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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents barely defend the Second Circuit's ill-considered "balancing" test. As the Opening Brief explained, that outlier approach lacks any basis in Rule 60(b)(6)'s text or context. It puts Rule 60(b) at war with itself on multiple fronts. It subverts the guiding principles of the Federal Rules of Civil Procedure. And it contradicts this Court's precedents.

Those decisions confirm that Rule 60(b)(6) "is available only when Rules 60(b)(1) through (b)(5) are inapplicable." *Kemp v. United States*, 596 U.S. 528, 533 (2022). "Even then, 'extraordinary circumstances' must justify [the] reopening" of a final judgment. *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988)). And a party's "free, calculated, deliberate choices are not to be relieved from." *Ackermann v. United States*, 340 U.S. 193, 198 (1950). Rather, the party must be wholly "faultless in the delay." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993).

Respondents largely ignore these foundational principles. That is because they cannot salvage the Second Circuit's backwards approach or the mess it would make of Rule 60(b) and the Federal Rules more broadly. Instead, Respondents try to avoid the Second Circuit's analysis, insisting that the court did not actually "'jettison' the extraordinary circumstances standard" and, in fact, "d[id] not 'hold' anything." Resp.Br.22, 25 (citation omitted).

They are wrong on both points. The Second Circuit expressly abandoned the extraordinary circumstances standard, and it held that the District Court erred by applying it. In doing so, the Second Circuit

acknowledged that a "plaintiff is *ordinarily* entitled to Rule 60(b)(6) relief 'only when there are extraordinary circumstances justifying relief.'" Pet.App.7 (emphasis added; citation omitted). "But," according to the Second Circuit, the standard changes when "'vacatur is sought in order to obtain leave to file an amended complaint.'" Pet.App.7 (quoting *Mandala v. NTT Data, Inc.*, 88 F.4th 353, 361 (2d Cir. 2023)). In that case, the Second Circuit believed that "'special considerations come into play'" that "require[] [district courts] to consider Rule 60(b) finality and Rule 15(a) liberality in tandem." *Id.* (quoting *Mandala*, 88 F.4th at 361). Based on that mistaken view of the Federal Rules, the Second Circuit held that the District Court abused its discretion by evaluating Respondents' Rule 60(b) motion "under only Rule 60(b)'s standard." *Id.*

This Court should reverse and hold that the District Court acted well within its discretion when it applied Rule 60(b)(6)'s high bar to deny relief. Indeed, Respondents' suggestion that extraordinary circumstances exist here only underscores the problems with the Second Circuit's test. Everything they point to sounds in "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). As a result, Rule 60(b)(6) relief is categorically unavailable to them. Rule 60(b)(1)'s one-year deadline instead applies—and it expired before Respondents filed their motion.

Respondents' repeated and deliberate waivers also foreclose post-judgment relief. They do not dispute "that they twice declined the opportunity to amend their Complaint before [the District] Court dismissed it," only to then "waive[]" any challenge to the "'with

prejudice' aspect of the dismissal" on appeal. Pet.App.16 & n.4. Nor do they dispute that it would have been "an abuse of discretion" for the lower courts to "override a [litigant's] deliberate waiver." *Wood v. Milyard*, 566 U.S. 463, 472-73 (2012) (citation omitted). That should be the end of the matter. Respondents chose to stand or fall on their complaint as pled and unequivocally stated that they "would not seek leave to amend." Pet.App.94.

Respondents gloss over these facts by claiming that "the Second Circuit did not find any waiver." Resp.Br.23. But the District Court did, and the Second Circuit nowhere disagreed. It nonetheless refused to uphold the District Court's decision—notwithstanding the waivers—because the District Court had not given "due regard" to "the liberal amendment policy of Rule 15(a)." Pet.App.7 (quoting *Mandala*, 88 F.4th at 361). That was error. Respondents "cannot be relieved" of their litigation choices merely "because hindsight seems to indicate" that those decisions were ill-advised. *Ackermann*, 340 U.S. at 199. Thus, Rule 60(b)(6) "has no application to [this] situation." *Id.* at 202. And, because a final judgment is in place, neither does Rule 15(a).

This Court should reverse the decision below, reinstate the District Court's denial of Respondents' Rule 60(b) motion, and bring this case to an end.

