *Halberstam* . . . . did not require [the defendant] to 'know' anything more about [the murderer's] unlawful activities than what she knew for the general awareness element." Pet.App.46.

Finally, under the fourth factor, the defendant's relation to the principal, "[t]he district court erroneously construed" Second Circuit precedent "to mean that Plaintiffs must plead a direct relationship between BLOM Bank and Hamas." Pet.App.47-48. A less direct relationship, depending on the circumstances, could suffice.

Again, these errors align with BLOM's "arguments" and "contentions" to which the district court invited Plaintiffs to respond by amendment. JA.156, Pet.App.125. Plaintiffs reasonably declined these invitations, as evidenced by the Second Circuit's complete rejection of them.

### 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." Pet.App.49. But whereas the district court required allegations of "acts or statements" from "BLOM employees" demonstrating their actual knowledge (which Plaintiffs naturally did not have before discovery), the Second Circuit identified a less exacting set of *specific and remediable* deficiencies in the complaint's knowledge allegations.

Chief among these was the circuit's finding that Plaintiffs' evidence of the Three Customers' Hamas affiliations was "publicly *available*," rather than from "public *sources*":

> However, "publicly available" evidence is not the same as public sources such as media

> articles. The latter, depending on their substance, plausibly suggest a defendant's knowledge which can be confirmed during discovery, whereas the former requires the implausible inference that the defendant was aware of those facts even before the news media.

Pet.App.50 n.18. The court then went on to find Plaintiffs' allegations of "public sources" too "limited" in detail and numerosity. Pet.App.51.

Plaintiffs understandably did not anticipate this new evidentiary distinction (the district court certainly did not). Moreover, the Second Circuit did not cite any precedent for this position, and it is by all appearances a newly articulated distinction. Nor did the *Kaplan II* decision mention any distinction between "publicly available evidence" and "public sources" of evidence. In fact, "publicly available evidence" echoes the term the Second Circuit had previously used as a basis for inferring knowledge, relying on this Court's precedent: "*Publicly available information* may provide relevant circumstantial evidence of actual knowledge." *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 873 F.3d 85, 122 (2d Cir. 2017) (emphasis added) (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003)). Indeed, it seems reasonable that banks, given their unique Know-Your-Customer obligations and due diligence policies, which assume close monitoring of customer accounts and transactions, *would* know facts about their customers "before the news media" *report* it (which involves deciding what is newsworthy and what facts are verifiable).

But no matter—Plaintiffs' proposed amended complaint included numerous and detailed allegations of contemporaneous "public sources" to meet the Second Circuit's requirement.

The other defects the circuit identified were also remediable. 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." Pet.App.52 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 defects were not due to unreasonable drafting—previous ATA decisions found it reasonable to infer that a foreign bank would "monitor *publicly available information*," including "Israeli lists of terrorists." *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 627 (E.D.N.Y. 2006) (emphasis added). But the proposed amended complaint now includes media reports on the relevant Israeli designations and BLOM's own customer due diligence procedures, such as monitoring transfer counterparties and non-profit organizations, which are often used as terror fronts.

Similarly, although Plaintiffs repeatedly emphasized the suspicious nature of Sanabil making large cash withdrawals from its BLOM account, the circuit suggesting that the complaint should more explicitly allege that cash is "untraceable." Pet.App.51 n.19. Although Plaintiffs took that characteristic of cash to be a reasonable inference rather than a necessary allegation, they included those explicit allegations in the proposed amended complaint.

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

As the Second Circuit explained in the summary order below, the district court had applied the "wrong legal standards" in dismissing the complaint, so once "[a]rmed with this Court's clarifications, Plaintiffs returned to the district court," promptly moving (11 days after *Honickman II* issued—in fact, before the mandate issued) under Rules 60(b)(6) and 15(a)(2) to vacate the judgment of dismissal and grant them leave to file a first amended complaint. JA.315. The district court denied the motion, concluding that Plaintiffs failed to show extraordinary circumstances chiefly because they declined the district court's two prior invitations to meet the erroneous and largely impossible pleading standard BLOM urged and that the district court erroneously adopted.

Plaintiffs again appealed. During argument, Circuit Court Judge Wesley—who also authored *Honickman II*—noted the case constituted an "unusual circumstance," 10/5/2023 Oral Arg. at 3:40, and "a curious situation," *id.* at 10:54, and was "quirky," *id.* at 18:07. And as he recognized, Plaintiffs faced "a wrong standard" "that's even harder for them to meet." Judge Wesley observed: "What are they supposed to do? They know they can't amend [to] . . . meet that" standard. *Id.* at 11:50-56. The dismissal was "[a]ffirmed for a different reason," as a result of a series of cases "where the law was really recasting itself." *Id.* at 13:12-38.

After that oral argument in this case, 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. *See 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 that 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 (citation omitted). The plaintiffs petitioned for rehearing *en banc*, and although it was denied, the dissenting judges urged the plaintiffs to move for vacatur and leave to amend. 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* and *Williams*, and other precedents.

Recognizing that its "discussion of the various considerations in *Mandala* will be particularly helpful to the district court's analysis" of Plaintiffs' motion for vacatur and leave to amend, the Second Circuit issued the summary order below, likewise citing *Foman* and *Metzler*. Pet.App.1-8.

## SUMMARY OF ARGUMENT

1. Second Circuit precedent does not meaningfully differ from other circuits' post-judgment amendment holdings. The summary order below does not "hold" anything, and the precedents it cites are typical of Rule 60(b)(6) cases. For example, they uncontroversially hold that "[r]elief under Rule 60(b)(6) is reserved for cases that present 'extraordinary circumstances.'" *Mandala*, 88 F.4th at 361 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)).

