

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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BLOM BANK SAL, )  
Petitioner, )  
v. ) No. 23-1259  
MICHAL HONICKMAN, ET AL., )  
Respondents. )  
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Pages: 1 through 61

Place: Washington, D.C.

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Petitioner, )

v. ) No. 23-1259

MICHAL HONICKMAN, ET AL., )

Respondents. )

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Washington, D.C.

Monday, March 3, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

MICHAEL H. MCGINLEY, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

MICHAEL J. RADINE, ESQUIRE, Hackensack, New Jersey; on behalf of the Respondents.

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P R O C E E D I N G S

(10:56 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 23-1259, BLOM Bank versus Michal Honickman.

Mr. McGinley.

ORAL ARGUMENT OF MICHAEL H. MCGINLEY  
ON BEHALF OF THE PETITIONER

MR. MCGINLEY: Mr. Chief Justice, and may it please the Court:

This Court has long held that Rule 60(b)(6) requires extraordinary circumstances to reopen a final judgment and those circumstances cannot be the result of the movant's own strategic choices.

The Second Circuit has diluted that stringent standard. In its view, courts must also give effect to Rule 15(a)'s liberal repleading policy when considering a 60(b)(6) motion seeking to replead.

That outlier view is wrong. It has no basis in law or logic. Rather than blurring the two rules, the proper approach is to keep them separate. If this Court's well-settled test for 60(b)(6) is met, then Rule 15 comes into play.

1           Collapsing the two steps undermines  
2           finality. It creates inherently -- an  
3           inherently contradictory test. It invites  
4           inefficient, repetitive, and costly litigation  
5           that is at odds with the Federal Rules'  
6           overriding objectives.

7           Here, Respondents do not qualify for  
8           Rule 60(b)(6) relief. They declined multiple  
9           opportunities to amend their complaint in both  
10          the trial court and on appeal. Instead, they  
11          made the tactical choice to stand on their  
12          pleadings even when the Second Circuit ordered  
13          supplemental briefing after the Kaplan decision.

14          As a result, they received a final  
15          judgment that was affirmed on appeal. Now they  
16          seek to restart that process all over again.  
17          Doing so would effectively treat the Second  
18          Circuit's original decision as an advisory  
19          opinion. And Respondents have offered no  
20          justification other than that they mistakenly  
21          believed that their -- that their original  
22          complaint was sufficient. That hardly qualifies  
23          as extraordinary circumstances.

24          It is litigator's remorse, and that is  
25          not enough for Rule 60(b)(6) relief. This Court

1 should reverse and bring this case to an end.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Respondent seems to  
4 have premised its argument on its view of the  
5 earlier Second Circuit opinion, that it  
6 announced a new rule. What do you think of  
7 that?

8 MR. MCGINLEY: That's not true, Your  
9 Honor. There's no change in law here. Instead,  
10 I would point you to my friend's brief on page  
11 12 where they admit that it was just the  
12 application of controlling law to their set of  
13 facts.

14 I would also mention, Your Honor, that  
15 what happened in this case is this case and  
16 Kaplan were decided in close proximity to each  
17 other both in the district court and in the  
18 Second Circuit. When we went to oral argument  
19 in the Second Circuit in this case, Kaplan had  
20 already been argued.

21 I would point you to page 300 of the  
22 JA, where the court in our case said to my  
23 friend on the other side: You're aware that  
24 Kaplan is sub judice before this court. You're  
25 also aware, I believe, that the detailed

1 allegations in Kaplan are quite different than  
2 what are at issue here in -- in Honickman. What  
3 are we to do?

4 What the court ended up doing is  
5 holding Honickman in abeyance until Kaplan was  
6 decided. At that point, my friend on the other  
7 side was fully aware that at least one member of  
8 that court thought that their allegations were  
9 lacking under -- as compared to Kaplan.

10 The court ordered supplemental  
11 briefing. At that time, they were fully  
12 capable -- and they admit this on page 40 of  
13 their brief -- of asking the court to -- to  
14 simply remand for them to replead if they -- if  
15 the court thought that their pleadings in this  
16 case weren't sufficient under the rule that was  
17 announced in Kaplan.

18 In fact, that's what happened in the  
19 last ATA/JASTA case that was in front of this  
20 Court. This Court might remember that in the  
21 Twitter case, it also had a companion case  
22 called Gonzalez versus Google.

23 And at oral argument in the Google  
24 case, Justice Barrett asked the plaintiff's  
25 attorney: If we were to rule against your

1 client in the Twitter case, what would we --  
2 what would you want us to do in this case? And  
3 the attorney in that case said: We would ask  
4 you to remand so that we could attempt to  
5 replead.

6 The Court ended up doing that in the  
7 Google case. It, of course, pointed out that  
8 even in that case, the plaintiff had -- had  
9 possibly waived their ability to amend because  
10 they -- they sought review rather than amending  
11 when the court gave them the opportunity to.  
12 But that shows that they could have done that in  
13 this case.

14 There was no controlling law. It was  
15 a mere application. If they had wanted another  
16 opportunity in the most efficient way that would  
17 have made sense, they could have done exactly  
18 what the attorney in Google did. And they --  
19 not only could they have done that at oral  
20 argument, when Judge Wesley, at page 300 of the  
21 JA, pointed out that their pleadings came  
22 nowhere close to Kaplan, they had a brief that  
23 they could have filed in -- in the case, that --  
24 that they did file where they didn't ask to  
25 replead. Instead, they said exactly what they



1 said in the district court, which is: We're  
2 happy to go forward on our pleadings. Please  
3 render a judgment in our case.

4 Having done that, that is their  
5 tactical choice. Under Ackermann and a number  
6 of other cases from this Court, it's clearly not  
7 enough to come in and say, under Rule 60(b)(6),  
8 oops, I made a mistake, I want a chance to -- to  
9 replead now.

10 That makes sense with the structure of  
11 the rules. In Liljeberg and a number of other  
12 cases including Crosby, this Court said the  
13 reason you can't have a mistake or excuse,  
14 excusable neglect, or some inadvertence that  
15 justifies 60(b)(6) relief is because all of  
16 those things are available under (b)(1) and  
17 (b)(1) has a very strict one-year limitations  
18 period.

19 JUSTICE SOTOMAYOR: Counsel, you're  
20 addressing a question that wasn't the question  
21 presented. The question presented was, does  
22 15(b) get folded into 60(b) the way the Second  
23 Circuit said? And the answer to that, you're  
24 asking us to say, is no. But you were asked --  
25 in answering Justice Thomas, you want us to go a

1 step further and actually look at the facts here  
2 and say they weren't extraordinary  
3 circumstances, correct?

4 MR. MCGINLEY: I'd say a few things on  
5 that, Your Honor. So, in -- in our petition and  
6 in the merits papers here, we fully raised the  
7 merits question of whether or not they're  
8 entitled to relief. I'd point you to page 13  
9 and 26 of our cert papers.

10 JUSTICE SOTOMAYOR: But that wasn't  
11 addressed below. The court below did not say  
12 whether or not it thought 60(b) was met.

13 MR. MCGINLEY: I actually disagree  
14 with that, Your Honor. So, certainly, in the --  
15 starting in the district court, what the  
16 district court did was it correctly said -- and  
17 this is consistent --

18 JUSTICE SOTOMAYOR: I know what it  
19 did. It did what you think is right. It  
20 applied 60(b).

21 MR. MCGINLEY: Correct.

22 JUSTICE SOTOMAYOR: When it got to the  
23 Second Circuit, the Second Circuit says you  
24 apply 60(b) by looking at 15(b), correct?

25 MR. MCGINLEY: That's correct.

1 JUSTICE SOTOMAYOR: And what you're  
2 saying is no, they shouldn't have. Did they  
3 look at this without the 15(b) lens? Did the  
4 Second Circuit look at it?