ARGUMENT

I. A Party Seeking To Vacate A Final Judgment For Purposes Of Amendment Must Satisfy Rule 60(b)'s Stringent Standards.

The Second Circuit's balancing test dilutes Rule 60(b)'s exacting requirements for post-judgment relief without any basis in text, context, or precedent. Respondents ignore the glaring problems with that approach. And their arguments only highlight the flaws in the decision below.

A. Rule 60(b)(6) Requires "Extraordinary Circumstances" Not Covered by Any Other Provision of Rule 60(b).

Respondents' Rule 60(b)(6) motion should have been analyzed under Rule 60(b)(6)'s standard. This Court has consistently "required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann*, 340 U.S. at 199); *see* Pet.Br.23 (collecting cases). This Court has also long stressed that Rule 60(b)(6) is "mutually exclusive" with the other grounds for relief in Rule 60(b). *Liljeberg*, 486 U.S. at 863 n.11. The Rule's text and structure dictate both of these principles. *See* Pet.Br.23, 27-28, 31-34. Yet the decision below flouts them. And Respondents provide no basis to discard these basic requirements where plaintiffs seek to revive their case with an amended complaint.

Perhaps recognizing the Second Circuit's misstep, Respondents start off by suggesting that the court *did not* "abandon[] the 'extraordinary circumstances'

standard in favor of a nebulous 'balanc[ing]' inquiry." Resp.Br.24 (citation omitted). But that is wrong. The decision below rebuked the "ordinar[y]" Rule 60(b)(6) standard for one that "balance[s] Rule 60(b)'s finality principles and Rule 15(a)'s liberal pleading principles." Pet.App.7; *see also* Pet.App.8 (holding that the District Court's extraordinary circumstances "framework for analyzing [Respondents'] motion was erroneous as a matter of law").

That analytical mistake was compelled by Second Circuit precedent. In *Mandala*, the court acknowledged the "extraordinary circumstances" test. 88 F.4th at 361. But then it cast that standard aside to hold that, when a plaintiff seeks to amend, a district court abuses its discretion by "denying post-judgment relief" based solely on the movant's "failure to demonstrate adequate grounds for relief under Rule 60." *Id.* at 362 & n.5. That makes no sense. As Judge Sullivan countered in his *Mandala* dissent, "it is beyond cavil that a party's failure to demonstrate extraordinary circumstances is *alone* a sufficient justification for denying postjudgment relief under Rule 60(b)(6)." *Id.* at 369 n.2 (Sullivan, J., dissenting). That is, after all, the standard for Rule 60(b)(6) relief. And it is the standard that should have applied here.

Respondents then later pull an about face, acknowledging that the Second Circuit *did* apply a "balancing test" that imports "the policies embodied in Rule 15(a)" into the vacatur analysis. Resp.Br.25 (quotation marks omitted). But they offer no persuasive defense of that misguided approach.

1. The Second Circuit's Balancing Test Lacks Any Precedential Support.

Respondents cannot ground the Second Circuit's balancing test in the text or context of Rule 60(b)(6). Accordingly, they spend over a dozen pages meandering through caselaw (at 25-38) in an effort to downplay the novelty of that outlier position. But they concede that other decisions are "out of step" with the Second Circuit's interpretation. Resp.Br.33. And Respondents do not rely on any case that helps them.

Respondents fumble (at 27) for support in *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010). But that case addressed the scope of "relation back under Rule 15(c)(1)(C)," as defined by "the text of the Rule." *Id.* at 541, 547. *Krupski* said nothing about the proper standard for reopening a judgment under Rule 60(b). That is the Rule that governs "Relief from a Final Judgment, Order, or Proceeding." Fed. R. Civ. P. 60(b).

Respondents also double down (at 26-27) on *Foman v. Davis*, 371 U.S. 178 (1962). But they concede that case involved a motion "under Rule 59(e), not Rule 60(b)." Resp.Br.27 n.3. As explained in the Opening Brief, that distinction matters. *See* Pet.Br.34-35. And while Respondents try to characterize the specific rule in *Foman* as "completely irrelevant to this Court's analysis," Resp.Br.27 n.3, that is not true. The proper standard for a Rule 60(b) motion was not before the *Foman* Court, and Rule 59(e) and Rule 60(b) impose "different standards" for relief "by their own terms." *Daulatzai v. Maryland*, 97 F.4th 166, 177 (4th Cir. 2024). Hence, the Rule 59(e) motion in *Foman* was "not controlled by the same exacting substantive requirements" codified in Rule 60(b)'s text. *Priester v.*

JP Morgan Chase Bank, N.A., 927 F.3d 912, 913 (5th Cir. 2019) (quotation marks omitted).