This case involves highly exceptional circumstances. The district court applied erroneous standards for pleading aiding and abetting under JASTA, including a knowledge pleading standard that was all but impossible to meet. Pet.App.5, 49. Plaintiffs reasonably declined the district court's invitation to amend to meet those erroneous standards. The Second Circuit "agree[d]" that those standards were incorrect, but found the complaint did not meet the standards it "clarified" on appeal. Pet.App.25, 40 n.11. After the district court refused to let Plaintiffs amend their complaint to meet the clarified standard, the Second Circuit directed it to reconsider, given prior precedents. It did not dictate a particular outcome.

2. The balancing test the circuit court described is also typical of Rule 60(b)(6) cases. The Second Circuit rejects allowing the "liberal amendment policy of Rule 15(a) to swallow the philosophy favoring finality of judgments whole." *Metzler*, 970 F.3d at 146 (internal quotation marks and citation omitted). Rather, the test balances Rule 60(b)'s value of finality "with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits." *Krupski*, 560 U.S. at 550. After all, "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).

The practical effect of that balance is far more modest than BLOM suggests: "In the post-judgment context, we have indeed given 'due regard' to 'the liberal spirit of Rule 15' by ensuring plaintiffs at least one opportunity to replead." *Metzler*, 970 F.3d at 146 (quoting *Williams*, 659 F.3d at 213-14). *See also Mandala*, 88 F.4th at 362 (same). Courts regularly recognize the importance of providing plaintiffs an opportunity to amend their complaints once apprised of *actual* defects in them. Where the dismissal standards are *wrong*, however, "the proper recourse" is an appeal, *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014), which Plaintiffs here took. None of BLOM's cited cases suggest that under the circumstances present here Plaintiffs would not be entitled to amend.

3. BLOM's appeal is premised on the unsupported inference that the Second Circuit agreed that Plaintiffs "waived" their opportunities to amend but then "directed district courts to override and rescue parties from their 'free, calculated, [and] deliberate choices.'" Pet.Br.28-29. But the Second Circuit did not find any waiver. Quite the opposite, it suggested Plaintiffs reasonably appealed the district court's dismissal decision and never received a meaningful opportunity to meet the correct and newly clarified standards—and thus had nothing to waive.

BLOM's litany of "waived" opportunities to amend are not supported by the record and in any event were not accepted by the panel below in discussing post-judgment amendment standards.

4. The Second Circuit's precedents do not conflict with the text of Rule 60(b) or Rule 15(a). The Second Circuit requires determining which Rule 60(b) provision applies as a "threshold issue," before considering amendment. *Mandala*, 88 F.4th at 359. The desire to amend a complaint itself is insufficient.

5. Extraordinary circumstances are clearly present here, for the reasons stated above. Plaintiffs were not afforded a meaningful opportunity to address *actual* defects in their complaint. They properly appealed the district court's erroneous decision and then promptly sought vacatur to meet the clarified standards the circuit issued on appeal. Discovery has not even commenced—this case is in its infancy, and Plaintiffs should have the opportunity to have their case adjudicated on the merits.

## ARGUMENT

### I. The Second Circuit's Analysis Is Consistent with Post-Judgment Amendment Jurisprudence Nationally.

BLOM asserts that the summary order below "abandons the 'extraordinary circumstances' standard in favor of a nebulous 'balanc[ing]' inquiry that pits Rule 60(b)(6)'s protection of 'finality' against 'Rule 15(a)'s liberal amendment policies.'" Pet.Br.25 (quoting Pet.App.8). This is inaccurate.

First, as Respondent acknowledges, the decision below is a non-precedential summary order which merely "[r]el[ies] on a series of Second Circuit precedents." Pet.Br.20. In fact, the order only cites three decisions on post-judgment amendment—*Mandala* and *Metzler* from the Second Circuit, and *Foman v. Davis*, 371 U.S. 178 (1962), from this Court.

Second, these decisions are not erroneous and certainly do not "jettison" the extraordinary circumstances standard, as BLOM claims. Pet.Br.14. *Mandala* holds that "[r]elief under Rule 60(b)(6) is reserved for cases that present 'extraordinary circumstances.'" 88 F.4th at 361 (quoting *Liljeberg*, 486 U.S. at 863). And in *Metzler*, the Second Circuit affirmed denial of post-judgment amendment because "the plaintiffs-appellants fail[ed] to identify any 'extraordinary circumstances' that would 'justify[] relief' under Rule 60(b)(6)." 970 F.3d at 147.

As explained below, the "extraordinary circumstances" here are clear. This case is, as Judge Wesley put it, "unusual," "quirky," and "curious," appearing to deny Plaintiffs even a single meaningful opportunity to amend. The Second Circuit therefore directed the district court to reconsider its denial of vacatur given the standards in *Mandala* and *Metzler*. As this remand reflected, Rule 60(b)(6) motions inherently require "case-by-case inquiry," *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007)). Indeed, even if this Court wanted to revisit its jurisprudence on Rule 60(b), it is difficult to imagine it being able to fashion any generally applicable standard based on the "unusual" procedural history of this case.

### A. Rule 60(b)(6) Jurisprudence Balances Finality and the Preference for Deciding Cases on Their Merits.

*Mandala* and *Metzler* both apply the balancing test articulated in *Williams v. Citigroup*: "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. Finality thus remains the starting point for applying Rule 60(b)(6) in the Second Circuit: "[t]he standards we have

developed for evaluating postjudgment motions generally place significant emphasis on the 'value of finality and repose.'" *Id.* (citation omitted). The circuit notes that "'[t]o 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.* (quoting *Nat'l Petrochemical Co. v. M/T Stolt Sheaf,* 930 F.2d 240, 245 (2d Cir. 1991)).

Finality is then *balanced* with Rule 15(a)'s preference for resolving cases on their merits, which the *Williams* panel sourced from this Court's "[p]articularly instructive" *Foman* decision. 695 F.3d at 213. *Foman* held that the district court abused its discretion in denying a motion to vacate the judgment in order to amend the complaint:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. *See generally*, 3 Moore, Federal Practice (2d ed. 1948), paras. 15.08, 15.10. 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. In the absence of any apparent or declared 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, futility of amendment, etc. — the leave sought should, as the rules require, be "freely given." 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.