5 MR. MCGINLEY: So that's how it was  
6 presented and argued in the Second Circuit  
7 because Mandala had not yet been decided. So it  
8 was fully aired in the Second Circuit. When the  
9 Second Circuit rendered its decision in this  
10 case, the only error that it pointed out was  
11 what it perceived to be the legal error of not  
12 considering 15(a).

13 And I want to point you to -- there's  
14 a footnote in the Second Circuit's decision that  
15 I think is quite telling on this. The Second  
16 Circuit couldn't even bring itself to say there  
17 was an abuse of discretion here. What the  
18 Second Circuit said is we're not saying there's  
19 an abuse of discretion; we're saying that the  
20 district court exceeded its discretion  
21 because -- solely because it made this legal --  
22 legal error.

23 And I think that's because the Second  
24 Circuit realized there's nothing that remotely  
25 approaches extraordinary circumstances here.

1 I would also --

2 JUSTICE GORSUCH: Mr. McGinley, I'd  
3 like to point you in a little different  
4 direction.

5 MR. MCGINLEY: Sure.

6 JUSTICE GORSUCH: So I understand your  
7 argument that 60(b) doesn't require  
8 consideration of Rule 15. Does it preclude it?  
9 I mean, could a district court in its discretion  
10 take into account a possible need -- or leave --  
11 leave to amend might be appropriate? I mean,  
12 60(b)(6) says something like any other reason  
13 that justifies relief.

14 And you can imagine a district court  
15 who perhaps sua sponte got a little fast out of  
16 the gate and dismissed a case with prejudice.  
17 Thirty days passes; 59's out the door.  
18 Plaintiff comes in and says: I've got a good --  
19 I've got a good amended complaint here.

20 Could -- couldn't a district court in  
21 its discretion take into account the policies of  
22 15 in those circumstances?

23 MR. MCGINLEY: So a few answers on  
24 that, Your Honor. The first --

25 JUSTICE GORSUCH: How about pick your

1 best one.

2 MR. MCGINLEY: Okay. So my best one  
3 is: No if it's under 60(b)(6), because what  
4 60(b)(6) says is it -- that it has to be  
5 something other than what's available under the  
6 other subsections of 60(b).

7 The -- the hypothetical that you posit  
8 there seems to me like maybe there's an argument  
9 under (b)(1). Maybe there's an argument that  
10 somebody made a mistake, there was inadvertence,  
11 there was surprise. If that's brought within  
12 the one-year limitation for (b)(1), then it  
13 might be available.

14 And I think that's what you see in  
15 these 59(e) cases under Foman, is that the court  
16 is saying very close in time, before there's  
17 been an appeal.

18 In 59(e), of course, the Court points  
19 out in Banister what happens is the judgment is  
20 actually suspended for a period of time. And so  
21 it's entirely appropriate in that circumstance  
22 and efficient in that set of -- in that  
23 circumstance to say: Okay, if somebody thinks  
24 there's been a mistake, we'll consider that. We  
25 might give opportunity to replead there.

1           I do think you still have to satisfy  
2 the actual standard. This Court in -- in  
3 Waetzig last week dealt with a 60(b) issue where  
4 there was also a motion to vacate an arbitral  
5 award. And at pages 5 and 6 of the slip op, the  
6 Court makes it very clear that you don't blend  
7 the two analyses. Instead, you take 60(b)  
8 straight on. There, I think it was a mixed  
9 (b)(1) and (b)(6) motion.

10           And so you decide whether 60(b) relief  
11 is warranted. If so, then you can start looking  
12 at liberal repleading --

13           JUSTICE JACKSON: But, Mr. McGinley --

14           JUSTICE KAGAN: Well --

15           JUSTICE JACKSON: Oh. Mr. McGinley, I  
16 guess what I'm a little worried about is this  
17 notion of whether or not parties are being  
18 punished for exercising their right to appeal if  
19 we accept the rule that you are positing.

20           And the -- the way it comes up for  
21 me -- and I understand the facts of this  
22 particular case, but I'm -- I'm just thinking  
23 about the normal, ordinary case in which a  
24 district court dismisses a complaint for  
25 insufficient pleading.

1           And I guess, at that point, the  
2 plaintiff has a choice, especially if the  
3 district court gives them leave to amend or  
4 says: Hey, you can amend before I dismiss your  
5 complaint. You could follow the district  
6 court's recommendation and amend your complaint,  
7 or you can choose to appeal. You can say: No,  
8 I actually think my complaint is sufficient and  
9 I would like a court of appeals to weigh in on  
10 that.

11           What I worry about is, if the district  
12 court enters their judgment -- with or without  
13 prejudice, I guess. I'm not sure it matters.  
14 But, if they enter a judgment, they dismiss the  
15 appeal, you -- I mean, excuse me, they dismiss  
16 the complaint, you exercise your right to appeal  
17 and you lose, the court of appeals disagrees  
18 with you, says the district court was correct, I  
19 hear you saying that the part -- this particular  
20 party should not necessarily have a chance to  
21 amend, to cure, because they chose to appeal.

22           And I'm worried about that.

23           MR. MCGINLEY: So it's not quite what  
24 I'm saying. I think what I'm actually trying to  
25 say might assuage your concerns because what I'm

1 saying is what a party can't do is say: I want  
2 to stand on my pleadings no matter what --  
3 whatever the decision is, and then file a Rule  
4 60(b)(6) after --

5 JUSTICE JACKSON: Why not? If the --  
6 they're not -- what they're saying is: I  
7 disagree with you, district court, that my  
8 pleading is insufficient, and I have a right to  
9 go to the court of appeals to have them weigh  
10 in.

11 Once the court of appeals weighs in,  
12 then, obviously, they can do whatever is  
13 necessary to cure, I think.

14 MR. MCGINLEY: Right.

15 JUSTICE JACKSON: And I'm worried that  
16 they -- you're saying they can't.

17 MR. MCGINLEY: No. What I'm saying  
18 is, if they think there's some ambiguity as to  
19 whether or not the facts that they've alleged  
20 meet the standard that they think is the correct  
21 one, then they have two options.

22 They can replead whatever facts they  
23 think might clearly meet that standard. That's  
24 the most efficient course.

25 But the other option they have is



1 exactly what happened in this Court in Google  
2 versus Gonzalez, where they can say: If you --  
3 we think the law is such, and we think our facts  
4 map -- meet that. But, if you disagree with us  
5 on whether our facts meet that law, then please  
6 give us a chance to go back and replead.

7 The efficient way to do that is the  
8 Court then says: Okay, fine, I'm going to  
9 decide the case, but --

10 JUSTICE JACKSON: But I guess I don't  
11 understand why that's not basically the same  
12 thing. They just don't have that second  
13 request. What they want to do is come back  
14 after the -- we've cleared up what the standards  
15 are and amend their complaint.

16 MR. MCGINLEY: No, the difference is  
17 there's a final judgment at that point. And the  
18 Court has always recognized and Rule 60(b)(6)  
19 makes it very clear that a final judgment  
20 changes things. And once there's a final  
21 judgment, then you have to satisfy one of --

22 JUSTICE JACKSON: But your -- your --  
23 I guess what I'm -- what I'm -- it's a final  
24 judgment only insofar as the -- the district  
25 court at the beginning, when it issues the

1 judgment, understands that this is about  
2 pleading. Most district courts say: I -- you  
3 know, you -- you're going to have leave to amend  
4 this complaint. It's not final in the sense of  
5 you lose -- you forfeit your ability to bring  
6 this claim.

7 And -- and I guess what I'm worried  
8 about is that you are making the ability to  
9 bring the claim contingent on whether or not you  
10 pursue your right to appeal. You're saying:  
11 It's okay to amend if you don't appeal. But, if  
12 you appeal and you lose, you're not going to be  
13 able to amend anymore.

14 And I think that burdens the right to  
15 appeal in a way that is not exactly the -- the  
16 way these rules should be read.