Nor is it surprising that the standards would differ between the two rules. They serve markedly different functions. A Rule 59(e) motion operates as "a limited continuation of the original proceeding" and plays "a part [in] producing the final judgment," whereas a Rule 60(b) motion "threaten[s] an already final judgment with successive litigation." *Banister v. Davis*, 590 U.S. 504, 519, 521 (2020); *see* Pet.Br.34-35. Rule 60(b) thus naturally poses a higher bar for relief.

Respondents next trumpet (at 29-31, 33, 35-38) a parade of lower court decisions. But those cases, obviously, do not control this Court's analysis. And most of them similarly addressed Rule 59(e) motions, not Rule 60(b) motions.[1] So, they are simply off-point as well. Rules 59(e) and 60(b) are not fungible, and Respondents fail to offer any reason to merge the two textually and functionally distinct rules into one.

Nor do any of the few 60(b) cases that Respondents lean on (at 29-30) provide them any support. Those decisions merely recognize that the Rules' drafters already balanced the needs for "finality" and "justice"

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[1] *See, e.g.*, *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 523 (7th Cir. 2015); *NewSpin Sports, LLC v. Arrow Elecs., Inc.*, 910 F.3d 293, 299 (7th Cir. 2018); *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 248-49 (3d Cir. 2016); *Jang v. Bos. Sci. Scimed, Inc.*, 729 F.3d 357, 368 (3d Cir. 2013); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *S. Constructors Grp. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993); *see also Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 184 (5th Cir. 2018).

in Rule 60(b) itself. *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (citation omitted). None suggests that courts should then smuggle in Rule 15(a)'s liberal repleading principles as an additional variable to tip the scales against finality under Rule 60(b). The Second Circuit stands alone by imposing that extratextual requirement.[2]

Respondents also rely heavily on *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014). But that was a Rule 60(b)(1) case, not a Rule 60(b)(6) case. *See id.* at 743. And it only further illustrates why Respondents are wrong here. Like every other Court of Appeals, *see* Pet.Br.21 n.3, the Eighth Circuit there held that courts may grant leave to amend only if doing so "is consistent with the stringent standards governing the grant of . . . Rule 60(b) relief," 752 F.3d

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[2] Other decisions cited by Respondents do not address either Rule 59(e) or Rule 60(b) motions. *See, e.g.*, *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-28 (1965); *Jack v. Evonik Corp.*, 79 F.4th 547, 565 (5th Cir. 2023); *Tate v. SCR Med. Transp.*, 809 F.3d 343, 346 (7th Cir. 2015); *Calvary Christian Ctr. v. City of Fredericksburg*, 710 F.3d 536, 539-41 (4th Cir. 2013); *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 998 (9th Cir. 2011); *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 790-91 (7th Cir. 2004); *Duggins v. Steak 'n Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999); *Moore v. City of Paducah*, 790 F.2d 557, 559-60 (6th Cir. 1986); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Delta Refin. Co.*, 277 F.2d 694, 697 (6th Cir. 1960); *Marranzano v. Riggs Nat'l Bank*, 184 F.2d 349, 351 (D.C. Cir. 1950). Nor do any of them deal with circumstances like these, in which Respondents engaged in a "documented series of deliberate choices not to cure the deficiencies identified in their pleading" prior to dismissal. Pet.App.19; *cf. Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008) (no waiver by plaintiff, who filed a combined Rule 59(e) and 60(b) motion just a week after the district court terminated the case without warning).

at 743. It then affirmed the district court's denial of post-judgment relief where, as here, the plaintiff "knew many months prior to the Order of Dismissal of the possible need to amend its pleading and elected to 'stand or fall'" on its complaint. *Id.* at 744; *see* Pet.App.15-18. The Second Circuit should have reached the same result.

Finally, Respondents cobble together (at 37) a trio of this Court's precedents that have nothing to do with the question presented in this case. None even mentions Rule 60(b), let alone purports to analyze the proper standard for a plaintiff seeking relief from a final judgment. Nor did they have occasion to do so. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007), this Court merely remanded for application of a legal standard to the facts alleged. In *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009), this Court confronted an "interlocutory appeal," not an appeal from a final judgment. And in *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014), this Court "reversed" an improper dismissal, meaning there was no longer a final judgment on remand.