371 U.S. at 182.[3] *See, e.g.*, *United States v. Vorachek*, 563 F.2d 884, 887 (8th Cir. 1977) (vacatur necessary given *Foman* and Rule 15(a)).

This Court has always balanced the finality of judgments with the preference for giving plaintiffs "an opportunity to test their claims on the merits." For example, this Court "balance[d] the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits." *Krupski*, 560 U.S. at 550. A statute of limitations embodies the value of finality and repose, *see, e.g.*, *Lozano v. Alvarez*, 572 U.S. 1, 14 (2014), just as, in the Second Circuit, "postjudgment motions generally place significant emphasis on

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[3] BLOM argues that the circuit erred in relying on *Foman* because the vacatur motion in that case was treated as coming under Rule 59(e), not Rule 60(b), and the two rules "differ in material ways and impose different standards for relief by their own terms." Pet.Br.18, 34-35. As explained *infra* 31-32, any such distinction does not help BLOM—but it was also completely irrelevant to this Court's analysis in *Foman*. The First Circuit had decided to treat the motion as "filed pursuant to Rule 59(e), rather than under Rule 60(b)" to resolve an unrelated procedural issue involving two notices of appeal. *Foman v. Davis*, 292 F.2d 85, 87 (1st Cir. 1961). This Court then noted that the "Court of Appeals' treatment of the motion to vacate as one under Rule 59(e) was permissible, at least as an original matter, and we will accept that characterization here." 371 U.S. at 181. It never suggested that the "characterization" impacted its review or the vacatur standards it applied.

the 'value of finality and repose,'" *Williams*, 659 F.3d at 213 (internal citation omitted).

This Court has also always understood Rule 60(b) as accommodating that preference, rejecting arguments that overemphasize finality at its expense. For example: "[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,* 580 U.S. at 126 (citations omitted). BLOM relies heavily on this Court's analysis of finality in *Gonzalez v. Crosby* but omits its conclusion: "[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." 545 U.S. 524, 529 (2005). Likewise, BLOM quotes this Court's admonition in *United States v. Denedo* that "judgment finality is not to be lightly cast aside," Pet.Br.27, but again leaves out the Court's conclusion: "the finality rule is not so inflexible that it trumps each and every competing consideration." 556 U.S. 904, 916 (2009). A "judgment" based on the wrong reasons, due largely to what the circuit itself concedes to have been its own "ambigu[ous]" precedent, Pet.App.40 n.11, *is* to be "cast aside" in order to permit disposition on the merits.

Like this Court, the Second Circuit rejects "a standard that overemphasize[s] considerations of finality at the expense of the liberal amendment policy embodied in the Federal Rules of Civil Procedure." *Williams*, 659 F.3d at 210. And like this Court, the Second Circuit holds that "Rule 60(b) relief is designed to afford parties an opportunity to resolve a dispute on its merits." *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986) (citing 7 *Moore's Federal Practice*, ¶ 60.19, at 156 (2d ed.

1983)). That is, the policies underlying Rules 60(b) and 15(a) work "in tandem," as the Second Circuit explained below. Pet.App.7.

The circuit courts have also consistently recognized this balance inherent in Rule 60(b)(6). The rule's "[extraordinary circumstances] requirement exists in order to balance the broad language of Rule 60(b)(6), which allows courts to set aside judgments for 'any' reason justifying relief, with the interest in the finality of judgments." *Budget Blinds*, 536 F.3d at 255. The Ninth Circuit sourced this principle to *Gonzalez*:

> As the Sixth Circuit rightly held when applying *Gonzalez*, "the decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts."

*Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (quoting *Stokes*, 475 F.3d at 736). *See also In re Spansion*, Inc., 507 F. App'x 125, 128 (3d Cir. 2012) ("The rule seeks 'to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done.'") (citation omitted); *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 529 (6th Cir. 2001) (same); *People for the Ethical Treatment of Animals v. United States HHS*, 901 F.3d 343, 354-55 (D.C. Cir. 2018) (same); *Griffin v. Swim-Tech Corp.*,722 F.2d 677, 680 (11th Cir. 1984) (same); *Grace v. Bank Leumi Tr. Co.*, 443 F.3d 180, 190 n.8 (2d Cir.

2006) (same).[4] *See also* 11 C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* § 2851 (2d ed. 1995) (same).

The Eighth Circuit has held that district courts reviewing post-judgment motions to amend under Rule 59(e) or Rule 60(b) "'may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits . . . .'" *Mask of Ka-Nefer-Nefer*, 752 F.3d at 743 (quoting *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823-24 (8th Cir. 2009)). Indeed, *Moore's Federal Practice* specifically notes that "[t]he hybrid approach of the Second and Eighth Circuits strikes the correct balance: it protects the strong interest in finality of judgments and the expeditious termination of litigation, while allowing postjudgment amendment of pleadings in a particular case if justice requires." 12 *Moore's Federal Practice - Civil* § 59.30. For that proposition, *Moore's* relies on two Rule 60(b)(6) cases—*Williams* and *Mask of Ka-Nefer-Nefer*. *Id.*, § 59.30 n.9.1.3, n.9.1.4.

The Seventh Circuit gives even greater weight to Rule 15 interests when the district court has entered judgment at the same time it dismisses a complaint:

> Because Rules 59(e) and 60(b) are reserved for extraordinary cases, the Girl Scouts urge us to apply a more demanding standard to post-judgment motions to amend than we do to motions to amend filed prior to the entry of judgment.

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[4] The same is true for Rule 59(e), in which "[t]he court must strike the proper balance between two competing imperatives: (1) finality, and (2) the need to render just decisions on the basis of all the facts." *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993).