17 MR. MCGINLEY: Yeah. Respectfully, I  
18 disagree because, you know, I think what -- what  
19 we're really saying is, when you have  
20 opportunities to ask, you have to ask, at a bare  
21 minimum, to satisfy 60(b)(6).

22 Remember what happened in Crosby,  
23 where this Court said even an actual change in  
24 law that changed the statute of limitations that  
25 opened the window for the -- for the petitioner

1 there to take advantage of the statute of  
2 limitations, the Court said: No 60(b)(6) relief  
3 because you could have asked a court to overrule  
4 the Artuz decision, and you didn't. You could  
5 have filed a cert petition at this Court, which,  
6 of course, is always discretionary for the Court  
7 to grant it. But that was the basis on which  
8 the Court said: No extraordinary circumstances.

9           So I don't think we're burdening the  
10 right to appeal. Instead, what we're doing is  
11 saying that a party doesn't get a -- get an  
12 opportunity at dress rehearsal, where they can  
13 say: We're going to plead the bare minimum set  
14 of facts that we think can satisfy the law as we  
15 see it, take it all -- take a defendant all the  
16 way through motion to dismiss or summary  
17 judgment or trial or whatever it might be, go up  
18 to the court of appeals, tell the court of  
19 appeals we want it to decide the question on the  
20 set of facts that we've pled.

21           JUSTICE JACKSON: No, but doesn't it  
22 matter if it's just the motion to dismiss? If  
23 the judgment comes after the motion to dismiss,  
24 we haven't had full litigation of the claim.  
25 We're in a situation in which, really, the core

1 dispute is over whether or not they have pled  
2 sufficient facts to meet whatever standard it  
3 is. And the court of appeals says: No, you  
4 haven't.

5 It's weird to me that after a ruling  
6 of the court of appeals saying your pleading is  
7 insufficient, the party goes back to the  
8 district court to say: Okay, we have this  
9 ruling now, we're ready to amend. I don't  
10 understand why they forfeit their claims  
11 ultimately in that situation.

12 MR. MCGINLEY: Because, if they  
13 have -- I apologize, Your Honor.

14 JUSTICE JACKSON: Yeah.

15 MR. MCGINLEY: Because they haven't  
16 diligently pursued it in the -- in the forum  
17 where they could have, which is the court of  
18 appeals. They can say to the court of appeals:  
19 Here's what we think the rule is. Here -- we  
20 think our facts satisfy the rule.

21 In this case, they had supplemental  
22 briefing that allowed them to do it. I'd also  
23 point out the same counsel in Kaplan as in this  
24 case. In Kaplan, they ended up surviving a  
25 motion to dismiss because they pled facts that

1 survived it. So the notion that they had no  
2 clue how to plead some set of facts that could  
3 satisfy the standard they were advocating is  
4 just fanciful.

5 But also, there's no -- there's no  
6 suggestion here that the facts that they claim  
7 that they want to now inject into the case  
8 weren't available to them. And so allowing them  
9 to do it now not only puts 60(b)(6) at odds with  
10 (b)(1), but it puts it at odds with (b)(2).

11 What (b)(2) says is that you can,  
12 within a year, seek to reopen for facts that  
13 were not previously available to you despite  
14 diligent efforts.

15 Here, they admit the facts were  
16 available to them. They admit that they didn't  
17 plead them. They didn't raise them to the  
18 Second Circuit when they had a chance to do it  
19 after Kaplan.

20 And so I just don't think that they  
21 can then come in and say: How could we have  
22 known? Now we need the extraordinary medicine  
23 of 60(b)(6) relief, and, you know --

24 JUSTICE KAGAN: Mr. McGinley, can I  
25 just make this more abstract --

1 MR. MCGINLEY: Sure.

2 JUSTICE KAGAN: -- take it out of the  
3 facts of this case and go back to the question  
4 that Justice Gorsuch asked, which I understood  
5 to be something like the following: Look, get  
6 your -- your principal argument that Rule 60 is  
7 Rule 60 and Rule 15 is Rule 15 and there's not,  
8 like, some strange combination in the way that  
9 the -- that the Second Circuit thought here.

10 But, you know, does -- is Rule  
11 60(b)(6) flexible enough so that a court can, in  
12 appropriate circumstances -- and maybe this case  
13 is not one of those, but I really want to think  
14 about this in the abstract -- in appropriate  
15 circumstances, take into account matters  
16 relating to amendment, like whether the party  
17 has had a sufficient opportunity to amend?

18 And I understood you to say to Justice  
19 Gorsuch: Well, they couldn't do it in a way  
20 that evades 60(b)(1) or other of the year-long  
21 provisions. And that seems totally right,  
22 blackletter law.

23 But, if we put that aside, say that  
24 this isn't something that falls neatly into  
25 another 60(b) provision, why is it that -- that

1 your -- you seem to be saying: You can't even  
2 think about amendment in the 60(b)(6) inquiry.

3 And that seems wrong the other way.  
4 Like, why -- why not think -- you -- it's a high  
5 bar, extraordinary circumstances. But there's  
6 also a lot of latitude in what you can consider  
7 or so I thought, and that latitude maybe should  
8 include things relating to amendments in  
9 appropriate cases.

10 MR. MCGINLEY: So, yeah, and I don't  
11 want to overstate our position because --  
12 because I -- I don't think it's quite that you  
13 can never consider the fact that it's a 60(b)(6)  
14 in order to amend. What the Court has said is  
15 that the extraordinary circumstances that are  
16 required must match the thing that you're trying  
17 to do.

18 And so, if somebody comes in and says:  
19 I want to amend and I want to have that  
20 opportunity through 60(b)(6), they have to show  
21 extraordinary circumstances that justify that  
22 desire to amend. You don't let liberality bleed  
23 into the analysis because that's just not  
24 appropriate at that stage.

25 But what you could say -- and this may

1 sound like an extreme example, but it comes from  
2 the facts of the first case to ever apply  
3 60(b)(6). Imagine a circumstance like  
4 Klapprott. What happened in Klapprott, which  
5 was decided one year, I believe, after 60(b)(6)  
6 was adopted, is that the petitioner in that case  
7 was someone who had his citizenship rights  
8 stripped through a default judgment during a  
9 period of time in which the U.S. Government, who  
10 was his adversary in the default judgment case,  
11 was detaining him and he was ill. And the Court  
12 said that's enough for extraordinary  
13 circumstances.

14 So you could imagine a scenario where  
15 somebody files a case, there's a motion to  
16 dismiss filed, maybe they even oppose that  
17 motion to dismiss, they go abroad, they fall  
18 ill, they are -- they never find out that the  
19 court has granted the motion to dismiss but  
20 granted them leave to replead. They don't do  
21 anything in time. The court enters a default  
22 judgment. That becomes final.

23 Maybe in that set of circumstances the  
24 person could come in and say: I had no idea  
25 that this was entered against me. You gave me



1 the opportunity to replead. I had no ability to  
2 take advantage of it, the same way that  
3 Mr. Klapprott had no ability to oppose the  
4 circumstances in his -- or the default judgment  
5 in his case.

6 There, I would say I -- I think that  
7 that may be appropriate under 60(b)(6).

8 JUSTICE KAGAN: So you're not saying  
9 that a court has to blind itself to anything  
10 remotely relating to amendments?

11 MR. MCGINLEY: No.

12 JUSTICE KAGAN: You're saying the  
13 60(b) standard, the extraordinary  
14 circumstances --

15 MR. MCGINLEY: Right.

16 JUSTICE KAGAN: -- is the right  
17 standard to use.

18 MR. MCGINLEY: Right.

19 JUSTICE KAGAN: And, of course, you  
20 can't try to evade 60(b)(1), et cetera, but  
21 there's -- there's -- there's -- there's no  
22 greater requirement or -- or strictures that  
23 you're asking for.