Here, by contrast, Respondents seek to set aside a dismissal with prejudice that was affirmed on appeal. Pet.App.49-53. A final judgment remains in place. Thus, Respondents must "satisfy one of the Rule 60(b) grounds *before* [the] court may consider [a] motion to amend." *Daulatzai*, 97 F.4th at 178. "The permissive policy favoring amendment under Rule 15 [is] simply not relevant" until they make that showing. *Garrett v. Wexford Health*, 938 F.3d 69, 86 (3d Cir. 2019). The Second Circuit erred in holding to the contrary.

2. Respondents' Other Arguments Are Meritless.

Beyond citing inapposite precedents, Respondents say little else to defend the decision below. They do not suggest that the Second Circuit's outlier approach finds any support in Rule 60(b)'s text. They do not rely on the Rule's history or structure. They do not dispute that the decision below thwarts the "speedy" and "inexpensive" resolution of claims. Fed. R. Civ. P. 1. And they do not explain how it is "just" to relieve plaintiffs from their own litigation choices—which would burden both defendants and the courts with duplicative litigation. *Id.*; *see* Pet.Br.37; *Mandala*, 88 F.4th at 369 (Sullivan, J., dissenting).

Nor do Respondents grapple with the many ways in which the Second Circuit's balancing test clashes with other provisions of Rule 60(b). *See* Pet.Br.31-34. They do not dispute that it enables plaintiffs to evade Rule 60's strict time limitations where allegations are omitted by "excusable neglect." Fed. R. Civ. P. 60(b)(1), (c)(1). Nor do they explain why plaintiffs could wield Rule 60(b)(6) to introduce previously available facts years after judgment, when Rule 60 elsewhere limits relief to matters "newly discovered" within a year of judgment that "could not have been discovered" before with "reasonable diligence." Fed. R. Civ. P. 60(b)(2). The Second Circuit's test invites that internal inconsistency. *See Mandala*, 88 F.4th at 365 (ordering vacatur and amendment "based on information that was publicly available for years prior to the filing of the Complaint").

As to mistake, Respondents claim that "the Second Circuit has never suggested that vacatur and

amendment are permissible where a complaint failed due to counsel's mistake." Resp.Br.43. But, even setting aside the fact that Rule 60(b)(1) is not limited to counsel's mistakes, *see Kemp*, 596 U.S. at 534-35, the Second Circuit has required just that. It deployed its balancing test in *Mandala* to compel the reopening of a final judgment, even though the "vacatur motion ar[ose] from a legal mistake based on insufficient pleading." 88 F.4th at 360. That is precisely Respondents' theory here too—that they made a legal mistake as to which facts they needed to allege to satisfy JASTA's statutory standard. *See* Resp.Br.45.[3]

Retreating from Rule 60(b), Respondents note that Rule 15 "contemplates two stages of amendment—before trial and during or after trial." Resp.Br.42. Yet, they fail to explain why that might bear on the threshold vacatur inquiry, which necessarily occurs in the post-*judgment* context. At that point, "[t]he suit is over." *Peña v. Mattox*, 84 F.3d 894, 903 (7th Cir. 1996). "There is no complaint to amend." *Id.* And Respondents concede "that Rule 15(a) 'does not provide a mechanism for amending pleadings after dismissal.'" Resp.Br.42 (quoting Pet.Br.30). Rather, Rule 60(b) defines the "limited set of circumstances" that might allow the losing party to "request reopening of his case." *Gonzalez*, 545 U.S. at 528.

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[3] To be clear, Respondents' proposed amendments *still* fail to meet JASTA's pleading standards under this Court's decision in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), and the Second Circuit's own precedents. That question is not presented here because the District Court correctly instructed the parties not to address futility (a Rule 15 question) until Respondents first demonstrated that they could justify vacatur under Rule 60(b)(6)—which they could not. *See* Pet.App.11, 13; JA.509.

While Respondents baldly insist that Rule 15(a) lurks in the background to "presumably inform[] the reasons that 'justify relief' under Rule 60(b)(6)," Resp.Br.42-43, that is simply wrong. "As long as the judgment remains in effect, Rule 15(a) is inapposite." *Fisher v. Kadant, Inc.*, 589 F.3d 505, 508-09 (1st Cir. 2009).