> But the extraordinary nature of these remedies does not mean that a different standard applies—at least when judgment was entered at the same time the case was first dismissed. When the district court has taken the unusual step of entering judgment at the same time it dismisses the complaint, the court need not find other extraordinary circumstances and must still apply the liberal standard for amending pleadings under Rule 15(a).

*Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 521 (7th Cir. 2015). *See also NewSpin Sports, Ltd. Liab. Co. v. Arrow Elecs., Inc.*, 910 F.3d 293, 310 (7th Cir. 2018) (same).

BLOM attempts to draw a distinction between post-judgment analyses under "Rules 59(e) and 60(b)," relying on *Daulatzai v. Maryland*, 97 F.4th 166 (4th Cir. 2024). Pet.Br.34-35. But *Daulatzai* only held that under Rule 59(e), a court should *solely* "apply the more specific standard of Rule 15(a)," and "need not concern itself" with Rule 59(e)'s other standards. 97 F.4th at 177 (internal quotation marks and citation omitted). *See also Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003) ("this Court has held that, under these circumstances, the considerations for a Rule 59(e) motion are governed by Rule 15(a)"); *Jang v. Bos. Sci. Scimed, Inc.*, 729 F.3d 357, 368 (3d Cir. 2013) ("[w]here a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and 59 inquiries turn on the same factors.") (internal quotation marks and citation omitted); *Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 184 (5th Cir. 2018) (same).[5] *Daulatzai* unremarkably

[5] BLOM relies heavily on *Banister v. Davis*, 590 U.S. 504 (2020), but that case deals with what types of vacatur motions count as a successive habeas application.

held that "to obtain relief from a final judgment under Rule 60(b), one of the six grounds enumerated must be satisfied," including finding "extraordinary circumstances" under Rule 60(b)(6). 97 F.4th at 178. The plaintiff failed to show "extraordinary circumstances" there because she had already amended twice, and her amendment "efforts were pursued in bad faith." *Id.* at 170. The extraordinary circumstances requirement is the same in *Metzler* and *Mandala* (and in *Runnion*, which *did* find "extraordinary circumstances").

In sum, BLOM's claim that "every one of [the Second Circuit's] sister Circuits" disagrees with it is simply wrong. Pet.Br.25. A number of BLOM's own cases recognize the need to balance competing policies in Rule 60(b). For example, in *Leisure Caviar, LLC v. United States Fish & Wildlife Service*, the Sixth Circuit explained that while amendment should be "freely allowed," "when a Rule 15 motion comes *after* a judgment against the plaintiff," courts "must 'consider[] the *competing* interest of protecting the finality of judgments"; that is, "[i]nstead 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." 616 F.3d 612, 615-16 (6th Cir. 2010) (citations omitted) (emphases added). Like in *Phelps*, *Leisure Caviar* directs courts to balance the "competing" policies of Rule 15 and Rule 60.

And in *Nation v. DOI*, the Ninth Circuit explained that "[a]fter judgment . . . 'our policy of promoting the finality of judgments' *somewhat* displaces Rule 15's openhandedness," given Rule 60(b)(6)'s predicate of extraordinary circumstances. 876 F.3d 1144, 1173 (9th Cir. 2017) (citation omitted) (emphasis added). That case affirmed denial of post-judgment leave to amend because the plaintiff had already twice amended and

failed to identify how yet another amendment could cure its standing problem.

Most of BLOM's remaining cases simply note that a judgment must be appealed or vacated before a complaint is amended or that Rule 15(a) does not *alone* provide the analytical basis for vacatur—but none dispute that the Rule 15 *principles* could inform the exceptional circumstances analysis. *See Rosenzweig*, 332 F.3d at 864 (explaining that post-judgment amendment requires appeal or vacatur); *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 624 (6th Cir. 2008) (same); *Helm v. Resolution Tr. Corp.*, 84 F.3d 874, 879 (7th Cir. 1996) (same); *Bldg. Indus. Ass'n v. Norton*, 247 F.3d 1241, 1245 (D.C. Cir. 2001) (same); *Boyd v. Secretary*, 114 F.4th 1232, 1237 (11th Cir. 2024) (same). Indeed, in a case BLOM cites for the proposition that "there is no pending complaint to amend" once "the action has been dismissed" with prejudice, the opinion noted that courts still apply "Rule 15 standards" to such vacatur motions. *Calvary Christian Center v. City of Fredericksburg*, 710 F.3d 536, 540 (4th Cir. 2013).

To the extent that any of BLOM's cases can be read to suggest that Rule 15(a)'s preference for determining cases on their merits plays *no* role in motions for post-judgment amendment, they are out of step with the other circuits. BLOM quotes *Garrett v. Wexford Health* as holding that under Rule 60(b), "[t]he permissive policy favoring amendment under Rule 15 was simply not relevant." 938 F.3d 69, 86 (3d Cir. 2019). But that case cited and relied on *Leisure Caviar*, 616 F.3d at 615-16, which requires courts to weigh the "competing interests" of Rules 15 and 60. The starker language in *Garrett* was understandable as the

plaintiff had already amended his complaint *four times*, clearly exhausting the policy of liberal amendment.

Unsurprisingly, BLOM has selected cases where plaintiffs have thoroughly exhausted any chance to amend. As noted above, *Daulatzai* involved a motion to file a fourth complaint, "pursued in bad faith." 97 F.4th at 170. In *James v. Watt*, 716 F.2d 71, 77 (1st Cir. 1983), the delay in amendment was "strategic." In *In re Ferro*, the plaintiff did not have an actual amendment in mind and needed discovery. 511 F.3d at 624. *See also Helm*, 84 F.3d at 879 ("inexcusable attorney negligence"); *UMB Bank, N.A. v. Guerin*, 89 F.4th 1047, 1057-58 (8th Cir. 2024) (proposed second amended complaint "repeats . . . scandalous, logically irrelevant material" and was futile) (internal quotation marks and citations omitted); *Nation*, 876 F.3d at 1174 (plaintiff "amended its complaint twice before" dismissal).