24 MR. MCGINLEY: No. All we're asking  
25 you to do is apply 60(b)(6) as you do in every

1 other circumstance that always takes into  
2 account what the request is for.

3 JUSTICE GORSUCH: I appreciate that  
4 acknowledgment in Justice Kagan's question  
5 because I think -- I do think it's one thing to  
6 say the district court abuses its discretion in  
7 60(b)(6) by not looking at Rule 15 and quite  
8 another to say the district court abuses its  
9 discretion to look at Rule 15 in some 60(b)(6)  
10 cases.

11 MR. MCGINLEY: Right. And I just want  
12 to be clear that I'm not now overselling in the  
13 other direction. We -- we want --

14 JUSTICE GORSUCH: Oh, I think -- I  
15 think you were selling really well just a moment  
16 ago.

17 (Laughter.)

18 MR. MCGINLEY: Okay. Good. Yeah.  
19 All I want to say is --

20 JUSTICE GORSUCH: You might leave it.

21 MR. MCGINLEY: Yeah. Okay. That's  
22 fine, Your Honor.

23 (Laughter.)

24 JUSTICE KAVANAUGH: Well, what are  
25 you -- what were you going to say?

1 (Laughter.)

2 MR. MCGINLEY: I was just going to  
3 say -- I was just going to say that we want to  
4 be absolutely clear that doesn't mean liberality  
5 creeps into the equation. All it means is that  
6 the extraordinary circumstances that are cited  
7 must match the request --

8 JUSTICE GORSUCH: Yeah, some  
9 extraordinary circumstances in which somebody  
10 was denied the right to replead, and, at that  
11 point, one might take a look at -- at our  
12 general presumption, you can call it Rule 15,  
13 you can call it whatever, that somebody should  
14 have their day in court and a -- and a fair  
15 opportunity to do so. No?

16 MR. MCGINLEY: I want to be careful  
17 because I -- I just -- I think that --

18 JUSTICE GORSUCH: They're blameless.  
19 They meet all the 60(b) standards.

20 MR. MCGINLEY: If they're blameless,  
21 it's truly extraordinary circumstances, that, of  
22 course, means that they didn't waive  
23 opportunities, that they were diligent in their  
24 pursuit, I don't know what the liberality would  
25 add to the equation at that point. I think that

1 60(b)(6) just gives them the opportunity to do  
2 what they want to do. So --

3 JUSTICE GORSUCH: But, if a district  
4 court judge cited Rule 15 in a 60(b)(6) order,  
5 that would not be an abuse of discretion --

6 MR. MCGINLEY: Oh.

7 JUSTICE GORSUCH: -- would it?

8 MR. MCGINLEY: No. If all they did  
9 was cite it, no. If there's evidence that they  
10 let the liberality creep in in a way that  
11 changed the analysis that they were applying --

12 JUSTICE GORSUCH: I understand that.

13 MR. MCGINLEY: -- then yes. But --  
14 but, no, if all they did was cite it. I also  
15 would say that I think that a district court  
16 could say -- if they thought it was more  
17 efficient, they could say: I don't think  
18 there's any chance that you could possibly meet  
19 Rule 15's standard, so I'm going to deny this  
20 because, no extraordinary circumstances, it  
21 would be futile.

22 I think that's fine for them to do  
23 that. What they can't do is grant it by  
24 diluting 60(b)(6).

25 JUSTICE GORSUCH: I -- I appreciate

1 that.

2 JUSTICE BARRETT: So is one way to say  
3 what you're saying that when you're in 60(b)  
4 land with a 60(b) motion, the standard is always  
5 extraordinary circumstances, not the liberality  
6 under Rule 15, and just say no more?

7 MR. MCGINLEY: For 60(b)(6)?

8 JUSTICE BARRETT: Yes.

9 MR. MCGINLEY: Yes, that's correct.

10 JUSTICE BARRETT: Okay.

11 MR. MCGINLEY: And -- and then, of  
12 course, we believe that it's fully briefed here  
13 as to whether they -- or not they meet it.

14 I wanted to say one more thing. I  
15 think it was Justice Sotomayor asked why you  
16 should decide it. It's what you did in  
17 Crosby -- or -- yeah, in Crosby. There -- there  
18 was not a separate QP on whether 60(b)(6) relief  
19 should be granted or not. The Court decided the  
20 AEDPA issue, which was whether it's a second or  
21 successive petition, and then it said: But he  
22 can't meet 60(b)(6) here because there's no  
23 extraordinary circumstances. He wasn't diligent  
24 in pursuing his effort to -- to do what he  
25 wanted to do.

1                   That's precisely what has happened  
2 here, and we would ask the Court to therefore  
3 reverse.

4                   CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6                   Justice -- Justice Sotomayor, anything  
7 further?

8                   JUSTICE JACKSON: I have a question.

9                   CHIEF JUSTICE ROBERTS: Sure.

10                  JUSTICE JACKSON: Yes. I guess what  
11 I'm still a little worried about is that you are  
12 characterizing the choice to appeal the district  
13 court's determination about the sufficiency of  
14 your pleading as a tactical waiver of your  
15 ability to amend if the court of appeals  
16 disagrees with you. And I'm worried about that.

17                  MR. MCGINLEY: Yeah.

18                  JUSTICE JACKSON: So let me give you a  
19 hypo. So you have a plaintiff who files a  
20 complaint that he thinks is sufficient. The  
21 district court signals no, I actually think it's  
22 not. The law is such and you haven't pled  
23 enough facts, but I'll give you the ability to  
24 amend. And the plaintiff says: No. With --  
25 with respect, Your Honor, I really do think it's

1 sufficient. I have a right to appeal your  
2 ruling. If you'd like to rule that my complaint  
3 is dismissed, do so, and we'll go to the court  
4 of appeals to get a ruling on that.

5 MR. MCGINLEY: Yeah.

6 JUSTICE JACKSON: They go to the court  
7 of appeals and the court of appeals agrees with  
8 the district court.

9 What I don't understand is a rule,  
10 whether it's Rule 60(b) or 15 or whatever, that  
11 prevents under those circumstances the plaintiff  
12 from curing by pleading the facts that he  
13 originally thought and mistakenly thought were  
14 not necessary. I don't know why he forfeits  
15 then the opportunity to proceed with his  
16 litigation having gotten now a clear ruling from  
17 the court of appeals about what is required.

18 MR. MCGINLEY: So I'd say, in that  
19 circumstance where there's never a request to  
20 replead either in the trial court or in the  
21 court of appeals, I think that's Ackermann,  
22 which says that if you make a tactical decision  
23 to induce the court to do something or -- or you  
24 make a tactical decision not to do something in  
25 that --

1 JUSTICE JACKSON: But why -- is -- is  
2 the tactical decision choosing to appeal the  
3 district court's ruling?

4 MR. MCGINLEY: No.

5 JUSTICE JACKSON: That's my question.

6 MR. MCGINLEY: No, no. It's choosing  
7 not to plead the facts that you think might have  
8 satisfied even the rule that you're advocating.  
9 That's what happened here.

10 I would also point out here -- and I'd  
11 point you to JA 171 through 185 -- we raised all  
12 of the issues that they say that they now want  
13 to --

14 JUSTICE JACKSON: No, I -- I don't  
15 want this case. I'm just trying to understand  
16 what --

17 MR. MCGINLEY: Well --

18 JUSTICE JACKSON: Can I just change  
19 the hypo a little bit?

20 MR. MCGINLEY: That's fine.

21 JUSTICE JACKSON: What if the court of  
22 appeals actually partially agrees with the  
23 plaintiff and changes and says neither of you is  
24 right, the district court said you needed to do  
25 a whole lot more, we don't think that's the



1 case, you only need to plead some subset of  
2 facts?