If anything, Respondents' invocation of Rule 15(b) refutes their approach. That Rule contemplates two types of late-breaking amendments, neither of which applies here. *First*, if a party objects that its opponent's evidence at trial deviates from the pleadings, then the "court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." Fed. R. Civ. P. 15(b)(1). *Second*, "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." Fed. R. Civ. P. 15(b)(2). In that situation, "[a] party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue." *Id.*[4] Rule 15 thus contemplates a single, narrow, consent-based ground for a party to amend "after judgment." *Id.* In turn, the "traditional rule" of *expressio unius est exclusio alterius* confirms that Rule 15 does not apply to any other post-judgment efforts to amend. *Bittner v. United States*, 598 U.S. 85, 94 (2023). Rather, post-

[4] A "failure to amend does not affect the result of the trial of that issue." Fed. R. Civ. P. 15(b)(2). But amendment can be "useful in clarifying the record on appeal or in determining the preclusive effects to be given to the judgment." 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.18[1] (3d ed. 2024).

judgment relief falls squarely within the bailiwick of Rule 60(b).

Taking a slightly different tack, Respondents insist that "[p]laintiffs should have the opportunity to have their case adjudicated on the merits." Resp.Br.24. But they did, in fact, have their case decided on the merits: A final "dismissal with prejudice" *is* an "adjudication on the merits." *Lomax v. Ortiz-Marquez*, 590 U.S. 595, 601 (2020) (quotation marks omitted). Respondents merely lost that merits battle. Along the way, they deliberately chose to stand on their complaint. They declined to appeal the "with prejudice" aspect of the dismissal. Then they lost again on appeal. As a result, they cannot reopen the judgment to pursue an amended complaint unless they satisfy the strictures of Rule 60(b).

In short, where a losing party seeks leave to file an amended complaint following a final judgment, it must first clear Rule 60(b)'s deliberately high hurdle for setting aside that judgment. The Second Circuit erred in collapsing these two inquiries into a single, nebulous balancing test.

B. Respondents Concede that Rule 60(b)(6) Provides No Basis for Relief from a Party's Voluntary Litigation Choices.

Respondents likewise cannot square the Second Circuit's approach with basic principles of waiver. Indeed, they do not contest that it would be an abuse of discretion for a court to "excuse a party's voluntary waiver of a court's invitation to amend." Pet.Br.28; *see Wood*, 566 U.S. at 472-73.

It could hardly be otherwise. Our adversarial system of justice "is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) (citation and brackets omitted). Thus, where a plaintiff makes a "voluntary" choice to rest on their pleadings—thereby waiving the opportunity to amend their complaint—Rule 60(b)(6) provides no recourse. *Ackermann*, 340 U.S. at 200.

That principle applies with equal force to forfeitures in the context of Rule 60(b)(6). Rule 60(b) makes clear that if a party is even "partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Pioneer Inv. Servs.*, 507 U.S. at 393. That party cannot "seek relief more than a year after the judgment by resorting to subsection (6)." *Id.*; *see* Pet.Br.27-28.

Respondents do not contest this either. Yet, the Second Circuit's balancing test contravenes that framework. It enables plaintiffs to obtain relief through Rule 60(b)(6) even when they "were repeatedly apprised" prior to judgment of the "precise pleading defect" that led to dismissal. *Mandala*, 88 F.4th at 368 (Sullivan, J., dissenting); *see also* Pet.App.19 (similar). Granting such a mulligan to plaintiffs who caused their own predicament defies the text and structure of Rule 60(b).

None of this is to suggest that Rule 60(b) can *never* provide an avenue for plaintiffs seeking to set aside a judgment to pursue an amended complaint. But the

Rule itself sets the parameters for doing so. For instance, if a plaintiff's belated allegations were omitted because of its "inadvertence" or "excusable neglect," then Rule 60(b)(1) provides a year in which to seek relief. Fed. R. Civ. P. 60(b)(1), (c)(1). The same goes for "newly discovered evidence" that could not have been found earlier with "reasonable diligence." Fed. R. Civ. P. 60(b)(2). And so too for a "mistake" made by either the court or the parties or their attorneys—whether that be an "error[] 'of law or fact.'" *Kemp*, 596 U.S. at 534 (quoting *Black's Law Dictionary* 1195 (3d ed. 1933)); *see* Fed. R. Civ. P. 60(b)(1). A party can also seek relief under Rule 59(e)'s more forgiving standard within 28 days of judgment. Or, in rare cases, truly extraordinary circumstances outside the party's control might justify relief under Rule 60(b)(6). *Cf. Klapprott v. United States*, 335 U.S. 601, 613-15 (1949) (lead op.).