### B. Rule 60(b)'s Balancing Means Ensuring Parties Have a Meaningful Opportunity to Amend Pleadings at Least Once, Which Courts Broadly Support.

In the Second Circuit, the practical effect of the balancing inquiry for post-judgment motions to amend is far less dramatic than BLOM suggests: "In the post-judgment context, we have indeed given 'due regard' to 'the liberal spirit of Rule 15' by ensuring plaintiffs at least one opportunity to replead." *Metzler*, 970 F.3d at 146 (quoting *Williams*, 659 F.3d at 213-14). *See also Mandala*, 88 F.4th at 362 (same). If the plaintiff has had a meaningful chance to amend, dismissal is no longer extraordinary:

> In most if not all Second Circuit cases denying post-judgment leave to replead, the plaintiff had already taken at least one shot at amendment. This makes sense: when a plaintiff already had multiple chances to state a claim, there is little risk of manifest injustice in denying yet another go.

*Id.* (citations omitted).

But a chance to state a claim is only meaningful if the claimant has been fairly instructed in the correct legal standard, either by a ruling of the district court or by clear precedent. Such a ruling identifies *actual* and remediable defects in the complaint, if any. *See, e.g.*, *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 250 (3d Cir. 2016) (observing that without a ruling, "a plaintiff is unlikely to know whether his complaint is actually deficient—and in need of revision"); *Tate v. SCR Med. Transp.*, 809 F.3d 343, 346 (7th Cir. 2015) ("the court should grant leave to amend after dismissal of the first complaint 'unless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted'") (citation omitted); *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 998 (9th Cir. 2011) ("[plaintiffs] should have at least one opportunity to add any such facts to the Complaint"); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (similar). The Second Circuit noted that it is an "impropriety" to deny amendment "without the benefit of a ruling," as that presents plaintiffs with a "Hobson's choice: agree to cure deficiencies not yet fully briefed and decided or forfeit the opportunity to replead." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015).

Ordinarily, entering judgment dismissing a case without the opportunity to amend is an abuse of discretion. *See supra* 30-31 (quoting *Runnion*, 786 F.3d at 521). *See also Jack v. Evonik Corp.*, 79 F.4th 547, 565 (5th Cir. 2023) ("Plaintiffs should usually be able to amend at least once, because 'fairness requires' it.") (citation omitted). In such case, "[t]he district court left the plaintiff with little recourse but to file a motion under Rules 59(e) and 60(b) . . . ." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008).

In fact, Plaintiffs' motion here would have come under Rule 59(e), which BLOM's cases suggest are evaluated under Rule 15(a)'s liberal standards *only*, *see supra* 31-32—if not for the necessity of appealing the district court's erroneous and essentially impossible pleading standards first. *See Mask of Ka-Nefer-Nefer*, 752 F.3d at 743 (explaining that appealing is "the proper recourse" where a dismissal decision is wrong). As the Seventh Circuit explained, "a plaintiff who receives a Rule 12(b)(6) motion and who has good reason to think the complaint is sufficient may also choose to stand on the complaint and insist on a decision without losing the benefit of the well-established liberal standard for amendment with leave of court under Rule 15(a)(2)." *Runnion*, 786 F.3d at 523.

Of course, that entailed a risk—Plaintiffs could have been wrong on appeal. If the Second Circuit had affirmed the district court's *reasoning* (and not just outcome), that would not be an "exceptional circumstance"—that happens routinely and when it does, a plaintiff may have made a "free, calculated, [and] deliberate choice" not to take advantage of any prior opportunities to amend. The circuit's affirmance *on other grounds* here was thus fortuitous for BLOM—but that

does not justify elevating finality over the interests of justice.

This is why BLOM is compelled to argue that the Second Circuit really affirmed dismissal of the case on the same "grounds" the district court used. Pet.Br.40. But the district court acknowledged its dismissal was only affirmed "on other grounds." Pet.App.10. The Second Circuit's ground for affirmance involved one of the same *elements* (knowledge), but for a fundamentally different reason: the (original and still only) complaint relied too much on "publicly available evidence" rather than "public sources" of information identifying BLOM's customers as Hamas-affiliated entities, and its allegation of the latter was too "limited." Pet.App.51.

That the pleading standard was clarified on appeal is grounds to *permit* amendment, not deny it. For example, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, this Court explained that "[w]hile we reject the Seventh Circuit's approach . . . we do not decide whether, under the standard we have described . . . the Shareholders' allegations" are sufficient. Because the lower courts lacked "the opportunity to consider the matter in light of the prescriptions we announce today," the Court vacated judgment "so that the case may be reexamined in accord with our construction . . . ." 551 U.S. 308, 329 (2007). And after clarifying the Rule 8 pleading standard in *Ashcroft v. Iqbal*, this Court ordered that "[t]he Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint." 556 U.S. 662, 687 (2009). *See also Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (reversing dismissal with instructions to permit amendment if necessary). *See also Marranzano v. Riggs Nat'l Bank*, 184

F.2d 349, 351 (D.C. Cir. 1950) (where a decision is "affirmed" but "based on an incorrect ground," the "ends of justice" require "an opportunity to amend [the] complaint"); *Oil, Chem. & Atomic Workers Int'l Union v. Delta Ref. Co.*, 277 F.2d 694, 697 (6th Cir. 1960) (where "the views which we have expressed give the case a somewhat different aspect than it had under the trial court's ruling," amendment is appropriate).

After the Second Circuit affirmed dismissal on other grounds in *Honickman II*, it left Plaintiffs the choice of whether to move for post-judgment leave to amend, if they thought they had the allegations to do so. But as is clear from the subsequent summary order below remanding the case for further consideration, that affirmance was not intended to preclude Plaintiffs from seeking an opportunity to amend.