3 MR. MCGINLEY: Right.

4 JUSTICE JACKSON: In those -- in that  
5 situation, does the plaintiff get to go back and  
6 do what the court of appeals says is now  
7 required?

8 MR. MCGINLEY: They can ask to do so.  
9 They admit this on page 40, I believe, of their  
10 brief, that they could have asked the Second  
11 Circuit to do that. They -- that's what  
12 happened in the Google case. It's what happened  
13 in the Schwab case that they cite.

14 JUSTICE JACKSON: But, if they don't,  
15 you're saying they can't go to the district  
16 court and ask?

17 MR. MCGINLEY: Not on a 60(b)(6).  
18 Now, I mean, the other thing they could have  
19 done here -- and this -- and I'm not just trying  
20 to make this about this case. I'm saying a  
21 plaintiff even in this -- the --

22 JUSTICE JACKSON: Yes.

23 MR. MCGINLEY: -- circumstances that  
24 you're positing. Say they -- they mistakenly  
25 think that they can meet even the standard that

1 the Second Circuit or the court of appeals is  
2 advocating, but the court rules against them.  
3 They could file a rehearing motion and they  
4 could say: Your Honors, we're sorry, we should  
5 have asked you at the outset, but we're asking  
6 you now, we think there might be facts that  
7 could replead.

8 Obviously, they're going to have to  
9 labor under the rehearing standard at that  
10 point, but that's still better than a 60(b)(6),  
11 which is an attack on a final judgment that's  
12 already been affirmed on appeal.

13 JUSTICE JACKSON: Thank you.

14 MR. MCGINLEY: Thank you. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Mr. Radine.

18 ORAL ARGUMENT OF MICHAEL J. RADINE

19 ON BEHALF OF THE RESPONDENTS

20 MR. RADINE: Mr. Chief Justice, and  
21 may it please the Court:

22 The answer to the question presented  
23 is that Rule 60(b)(6)'s standard does apply  
24 here, and the circumstances of this case clearly  
25 meet that standard. The plaintiffs here did

1 everything you'd want litigants to do. They  
2 didn't waste the district court's time with  
3 futile amendments given the district court's  
4 erroneous standards. They appealed an incorrect  
5 decision, secured a corrected pleading standard  
6 and substantive legal standards from the  
7 circuit, and then, armed with those  
8 clarifications, promptly sought an opportunity  
9 to amend from the court tasked with making those  
10 decisions, the district court.

11           The circuit acknowledged that  
12 plaintiffs faced an impossible situation,  
13 including the district court's soup-to-nuts  
14 incorrect standards, from every one of the  
15 relevant JASTA standards to the direct evidence  
16 knowledge pleading standard, which most  
17 plaintiffs could not hope to meet.

18           And it acknowledged that the district  
19 court was confused given ambiguous circuit law  
20 on JASTA. It's fundamentally unfair to lay the  
21 consequences of that confusion at plaintiffs'  
22 doorstep.

23           But when presented with a motion for  
24 vacatur, the district court exalted finality  
25 without balancing that principle against the

1 federal rule's preference for deciding cases on  
2 their merits; a preference which is at its peak  
3 at the initial stages of litigation where  
4 discovery has not even begun.

5           The circuit recognized that the fair  
6 thing to do was to give plaintiffs a chance to  
7 meet the corrected standards in a first amended  
8 complaint. The panel then issued the summary  
9 order below, which included the author of the  
10 prior affirmance and other grounds, effectively  
11 undoing that affirmance, and attempting to clean  
12 up a very strange and unfair situation.

13           That's why Petitioner was forced to  
14 manufacture waivers by plaintiffs that the  
15 circuit preliminary never found. Like many  
16 cases involving extraordinary circumstances  
17 under Rule 60(b)(6), crafting a universal rule  
18 from unusual facts of this case is very  
19 difficult, but we know that Rule 60(b)(6) makes  
20 an exception to finality intended for unusual  
21 cases like this one.

22           I welcome the Court's questions.

23           JUSTICE THOMAS: Wouldn't you be in a  
24 stronger position had you taken up the district  
25 court's offer to amend your complaint?

1                   MR. RADINE: The offer from the  
2 district court was to meet the standards urged  
3 by defendant, which were entirely incorrect.  
4 And as of oral argument, included the Kaplan I  
5 standard for pleading knowledge that the  
6 defendant read or was aware of the sources cited  
7 to convey knowledge. That's something that we  
8 couldn't prove -- allege, much less plead to.

9                   JUSTICE THOMAS: But even if -- if you  
10 look at the first opinion by the court of  
11 appeals, didn't it affirm the district court?

12                   MR. RADINE: On other grounds, Your  
13 Honor.

14                   JUSTICE THOMAS: I know, but is -- but  
15 the point was that your complaint as it stood  
16 did not even meet that standard, even if it  
17 wasn't the correct standard.

18                   MR. RADINE: It didn't meet the  
19 clarified standard that the district court --  
20 sorry, the Circuit Court provided. The Circuit  
21 Court provided a standard that -- in what Judge  
22 Wesley called it, a law that was recasting  
23 itself in an ambiguous and evolving legal  
24 situation, that gave us among other things a new  
25 knowledge pleading standard, as near as we can

1 tell. This is the public sources versus  
2 publicly-available evidence distinction. And it  
3 identified specific and I'd add non-intuitive  
4 defects in the complaint, defects that we can  
5 remedy but not defects that necessarily should  
6 have been obvious to us before.

7 JUSTICE KAVANAUGH: The other side  
8 says that once you have an affirmance of the  
9 dismissal, though, that you should have sought  
10 rehearing or asked the Second Circuit to modify  
11 the decision to remand and to permit the -- you  
12 all to amend the complaint.

13 Why didn't you do that? And why isn't  
14 that the answer?

15 MR. RADINE: There's no obligation to  
16 do that. And, in fact, in the Second Circuit  
17 there's not only no obligation but it appears to  
18 be a regular enough practice to go back to the  
19 district court.

20 So, for example, in the *Mandala en*  
21 *banc* dissent, four of the judges of that court  
22 encouraged the plaintiffs to go back to the  
23 district court and seek vacatur under Rule  
24 60(b)(6) and amendment. The same thing we did  
25 here.

1           The Ninth Circuit in *Nguyen v. United*  
2           States relying on this Court's decision in  
3           *Rogers v. Hill* said that so long as the mandate  
4           from the circuit doesn't say you can't amend,  
5           then you are free to go back and ask the  
6           district court for leave to do so under Rule 60.

7           And then the Tenth Circuit also  
8           commented this in *Pierce v. Cook* telling the  
9           district court I understand you might have been  
10          unsure if you could grant that relief, you can.

11          JUSTICE KAGAN: Mr. Radine --

12          JUSTICE GORSUCH: Counsel --

13          JUSTICE KAGAN: -- if I understood  
14          your introduction, you said the right standard  
15          is 60(b)(6), extraordinary circumstances, and  
16          here it's not. That's not what the Second  
17          Circuit said, is it?

18          MR. RADINE: The summary order below,  
19          I don't think is a picture of clarity.

20          JUSTICE KAGAN: Well, it's kind of  
21          clear. It just doesn't say what you say it  
22          says. It says the district court erred because  
23          -- and I'm quoting here -- "it evaluated  
24          Plaintiff's motion under only Rule 60(b)  
25          standard." And then it says what was it

1 required to do instead? It was -- and I'm  
2 quoting again -- "required to consider Rule  
3 60(b) finality and Rule 15(a) liberality in  
4 tandem."

5           So that's to say it's not just the  
6 Rule 60(b) standard where the plaintiff comes in  
7 and says it wants to amend, you know, that  
8 there's some kind mishmash of a standard, which  
9 is part 60(b) and part 15(a). And as I  
10 understood your introduction, you have given up  
11 on that. And, I mean, we seem to have a lot of  
12 people giving up on things, properly so, because  
13 we seem to have a lot of outlier positions  
14 today.