But what plaintiffs cannot do is what Respondents did here—waive multiple opportunities to amend, litigate the matter to final judgment, drag their opponent through an unsuccessful appeal, and then try to use Rule 60(b)(6) to start the process all over. "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann*, 340 U.S. at 198.

II. Respondents Cannot Satisfy Rule 60(b)(6).

Under the proper Rule 60(b)(6) standard, this is a straightforward case. Petitioner repeatedly emphasized that the complaint failed to allege that the bank was aware of a link between the Three Customers and Hamas "at the time" it provided the customers routine banking services. Pet.App.109;

JA.145; JA.175-77; JA.249-51. On multiple occasions, the District Court afforded Respondents the opportunity to cure any deficiencies in their pleadings through amendment. Pet.App.93-94; Pet.App.124-25. And, each time, Respondents "expressly declined" the invitation. Pet.App.17-18.

The District Court then dismissed their complaint, explaining that it failed to plausibly allege Petitioner "was aware of a connection between the Three Customers and Hamas at the time." Pet.App.74-75. The Second Circuit affirmed, "because the allegations do not support an inference that [Petitioner] was aware of the Three Customers' ties with Hamas prior to the relevant attacks." Pet.App.49. Only then did Respondents seek to reopen the judgment to file an amended complaint—in direct contradiction to their prior position that they "would not seek leave to amend." Pet.App.94.

This is thus a classic case of litigator's remorse, for which Rule 60(b)(6) provides no relief. Through sophisticated counsel, Respondents repeatedly waived or forfeited opportunities to amend their complaint in both the District Court and the Court of Appeals. These litigation choices led to dismissal with prejudice and affirmance on appeal. And Respondents have not "show[n] 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann*, 340 U.S. at 199); *see* Pet.App.14-19. The District Court certainly did not abuse its discretion in reaching that conclusion.

Respondents conspicuously fail to address this deferential standard of review anywhere in their brief.

And their last-ditch effort (at 44-49) to demonstrate extraordinary circumstances falls flat.

To start, Respondents insist that they "have yet to be afforded a single opportunity to amend their complaint." Resp.Br.45 (citation omitted). That is categorically false. They "twice expressly declined the opportunity to amend their complaint prior to the [District] Court's decision." Pet.App.10. And Respondents did not challenge the "with prejudice" aspect of the dismissal during their first appeal. Pet.App.16 n.4. Those decisions were "calculated and deliberate," and Respondents "cannot be relieved" from the consequences of those voluntary choices through Rule 60(b)(6). *Ackermann*, 340 U.S. at 198; *see* Pet.App.19.

Respondents elsewhere concede there is nothing "extraordinary" about dismissing a complaint where "the plaintiff has had a meaningful chance to amend." Resp.Br.34. And their claim that the multiple chances they received were not "meaningful" is flatly incorrect. Resp.Br.46. Prior to dismissal, they were consistently apprised of the timing mismatch between their allegations of general awareness and Petitioner's alleged provision of banking services. *See* Pet.App.19. Petitioner raised this argument in its pre-motion letter, *see* JA.144-45, in its memorandum of law supporting the motion to dismiss, *see* JA.160-61, 174-85, and in its statements at oral argument, *see* Pet.App.108-09. Yet, Respondents chose not to amend.