## II. The Second Circuit Did Not Find Waiver, and Thus Did Not Alter the Vacatur Standard in Its Summary Order

BLOM's argument hangs on the straw man that the Second Circuit agreed that Plaintiffs "consistently and consciously rejected numerous invitations and opportunities to amend," but nevertheless "directed district courts to override and rescue parties from their 'free, calculated, [and] deliberate choices.'" Pet.Br.28-29 (citations omitted). Although BLOM pressed this argument to the circuit below, *see* BLOM Brief, No. 22-1039, Dkt. No. 42, at 1-2, 41-43, the circuit did not find any such waiver. To the contrary, it found that the district court applied a "wrong standard" that was unmeetable. As Judge Wesley asked BLOM's counsel during the oral argument below, "What are [Plaintiffs] supposed to do? They know they can't amend [to] . . . meet" the standard BLOM urged and the district court adopted. Notably, BLOM does not challenge the

Second Circuit's findings as to waiver in its question presented here.

Nevertheless, BLOM attempts to muster evidence of occasions when Plaintiffs forfeited opportunities to amend. The first two "opportunities" were the district court's invitations to amend before issuing its dismissal decision. But these opportunities were not meaningful because they offered only to amend in conformity with the incorrect legal standards BLOM urged, giving Plaintiffs no notice of defects under the correct legal standard. *See, e.g.*, *Bryant v. Dupree*, 252 F.3d 1161, 1164 (11th Cir. 2001) ("it cannot be said that the plaintiffs failed to correct defects *of which they had notice*") (emphasis added). There is no forfeiture where "Defendants did not [identify] below" and "the district court itself did not rely on the deficiencies we have identified in dismissing" a plaintiff's claims—especially where "the district court's reasoning meant that no such amendments would remedy the defects that the district court perceived." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 89-90 (2d Cir. 2018).

Again, even the district court here acknowledged that its dismissal decision was only affirmed "on other grounds." Pet.App.10. BLOM notes that Plaintiffs could have added some useful additional allegations in their proposed amended complaint before appealing, but it would have been futile to do so given that Plaintiffs would still have failed to meet *each* of the district court's (erroneous) standards.

Indeed, if declining these pre-judgment "opportunities" to amend constituted waiver, litigants would be compelled to file serial (futile) amendments and rebrief Rule 12(b) motions simply to preserve their rights to amend post-appeal, which would hardly improve the efficiency of the lower federal courts or lead

to more equitable outcomes. Likewise, a rule that disincentives bringing valid cases "where the law [i]s really recasting itself" in the circuit courts, as Judge Wesley observed it was here, Oral Arg. at 13:23-38, does not promote the interests of justice.

BLOM faults Plaintiffs for not moving for vacatur-for-amendment instead of appealing, or not appealing the with-prejudice nature of the dismissal. Pet.Br.11. Plaintiffs did not seek vacatur before appealing because there is "no reason" to "file a post-judgment motion seeking leave to amend" where "the district court's reasoning meant that no such amendments would remedy the defects that the district court perceived." *Charles Schwab*, 883 F.3d at 90. Again, "the proper recourse when [a party] disagreed with the district court's interpretation of the . . . statute was a direct appeal, not a Rule 60(b) motion." *Mask of Ka-Nefer-Nefer*, 752 F.3d at 743. And Plaintiffs did not appeal the "with-prejudice" component of the dismissal decision because leave to amend would not have altered the result without the circuit first correcting the district court's legal errors.

Finally, BLOM also faults Plaintiffs for not asking the circuit court for leave to amend in their post-argument supplemental brief in *Honickman II*. Pet.Br.11. Though asking the circuit for leave to amend is permissible, in the Second Circuit, post-judgment leave to amend is generally a decision for the district court to make "in the first instance." *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009).[6] The circuit court's job is to

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[6] BLOM also faults Plaintiffs for "not seek[ing] rehearing," Pet.Br.12, but in the *Mandala* dissent BLOM relies on, Judge Sullivan criticized precisely that: "[r]ather than seek vacatur and leave to amend" after the first appeal, "Plaintiffs instead opted to

assess the district court's ruling—it goes without saying that if a viable amendment is necessary, plaintiffs will want to make it. The summary order demonstrates that the circuit court did not find a need for Plaintiffs to have requested leave to amend from the first panel (Judge Wesley was on both unanimous panels).

### III. The Balancing Inquiry Does Not Conflict with the Text of Any of the Federal Rules of Civil Procedure.

BLOM argues that the Second Circuit's precedent conflicts with the plain text of Rule 15(a) and Rule 60(b). To do so, it erroneously construes the Second Circuit's basis for remand as "allow[ing] plaintiffs to leapfrog over 'Rule 60(b)'s finality gauntlet' to the sanctuary of 'Rule 15(a)'s liberal repleading policy.'" Pet.Br.30. Again, the Second Circuit directs district courts to *balance* Rule 60(b)'s finality and Rule 15(a)'s liberality "in tandem," Pet.App.7; it does not permit "leapfrogging." *See Meltzer*, 970 F.3d at 146 (finding the "argument that the [post-judgment] motion is governed solely by the legal standard applicable to Rule 15(a)(2) motions . . . without merit.").

To establish a textual conflict, BLOM argues that Rule 15(a) "applies only to 'Amendments Before Trial,'" and "[i]t is in that setting . . . that the Rules encourage courts to 'freely give leave' to amend." Pet.Br.30. Thus, BLOM suggests, Rule 15's preference

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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.

for deciding cases on their merits is entirely extinguished at judgment.