15           And if it's an outlier position, why  
16 don't we just say the outlier position is wrong,  
17 go back and try it again?

18           MR. RADINE: Well, I think all that  
19 the circuit meant about considering the rules in  
20 tandem was balancing finality against Rule 15's  
21 preference for hearing cases on their merits.  
22 The -- I don't think that's contrary to Rule 60.

23           Rule 60(b) doesn't have the word  
24 "finality" in it. It doesn't have the word  
25 "extraordinary circumstances" in it.



1 JUSTICE KAGAN: Well it -- it says --  
2 and this goes back to Justice Gorsuch's question  
3 to Mr. McGinley -- I mean, it says you are  
4 required to consider what 15(b) tells you about  
5 amendments. And you're -- and -- -- and -- and  
6 and, you know, that provision, it really does  
7 set forth a standard, which is like 60(b)(6),  
8 high bar; 15(b), low bar. Put them together,  
9 medium bar. That's -- that's different from  
10 what even you are saying is the right way to  
11 look at this.

12 MR. RADINE: Yeah, I think that Rule  
13 15 here helps illustrate what might be  
14 extraordinary, as in denying the opportunity to  
15 amend. I think that Rule 15(a) also gives us  
16 some insight at the importance of the stage this  
17 happens at.

18 At an early stage, amendment is freely  
19 given. We're not asking for amendment to be  
20 freely given here, simply saying it reflects an  
21 understanding that the court should be more  
22 permissive at the early stages of litigation,  
23 but ultimately those are all built in to Rule 60  
24 as this Court --

25 JUSTICE GORSUCH: Ahh. So if they're

1 all built in, Mr. Radine, what objection would  
2 you have to a short opinion from this Court  
3 saying simply that the Rule 60(b) standard  
4 applies, there isn't this mishmash, as Justice  
5 Kagan I think referred to it, between 15 and 60,  
6 go back and try again? Because I hear most of  
7 your argument saying we can meet 60(b).

8 MR. RADINE: Yes. I think this Court  
9 could issue a ruling saying that 60(b) governs;  
10 Rule 15 is not governing here. But if I can  
11 help with the opinion --

12 JUSTICE GORSUCH: Period. Well, how  
13 about putting a period there?

14 MR. RADINE: Sure. I think so. I  
15 mean, I think as this Court held in Witzig just  
16 the other day, that Rule 60 balances finality in  
17 the interest of justice.

18 JUSTICE GORSUCH: It's already in  
19 there. It's baked in.

20 MR. RADINE: It's already in there,  
21 Your Honor.

22 JUSTICE GORSUCH: Okay. Thank you.

23 JUSTICE JACKSON: Can I have you speak  
24 to the genesis of the extraordinary  
25 circumstances? I mean, that language doesn't

1 appear in (a)(6), any other reason that  
2 justifies relief says the actual provision.

3 So I know we came up with it, I think.

4 MR. RADINE: Yeah.

5 JUSTICE JACKSON: Can you just talk  
6 about that a little bit?

7 MR. RADINE: Yes. As my friend  
8 mentioned, it is from the case, Klapprott, where  
9 a plaintiff essentially misses a summons because  
10 he's in jail and ill. And the -- the reason why  
11 the Court identified the extraordinary nature of  
12 that was to point out the lack of fault.

13 So it was extraordinary in that he  
14 wasn't just sitting around ignoring a court  
15 order. There was a lack of fault issue.

16 It's not -- to be clear, the  
17 extraordinary circumstances test is not a  
18 frequency test. It's not that oh, this is very,  
19 very rare. I don't think being sick or being in  
20 jail really necessarily is that rare.

21 JUSTICE JACKSON: I see. So it's more  
22 like akin to you say lack of fault.

23 MR. RADINE: Yes.

24 JUSTICE JACKSON: Counsel on the other  
25 side kind of points the finger at you all and --

1 MR. RADINE: Absolutely.

2 JUSTICE JACKSON: -- says in this case  
3 you were at fault.

4 MR. RADINE: Right.

5 JUSTICE JACKSON: So why is he wrong  
6 about that?

7 MR. RADINE: Well, the two invitations  
8 we get from the district court are, as Judge  
9 Wesley said, impossible for us to meet. They're  
10 premised on incorrect standards. The correct  
11 thing to do there is to appeal.

12 Rule 60, for example, is not a  
13 substitution for appeal. We -- moreover, I  
14 think it's -- it would be needless to go back to  
15 the district court and say: Oh, I think you  
16 made a mistake and got every single thing wrong.

17 The thing to do in that situation is  
18 to appeal. When we get to the circuit, why  
19 didn't we ask the circuit to amend? Naturally  
20 we think we're right. We don't think we're --  
21 that we have failed to meet some standard that  
22 we're advocating for.

23 And, indeed, where we fall down in the  
24 Second Circuit is in what appears to be a new  
25 knowledge pleading standard, but also it's not

1 the Second Circuit's job to grant us leave --

2 JUSTICE JACKSON: Was there an  
3 opportunity for you to, as Justice Kavanaugh  
4 pointed out, ask the circuit even after they  
5 clarified? I mean, I know that there's a --  
6 there's a point at which you come to the  
7 circuit --

8 MR. RADINE: Yeah.

9 JUSTICE JACKSON: -- and you could  
10 have said or in the alternative, you know, let  
11 us amend to begin with, but then once the Second  
12 Circuit clarified, okay, so this is the  
13 standard, was that the moment at which you were  
14 supposed to ask about --

15 MR. RADINE: We could --

16 JUSTICE JACKSON: -- amendment?

17 MR. RADINE: -- have petitioned for a  
18 panel rehearing, but, as I mentioned, it seemed  
19 to be the practice in the circuit to take that  
20 back to the district court. And I don't see  
21 that there's any rule that suggests that we  
22 should be essentially punished for making a  
23 reasonable choice of who to bring that issue to.

24 JUSTICE GORSUCH: Well, I think  
25 Mr. McGinley would -- would probably object to

1 that on the grounds that we have a final  
2 judgment. You know, you -- you didn't ask the  
3 circuit to -- for leave. Now I'm not sure we  
4 need to get into any of this for reasons we've  
5 already discussed, but if we were to, not having  
6 asked the circuit for any further relief beyond  
7 we win or we lose, why wouldn't that normally be  
8 the end of the case?

9 MR. RADINE: Well, I think -- first of  
10 all, I think that just to note that in any  
11 appeal where you think the standards are wrong,  
12 I suppose it's implicit that the appellant --

13 JUSTICE GORSUCH: You have a final  
14 judgment in the district court on appeal --

15 MR. RADINE: Right.

16 JUSTICE GORSUCH: -- yes or no, not  
17 asking for further proceedings, court says no.  
18 That's usually it, right?

19 MR. RADINE: I think it's the Second  
20 Circuit practice, as expressed in Mandala, to  
21 take that back to the district court. It  
22 certainly was something we reasonably relied on  
23 as an understanding of how the Second Circuit  
24 operates.

25 If the Court were to -- this Court

1 were to make a rule --

2 JUSTICE GORSUCH: I understand that  
3 you think that's how -- I'm just struggling to  
4 understand how that -- how that might operate  
5 given you have a final judgment that's been --

6 MR. RADINE: Well, this is the  
7 premise --

8 JUSTICE GORSUCH: -- you know,  
9 affirmed.

10 MR. RADINE: -- of -- of Rule 60(b).

11 JUSTICE GORSUCH: Oh, that's  
12 different. I'm asking about you didn't -- the  
13 absence of leave to amend being requested in the  
14 appeal. The appeal is over. It's done. Case  
15 closed.

16 MR. RADINE: Right. The only time --  
17 the way to -- right. It's closed. We didn't  
18 ask for an amendment because we didn't think we  
19 needed one. Why would we?