This requirement of contemporaneous awareness was also nothing new. It traces directly to *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which both Congress and the Second Circuit had already

recognized as providing the "proper legal framework" for JASTA liability. *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018) (quoting JASTA, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, 852 (2016)). In fact, Respondents *themselves* urged the court to apply the *Halberstam* framework—and acknowledged its requirement that "the defendant must be generally aware of his role . . . *at the time* he provides the assistance." JA.210 (emphasis added) (quoting *Halberstam*, 705 F.2d at 477). Respondents have never "explain[ed] why they did not allege facts sufficient to satisfy the standard for which they were advocating." Pet.App.17 n.5. Nor have they argued "that any of their proposed new allegations were unavailable to them when given the opportunity to amend." Pet.App.15. At best, their tactical decisions not to amend were the result of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). And they were time-barred from reopening on that basis. *See* Fed. R. Civ. P. 60(c)(1). They cannot end-run those limitations via Rule 60(b)(6). *See Kemp*, 596 U.S. at 533; *Pioneer Inv. Servs.*, 507 U.S. at 393.[5]

Respondents next argue that the District Court's "dismissal decision was premised on 'the wrong legal

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[5] Respondents misconstrue (at 44) this interplay between 60(b)(1) and 60(b)(6). Petitioner has explained at length why "Respondents cannot satisfy Rule 60(b)(6)'s stringent standard." Pet.Br.38-45 (capitalization altered). And that is in part because Respondents' Rule 60(b)(6) motion is, at best, "based on grounds specified in clause (1)." *Liljeberg*, 486 U.S. at 863 n.11. Accordingly, they cannot avail themselves of Rule 60(b)(6)'s "any other reason" language. *Id.* (citation omitted); *see* Fed. R. Civ. P. 60(b)(6); Pet.Br.1, 16-17, 27-29, 31-33, 43-44.

standard.'" Resp.Br.47. But that argument similarly runs straight into the teeth of Rule 60(b)(1), which "covers all mistakes of law made by a judge." *Kemp*, 596 U.S. at 534. Rule 60(b)(6) is thus inapplicable. *See id.* at 533.

Moreover, any supposed legal errors cannot excuse Respondents' waivers here because the District Court did not articulate *what* standard it would apply until it issued its decision. That decision came *after* Respondents proclaimed they "would not seek leave to amend" and *after* they confirmed "[t]here are no facts that [they] would have" to address the deficiencies Petitioner identified—including the lack of allegations supporting awareness. Pet.App.94, 125. Respondents' allegations on this front were deficient in both the eyes of the District Court and the Second Circuit. And the "[District] Court's ruling that [Respondents'] complaint d[id] not plausibly allege that [Petitioner] was generally aware of any connection between the Three Customers and Hamas [was] not meaningfully different from the Second Circuit's ruling as to this same basis for affirming th[e] Court's dismissal." Pet.App.15 n.3 (quotation marks omitted); *see* Pet.App.49-52.

To the extent the two decisions differed, any "clarification" by the Second Circuit did not compel the District Court to reopen its affirmed final judgment. Congress did not amend JASTA, and the Second Circuit's decision in the first appeal did not overrule prior precedents. It merely applied the statutory text and existing caselaw to the facts alleged. Thus, there was no change in law. Respondents instead argue only that the District Court "*misapplied* controlling law."

Resp.Br.12 (emphasis added). In *Kemp*, this Court held that this precise type of attack on a final judgment falls within Rule 60(b)(1), not Rule 60(b)(6). *See* 596 U.S. at 535 n.2 ("Kemp alleged that the District Court erred by misapplying controlling law[.]"); *see also* Pet.Br.32-33, 40-41.[6]

Further, to the extent Respondents claim they "could not anticipate" the Second Circuit's ruling, Resp.Br.48, that too is just another way of saying they were "surprise[d]," made a pleading "mistake," or failed to include the allegations previously available to them because of "inadvertence" or "excusable neglect." Fed. R. Civ. P. 60(b)(1). All of those grounds for relief are explicitly covered by Rule 60(b)(1), and thus fall outside Rule 60(b)(6)'s "other reason" language.

In any event, this case pales in comparison to those few extraordinary cases where this Court has found Rule 60(b)(6) relief appropriate. In *Klapprott*, for example, the petitioner sought to set aside a default judgment renouncing his citizenship, because he had been "weakened from illness," unable to obtain counsel, "wrongfully" detained, and then imprisoned by "his adversary in the denaturalization proceedings," with "no reasonable opportunity" to defend himself. 335 U.S. at 607-08, 613-15. In

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[6] Respondents insist (at 48) that an outright change in law might sometimes justify post-judgment relief. But this Court has made clear that a change in law is not *per se* "extraordinary." *See Gonzalez*, 545 U.S. at 536-37. Whether it ever can be a basis for 60(b)(6) relief, as opposed to a "'mistake' under Rule 60(b)(1)," is an open question. *Kemp*, 596 U.S. at 535 n.2. Regardless, because the law here did not change and Respondents argue only that the District Court "misapplied controlling law," this Court need not address the issue.