But Rule 15 contemplates two stages of amendment—before trial and during or after trial. Both involve "freely" giving leave to amend, under certain circumstances which depend on *trial*, not judgment. *See* Rule 15(a)(2), Rule 15(b)(1). The rule has no higher standard. Indeed, "'[a]mendments under [Rule 15(a)(2)] may be made at any stage of the litigation.' Granting leave to amend after summary judgment is thus allowed at the discretion of the trial court." *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (quoting 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1484 (1971)). *See also Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) (applying Rule 15 and noting that "[i]nstances abound in which appellate courts on review have required that leave to amend be granted after dismissal or entry of judgment").

Obviously, this case was not dismissed after trial—it was dismissed following an initial Rule 12(b)(6) motion, before Plaintiffs had the opportunity to try to cure any *actual* defects in their complaint. That is precisely the context that Rule 15(a) squarely addresses. Entering judgment does not eliminate Rule 15(a)'s preference for "resolving disputes on their merits." *Krupski*, 560 U.S. at 550.

BLOM argues that Rule 15(a) "does not provide a mechanism for amending pleadings after dismissal," Pet.Br.30, but that is likewise irrelevant. To the extent Rule 60(b)(6) provides the "mechanism," it is an "exception to finality" for "any reason that justifies relief." Granting leave to amend "when justice so requires," as Rule 15(a) commands, presumably informs the

reasons that "justify relief" under Rule 60(b)(6)—including providing an opportunity to amend at least once.[7]

BLOM asserts that the Second Circuit's "balancing test" conflicts with the rest of Rule 60(b) because it would permit plaintiffs to "evade those explicit time limitations in" Rule 60(b)(1) (relief given mistake or excusable neglect) and Rule 60(b)(2) (relief given new evidence). Pet.Br.31-33. But the Second Circuit has never suggested that vacatur and amendment are permissible where a complaint failed due to counsel's mistake or where a plaintiff simply wants to present new evidence over a year after judgment. Instead, a district court's failure to give plaintiffs at least one meaningful opportunity to replead may constitute extraordinary circumstances, and vacatur and amendment may be appropriate.

In *Mandala*, the Second Circuit determined which provision of Rule 60(b) applied *before* turning to the policies and standards of either Rule 60(b) or Rule 15(a): "Proper characterization of Plaintiffs' Rule 60(b) motion is a threshold issue because, as previously explained, [Rule 60(b)'s] provisions are subject to different filing limitations . . . ." 88 F.4th at 359. The Second Circuit determined that Rule 60(b)(6) was the proper rule because "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." *Id.*

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[7] BLOM contends that this Court should read Rule 60(b) with Rule 1, not Rule 15(a). Pet.Br.35-38. But Rule 1 does not negate Rule 15—to the extent Rule 1 provides any guidance here, it is its command to secure the "just" outcome.

Nor does the decision below conflict with Rule 60(b)(2), which only permits vacatur to introduce (1) newly discovered evidence (2) within a year of judgment. The Second Circuit does not permit post-judgment amendments "based on previously omitted allegations," as BLOM asserts (or evidence discovered over a year after judgment). Pet.Br.33. In fact, *Metzler* rejected an attempt to circumvent Rule 60(b)(2)'s "newly discovered evidence standard." 970 F.3d at 146. That case still required a showing of extraordinary circumstances under Rule 60(b)(6). BLOM points out that movants might introduce allegations they could have presented before, Pet.Br.33, but Rule 60(b) gives reasons for vacating a judgment—it does not limit what a party can include in an amended pleading once vacatur and leave to amend are granted.

To be clear, BLOM no longer appears to contest that Rule 60(b)(6) applies in this case. The district court itself found that Rule 60(b)(6) applied here, noting that "none of [the other provisions] are applicable" to Plaintiffs' motion for vacatur. Pet.App.12. BLOM did nevertheless argue to the panel below that Rule 60(b)(1) applied, but the circuit did not accept the argument, assessing the case under Rule 60(b)(6). *See* Pet.App.6-7. BLOM did not challenge the district court's or circuit court's application of Rule 60(b)(6) in its petition for certiorari or in their merits brief to this Court.

## IV. Extraordinary Circumstances Are Present Here Because After *Honickman II* Clarified the Previously "Ambigu[ous]" Legal Standards, Plaintiffs Were Denied Any Opportunity to Meet Them.

As this Court has explained, "[i]n determining whether extraordinary circumstances are present

[under Rule 60(b)(6)], a court may consider a wide range of factors," including "'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck*, 580 U.S. at 123 (quoting *Liljeberg*, 486 U.S. at 864). In *Mandala*, the Second Circuit noted several factors in that case that established exceptional circumstances for purposes of a motion for post-judgment amendment:

> [1] Plaintiffs have yet to be afforded a single opportunity to amend their pleading; [2] the original dismissal of the Complaint was premised on grounds subject to reasonable, actual, and vigorous debate; [3] Plaintiffs diligently prosecuted their case at all times; and [4] Plaintiffs' proposed amendments address the sole pleading deficiency identified by the district court.

88 F.4th at 365.

Plaintiffs meet all of these factors here. Denying Plaintiffs leave to amend risks injustice, as they may lose their only opportunity to have this case decided on the merits, as the statute of limitations has run on their claims. *See LeBlanc v. Cleveland*, 248 F.3d 95, 101 (2d Cir. 2001) (finding "'extraordinary circumstances' under Rule 60(b)(6), because [plaintiff] would be left without a remedy if the motion [for vacatur and leave to amend] were not granted"). And where the case is at its earliest stage, with no discovery conducted, the prejudice to BLOM is limited solely to briefing a new motion to dismiss against allegations tailored to meet the legal standards articulated by the Second Circuit and this Court in *Taamneh*. The potential burden of re-briefing a motion to dismiss is already built into Rules 15(a)(1) and (2) and is not the kind of prejudice that the Rule considers. *See, e.g.*, *Patton v. Guyer*, 443 F.2d 79, 86 (10th Cir. 1971) ("There is

invariably some practical prejudice resulting from an amendment, but this is not the test for refusal of an amendment. . . . The defendants were not prejudiced in terms of preparing their defense to the amendment.").