20 JUSTICE GORSUCH: No, I appreciate  
21 that the circumstances here might lead to a  
22 60(b), but I think that would be the recourse,  
23 right? I mean, it's -- you did not --

24 MR. RADINE: Oh, to ask the --

25 JUSTICE GORSUCH: Yeah. You didn't --

1 MR. RADINE: -- the panel?

2 JUSTICE GORSUCH: Yeah, in --  
3 otherwise, you're stuck with 60(b), right?

4 MR. RADINE: Yes, but I don't -- but  
5 60(b)(6), I don't think, is -- is quite the  
6 mountain that my friend wants it to be.

7 JUSTICE GORSUCH: I appreciate that.  
8 I appreciate that.

9 JUSTICE BARRETT: So, speaking of  
10 mountain, let me just ask you a follow-up  
11 question about that which goes to some of your  
12 responses to Justice Jackson.

13 Do you think the extraordinary  
14 circumstances test is wrong?

15 MR. RADINE: No, Your Honor.

16 JUSTICE BARRETT: So you think the  
17 extraordinary circumstances test is right, but  
18 maybe it's just a lower mountain?

19 MR. RADINE: Yes, Your Honor.

20 JUSTICE BARRETT: Lower altitude?

21 MR. RADINE: A lower altitude  
22 mountain, yes.

23 JUSTICE BARRETT: Okay. Well, our  
24 precedent hasn't treated it that way, and pretty  
25 much the uniform practice in the court of



1 appeals so far as I'm aware is to say  
2 extraordinary circumstances really are  
3 extraordinary because we do have a preference in  
4 favor of letting final judgments be final.

5 MR. RADINE: Yes, Your Honor, but the  
6 extraordinary circumstances show up more often  
7 than just someone being ill and in jail. I  
8 think they happen here, where a plaintiff has  
9 not had an opportunity to amend his or her  
10 complaint even once on the actual defects  
11 identified in that case.

12 As my friend mentioned, you know, it's  
13 not so extraordinary to have the law change over  
14 time. That's true. But, when it happens in  
15 that case and then the same circuit essentially  
16 takes back the affirmance in the summary order,  
17 as they did here --

18 JUSTICE BARRETT: So is your argument  
19 then that if you went back to the Second  
20 Circuit, you would be able to satisfy the  
21 extraordinary circumstances test? You don't  
22 really need the liberality standard from Rule  
23 15?

24 MR. RADINE: I think it's -- it's  
25 built into Rule 60, which, as this Court says,

1 balances finality against the interests of --

2 JUSTICE BARRETT: So you're not giving  
3 up that Rule 15's liberality standard is  
4 peppered in in this circumstance?

5 MR. RADINE: I -- I -- I think -- like  
6 this Court said in Krupski, I think that it,  
7 along with the rest of the Federal Rules, helps  
8 express a preference for trying cases on  
9 their -- on their preferences. Whether this  
10 Court says that you get there by invoking the  
11 words "Rule 15" or not I don't think changes  
12 that analysis, though.

13 JUSTICE KAVANAUGH: Are you arguing  
14 that you were misled in some respects -- maybe  
15 "misled" is a little strong -- but by the Second  
16 Circuit's practice?

17 MR. RADINE: Well, I think that the  
18 normal case for a circuit in its position would  
19 be to remand. So for -- on -- on its own. We  
20 see this in Marranzano, for example. The D.C.  
21 Circuit says nobody's right here, go back and  
22 try again. And I think that's what the circuit  
23 should have done here. I think that's where,  
24 once we get --

25 JUSTICE KAVANAUGH: But, once they

1 affirm, you said --

2 MR. RADINE: Once they affirm.

3 JUSTICE KAVANAUGH: -- you didn't ask  
4 for rehearing because you thought -- and maybe  
5 fill in the blank there -- you thought?

6 MR. RADINE: That that is a decision  
7 for the district court in the first instance,  
8 which the circuit agreed with. When we went  
9 back on -- on the summary order below, the  
10 circuit doesn't say: I don't know why you  
11 bothered the district court with that. You  
12 should have come to us.

13 The circuit, which is in charge of its  
14 own, you know, docket and rules and so on, said:  
15 You're right, you should probably get another  
16 crack at that or at least a district court  
17 should think further about it.

18 JUSTICE JACKSON: And, in Mandala,  
19 that's what --

20 MR. RADINE: That's what four judges  
21 of the court recommended.

22 JUSTICE JACKSON: -- that's what four  
23 judges of the court of appeals said.

24 MR. RADINE: That's right.

25 JUSTICE JACKSON: You should go back

1 to the district court, so --

2 MR. RADINE: That's right.

3 JUSTICE KAVANAUGH: So the answer, I  
4 think, is you feel like you were a bit misled by  
5 the practice.

6 MR. RADINE: To the -- if that were to  
7 be impermissible, then yes. I think we were  
8 following the circuit instructions as shown in  
9 the summary order itself.

10 JUSTICE ALITO: Under (b)(4) and (5),  
11 the circumstances are such that allowing the  
12 judgment to stand would arguably work a -- a --  
13 a really serious injustice. The judgment is  
14 void. The judgment has been satisfied, et  
15 cetera.

16 So do you think it would be fair to  
17 infer that the reason under (6) has to be of  
18 comparable magnitude?

19 MR. RADINE: Well, no, because, if it  
20 were, then why not just be comparable magnitude  
21 of (1), which excusable neglect does --

22 JUSTICE ALITO: Well, because (1) has  
23 the one-year limitation.

24 MR. RADINE: I see. I don't think  
25 that -- I think that what (6) is appreciating is

1 that cases can be strange and unusual, to quote  
2 Judge Wesley, unusual and quirky, as they were  
3 here.

4 I don't think that it means that it  
5 has to be on a severity of (4) and (5). The  
6 rule, 60(b)(6), still has a reasonable time  
7 limitation, for example. Courts have rejected  
8 this sort of relief in shorter periods of time  
9 because the plaintiff didn't jump to seek the  
10 amendment. We did. In 11 days, we were back  
11 before the district court seeking relief.

12 JUSTICE ALITO: Well, I thought you  
13 said that extraordinary doesn't mean infrequent.  
14 And then you said, well, it could be  
15 extraordinary if it's quirky. So what is the  
16 difference?

17 MR. RADINE: Well, I just mean that  
18 it's hard to fashion a rule about situations  
19 like this. It's hard to say that extraordinary  
20 circumstances are met when you were given  
21 incorrect standards and you appealed it and you  
22 were largely vindicated, but then the circuit  
23 adopted a new knowledge standard and identified  
24 some defects, and you promptly went back, but  
25 they had affirmed. They didn't -- they undid

1 the affirmation essentially. You know, it's  
2 a -- it's, to me, a textbook situation for the  
3 circuit monitoring its own cases.

4 JUSTICE JACKSON: Mr. McGinley says  
5 that you should have at least pled the facts  
6 that you thought, you know -- under these other  
7 hypothetical or potential standards. Like, why  
8 didn't you do that?

9 MR. RADINE: Well, we did under the  
10 standards that we understood to be the case.  
11 The -- the allegations we pled were similar to  
12 allegations that had survived motions to dismiss  
13 in other cases, like Weiss, as we point out in  
14 our -- in our brief.

15 The -- the circuit court's  
16 distinction, for example, about publicly  
17 available evidence versus public sources, that  
18 was not just new. I read it as, in fact,  
19 contrary to their Nomura decision that says  
20 publicly available information is sufficient to  
21 show circumstantial knowledge.

22 Or take the cash as untraceable. The  
23 circuit said we had to specifically plead that  
24 cash was untraceable. We didn't think that that  
25 was necessary. We thought that was an inherent

1 part of cash, but, fine, we can amend to meet  
2 that.