Liljeberg, the judge who presided over a bench trial "inexcusabl[y]" failed to recuse himself, despite an "obvious conflict of interest" that the movant could not reasonably discover. 486 U.S. at 850, 863-66 & n.11. And in *Buck v. Davis*, the petitioner "identified 11 factors" in his capital murder case—including the introduction of expert evidence suggesting "the color of [his] skin made him more deserving of execution," the State's confession of error in similar cases, and changed controlling law that removed a procedural "bar[]" to habeas review—which could collectively warrant relief. 580 U.S. 100, 113, 118-26 (2017).

This case is a far cry from those. Respondents "had ample opportunity to pursue all legal avenues available to them for relief," but simply chose not to pursue them. Pet.App.16. They are hardly "faultless in the delay." *Pioneer Inv. Servs.*, 507 U.S. at 393. That precludes them from obtaining relief under Rule 60(b)(6), and the District Court certainly did not abuse its discretion by denying Respondents' motion.

Switching gears, Respondents assert that the "burden of re-briefing a motion to dismiss" is "not the kind of prejudice" contemplated *by Rule 15(a).* Resp.Br.45. Again, though, Respondents needed to satisfy *Rule 60(b)'s* "more restrictive standard" for vacating the final judgment "before consideration [could] be given to [a Rule 15(a)] motion to amend." *Daulatzai*, 97 F.4th at 179. Those two Rules pose separate inquiries. *See* Pet.Br.20-38. In any case, Respondents waived multiple opportunities to amend, and the "federal rule of waiver does not include a prejudice requirement." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 419 (2022). Even if it did, Petitioner

would clearly suffer prejudice if the Court were to nullify a final judgment—secured after costly motions practice and then successfully defended in a protracted appeal—so that Respondents could pursue a strategy they repeatedly rebuffed. That is not how federal litigation works.

Nor can Respondents dispute that they made a "series of deliberate choices" not to amend. Pet.App.19. They try to duck that inescapable conclusion as one "not accepted by the panel below." Resp.Br.23. But the District Court made that factual finding, and the Second Circuit did not disturb it. Nor could it, because Respondents waived or forfeited at least five opportunities to amend—each of which suffices to bar relief.

First, the District Court asked Respondents at the pre-motion conference if they wanted the "opportunity to amend" to plead "additional facts" based on Petitioner's arguments. Pet.App.93. Respondents' counsel replied "No," and he averred that they "would not seek leave to amend" if the pleadings fell short. Pet.App.94. That is a textbook waiver.

Second, the District Court asked at oral argument on the motion to dismiss whether "everything [it] need[ed] to consider in terms of sufficiency of [the] pleading [was] going to be found in the complaint." Pet.App.124. Respondents' counsel answered "Yes, Your Honor." Pet.App.125. Another textbook waiver.

Third, Respondents opted not to file a Rule 59(e) motion after the District Court's decision. Doing so would have enabled the court to consider a proposed amended complaint and "fix any mistakes" that

Respondents believed the court made, "before a possible appeal." *Banister*, 590 U.S. at 516.

Fourth, Respondents "never appealed the 'with prejudice' aspect of the dismissal, and accordingly, waived it." Pet.App.16 n.4. Yet they seek the same relief that such an appeal could have provided, while tacitly conceding that Rule 60(b)(6) "cannot be used as a substitute for appeal." Pet.Br.44 (citation omitted).

Fifth, Respondents continued to sit on their hands before the Second Circuit, even though they admit that "asking the circuit for leave to amend [was] permissible." Resp.Br.40. They forfeited that opportunity in their opening brief; they forfeited it in their reply brief; they forfeited it at oral argument; and they forfeited it in their supplemental brief.

* * *

In the end, the Second Circuit's balancing test collapses under the weight of text, context, structure, and precedent. The proper inquiry for this Rule 60(b)(6) motion is the one that has always applied to Rule 60(b)(6) motions: Respondents had to "show 'extraordinary circumstances,'" not covered by any other provision of the Rule, that were beyond their control and that would "justify[] the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (citation omitted). They failed to meet that high bar.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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