Indeed, courts have applied more liberal standards to motions for post-judgment amendment at early stages in the litigation. For example, the Fifth Circuit held that "the Rule 15 standards apply when a party seeks to amend a judgment that has been entered based on the pleadings," but doubted whether those standards would apply "after trial." *S. Constructors Grp. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993). *See also Duggins v. Steak 'n Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) (holding that amendment risks significant prejudice "after the close of discovery"); *Ruotolo v. City of N.Y.*, 514 F.3d 184, 187, 192 (2d Cir. 2008) (similar).

Plaintiffs have also yet to be afforded a single meaningful opportunity to amend their complaint; the basis for the original dismissal of the complaint was not merely open to "vigorous debate," *Mandala*, 88 F.4th at 365, but entirely incorrect; Plaintiffs diligently prosecuted their case, appealing and moving for vacatur expeditiously; and Plaintiffs' proposed amendments could address the actual defects in the complaint that the Second Circuit identified.

BLOM argues that no extraordinary circumstances are present here because (1) the district court's decision was affirmed on the same grounds it provided; (2) Plaintiffs waived any "right" to an amendment because they did not take the district court's invitations to amend; (3) even if the district court was wrong, a clarification or change in law is not an extraordinary circumstance; and (4) Plaintiffs are at "fault" for

failing to amend or delaying doing so. Pet.Br.39-45. The first two reasons are addressed above: the dismissal decision was premised on "the wrong legal standard," and the Second Circuit did not find that Plaintiffs "waived" any meaningful opportunities to amend.

BLOM asserts that "mere clarification of the law is not extraordinary," as it "is what appellate courts do day in and day out"—and, in fact, "this Court has held that even an outright *change* in the law does not warrant relief under Rule 60(b)(6)." Pet.Br.19 (citing *Gonzalez*, 545 U.S. at 537). But in *Gonzalez*, the change in law was made in *another* case after the case under review was decided, leading this Court to remark: "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." 545 U.S. at 537. Moreover, Mr. Gonzalez failed to show sufficient diligence because he did not "seek review of the District Court's decision" on the issue relating to his vacatur motion. *Id.*

Here the "clarification" came *in the same case*, as a result of Plaintiffs' appeal. *See Charles Schwab*, 883 F.3d at 89-90. The Second Circuit "acknowledge[d] the district court's decision came before our opinion in *Kaplan [II]* clarified the import of our earlier JASTA aiding-and-abetting precedents which may have generated some ambiguity as to the proper standard." Pet.App.40 n.11. It is manifestly unfair to expect Plaintiffs to fully understand a set of legal standards that were still being "recast[]," Oral Arg. at 13:23-38, when the district court could not.

BLOM argues in the alternative that if the Second Circuit's clarification was "in line with [Plaintiffs'] own interpretation" of JASTA, Plaintiffs "never 'explain[ed] why they did not allege facts sufficient to

satisfy the standard for which they were advocating.'" Pet.Br.41 (quoting Pet.App.17 n.5). But while Plaintiffs were indeed broadly correct about JASTA's pleading standards—a fact that BLOM argues somehow counts *against* them—they could not anticipate the evidentiary distinction newly articulated by the Second Circuit between "publicly available evidence" and "public sources."

In fact, this Court has held that even a change in law in *another* case can constitute extraordinary circumstances. *See Kemp v. United States*, 596 U.S. 528, 540 (2022) (noting "the availability of Rule 60(b)(6) to reopen a judgment in extraordinary circumstances, including a change in controlling law" and citing cases) (Sotomayor, J., concurring). For example, a change in law relating to the same incident justified reversing a three-year-old denial of certiorari, because "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules"—another recitation of the balancing test. *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-28 (1965). The Tenth Circuit also found such a change in law in another case an "extraordinary situation justifying Rule 60(b)(6) relief." *Pierce v. Cook & Co.*, 518 F.2d 720, 723-24 (10th Cir. 1975) (*en banc*). The interests of justice and demands of fairness are even more pronounced when the relevant "change in law" occurs *in the same case.*

Petitioner's fourth waiver argument is wrong as well: unlike BLOM's cases rejecting post-judgment amendments that were strategically delayed like *James* and *Rozensweig*, Plaintiffs here are not at any "fault" and did not engage in any "gamesmanship." Pet.Br.27, 33, 36, 44. They timely appealed the district court's incorrect dismissal decision and, once "[a]rmed

with [the Second Circuit's] clarifications," promptly moved for vacatur and leave to amend. There was no "undue delay"—although "delay alone, regardless of its length is not enough to bar [amendment] if the other party is not prejudiced." *Moore v. Paducah*, 790 F.2d 557, 560 (6th Cir. 1986) (quoting 3 *Moore's Federal Practice*, para. 15.08 at 15.76). As explained above, BLOM would not be unduly prejudiced by vacatur and amendment here.

## CONCLUSION

BLOM quotes extensively from *Ackermann v. United States* to argue that "'[t]here must be an end to litigation someday . . . ." Pet.Br.1, 29 (quoting 340 U.S. 193, 198 (1950)). BLOM's comparison of *Ackermann* to this case is illustrative of its arguments generally. In *Ackermann*, the petitioners sought vacatur *four years* after judgments were entered following a *trial*, in order to bring an extremely late appeal. This case has never even entered discovery. *See Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 793 n.1 (7th Cir. 2004) ("It is important to emphasize that this litigation has never progressed beyond the pleadings stage. This is not the case where a plaintiff seeks to amend its complaint after the close of discovery or on the eve of trial."). Plaintiffs *did* file a timely and necessary appeal. Dismissal here is hardly what this Court in *Ackermann* meant by "someday."

The judgment of the court of appeals should be affirmed and the case should be remanded for further proceedings.

Respectfully submitted,

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January 8, 2025