3 I think what we don't want is a rule  
4 where plaintiffs have to load up dockets with  
5 amended complaints trying every which  
6 combination of facts. For example, what if the  
7 circuit had said, you know, you say that Hamas  
8 operates openly in Lebanon? How do you know?  
9 What are the -- how does Lebanon react  
10 historically to terrorist groups?

11 We could have written 30 pages on  
12 that. We are going to lose short and plain  
13 statements if we have a rule that makes  
14 plaintiffs try to essentially guess at every  
15 future ruling or lose their right to amend  
16 forever.

17 JUSTICE SOTOMAYOR: I'm sorry, I --  
18 I -- I understood here that you came in in your  
19 initial complaint and said basically, they knew  
20 that these people were tied to Hamas, the people  
21 who were on their board of directors --

22 MR. RADINE: Right.

23 JUSTICE SOTOMAYOR: -- the money that  
24 was given. The district court, I agree, said  
25 that's not enough. Public information is not

1 enough to give knowledge. But even if it was --  
2 this was their alternative reason -- there's no  
3 reason to know that this information was in  
4 their possession at the time of -- of the attack  
5 that occurred here for which you're seeking  
6 recompense.

7 I understood when you went up to the  
8 Second Circuit, the Second Circuit agreed with  
9 you that public information would be enough to  
10 give knowledge, but its alternative ground for  
11 affirming was: But the district court was  
12 right, none of the information was clearly  
13 present at the time the alleged aid to this  
14 attack occurred.

15 So you could have cured that below on  
16 the first round. Nothing about that was a  
17 surprise either in the district court or the  
18 court of appeals. But you chose not to.

19 MR. RADINE: Well, when the district  
20 court told us that we had to plead that BLOM --  
21 or, you know, acts or statements from BLOM or  
22 BLOM employees that they had read or were  
23 aware -- aware of sources, I don't think there's  
24 any benefit to us saying, well, we don't have  
25 that, but here are just some more allegations



1 that are going to fail to meet your standard.  
2 It's a frivolous amendment at that point.

3 We had what we thought were  
4 sufficient. And if you look at the actual  
5 defects identified by this circuit, I -- I think  
6 they're really quite narrow. For example, the  
7 cash one. Or making clear at what time people  
8 knew that Sheikh Qaradawi was the chair of the  
9 Union of Good, which we took to be clear --

10 JUSTICE SOTOMAYOR: Those are not  
11 inconsequential facts. Those are the very  
12 essence of the case.

13 MR. RADINE: I -- I -- for -- for  
14 example, in Weiss, a case where -- that said it  
15 is reasonable to assume that a bank -- and banks  
16 have know-your-customer obligations and so on --  
17 that a bank would look to foreign designations  
18 of their customers or perhaps their  
19 counterparties. And that's why these role  
20 designations --

21 JUSTICE SOTOMAYOR: But your complaint  
22 never said they had been identified at the time  
23 at issue.

24 MR. RADINE: Oh, no, no. The -- the  
25 -- the complaint says that the Union of Good was

1 -- was designated by Israel in 2002, and that  
2 the counterparties, which were sending millions  
3 of dollars that BLOM was converting into cash  
4 for these entities, were designated already by  
5 Israel.

6           The AAF, Al-Aqsa Foundation, had been  
7 shuttered by Germany in its own headquarters in  
8 2002, during the relevant period. HLF was a  
9 known Hamas financier that would soon get shut  
10 down during the relevant period. Shut down at  
11 the beginning of the relevant period.

12           And -- and when that's shut down by  
13 the U.S., there's -- the bank doesn't then say:  
14 You know, my goodness, I can't believe we've  
15 been receiving millions of dollars from this  
16 terrorist organization. What account is that  
17 going into? Who are these people?

18           They just move right over to the next  
19 transferor, KindHearts, until that one's  
20 eventually shut down years later.

21           JUSTICE SOTOMAYOR: Thank you,  
22 counsel.

23           MR. RADINE: Sure.

24           CHIEF JUSTICE ROBERTS: Justice  
25 Thomas? Anything further? No?

1 Thank you, counsel.

2 MR. RADINE: Thank you, Court.

3 CHIEF JUSTICE ROBERTS: Rebuttal,  
4 Mr. McGinley?

5 REBUTTAL ARGUMENT OF MICHAEL H. MCGINLEY  
6 ON BEHALF OF THE PETITIONER

7 MR. MCGINLEY: I think my friend on  
8 the other side has all but conceded the Rule  
9 60(b)(6) question, and I think his very first  
10 line standing before you today invited you to  
11 rule on the merits of whether 60(b)(6) relief is  
12 warranted here. I think everything he said  
13 showed that it's not. There are not  
14 extraordinary circumstances here.

15 I want to point out something that  
16 didn't come up, I don't think, in either side of  
17 the arguments, but it's really worth  
18 emphasizing. The denial of 60(b)(6) is deny --  
19 is reviewed for abuse of discretion. And I  
20 think that's why this Court can very easily cut  
21 through and -- and reverse entirely in this  
22 case, because there's no abuse of discretion  
23 here whatsoever.

24 Even if my friend is right, that they  
25 mistakenly thought that they didn't need to

1 plead the facts that turned out to be necessary  
2 under the very standard that they claim that  
3 they were advocating, that's at most a mistake,  
4 it's inadvertence, it's excusable neglect under  
5 (b)(1).

6 I would also point out that it's just  
7 simply not true that they had no notice that  
8 those defects existed before the district court  
9 issued her decision. On pages 171 and -- to 185  
10 of the JA -- this is our motion to dismiss.  
11 This is before the district court has issued any  
12 ruling -- we point out every single defect that  
13 the Second Circuit ended up affirming based on.

14 And I think if you look at that and  
15 you match it up to pages 49 through 52 of the  
16 JA, you'll see that everything the Second  
17 Circuit said was a problem, we said was a  
18 problem. At that point they had the opportunity  
19 to amend.

20 I also would say that the notion that  
21 somehow their case is the one that changed the  
22 law is fanciful, not only because there is no  
23 change of law but really what they're saying is  
24 Kaplan was some kind of new decision that they  
25 needed a chance to address.

1                   They had a chance to address it. That  
2 was the entire point of the supplemental  
3 briefing. At page 300 of the JA, Judge Wesley  
4 said to them -- same counsel as in Kaplan -- he  
5 said: You recognize that your facts pled here  
6 are nowhere close to what's in Kaplan.

7                   We agree they're nowhere close to  
8 what's pled in Kaplan. Even the proposed  
9 amended complaint is nowhere close to Kaplan.  
10 As my friend's own argument shows today, all of  
11 the allegations they want to make are about  
12 non-customers. Not about BLOM's customers, but  
13 about third parties.

14                   And I would point you to footnote 20  
15 in the Second Circuit's decision, which points  
16 out that even if they fixed the defects that  
17 they think the Second Circuit was talking about,  
18 they still lose. Because when all you're doing  
19 is talking about non-customers with nothing  
20 more, that's not enough to plead general  
21 awareness.

22                   I'd also point out, just to make you  
23 feel a little more comfortable, I think, that we  
24 also won on substantial assistance in the  
25 district court. The Second Circuit didn't

1 address it because it affirmed on general  
2 awareness. I think if you look at what was  
3 alleged even in the amend -- the proposed  
4 amended complaint, it's nowhere close to what  
5 this Court required in Twitter.

6 The problem with their case is that it  
7 simply does not meet the standards for JASTA.  
8 And we won dismissal -- the case was filed in  
9 2019. It's about events that occurred 25 years  
10 ago. We won dismissal in 2021, we won  
11 affirmance in 2022, and somehow we're here three  
12 years later talking about a zombie case that  
13 should have been over years ago.

14 They simply do not meet 60(b)(6). And  
15 we would ask the Court to reverse and render  
16 judgment in our favor. Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 The case is submitted.

20 (Whereupon, at 11:49 a.m., the case  
21 was submitted.)

22

23

24

25

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