No. 15-492

IN THE

Supreme Court of the United States

LINDA ASH; ABBIE JEWSOME,

Petitioners,

v.

ANDERSON MERCHANDISERS, LLC; WEST AM, LLC; ANCONNECT, LLC,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

BRENDAN J. DONELON
DONELON, P.C.
420 Nichols Road, Suite 200
Kansas City, MO 64112
(816) 221-7100

SCOTT MICHELMAN
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Counsel for Petitioners

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I. The Circuit Courts Have Issued Conflicting Decisions On The Questions Presented.

The courts of appeals are divided over both the standard applicable to post-judgment motions to amend and how to calculate the length of time a plaintiff has taken to amend. Respondents' arguments to the contrary are mistaken.

A. As the petition explains, the Second, Fourth, Fifth, Seventh, and Eleventh Circuits apply Rule 15's "freely give[n]" standard to a post-judgment motion to amend consistent with the Court's direction in *Foman v. Davis*, 371 U.S. 178 (1962). Pet. 10-14.

Respondents do not deny that *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510 (7th Cir. 2015), applied Rule 15's standard—as *Foman* instructs and in contrast to the Eighth Circuit's approach below. Instead, respondents try to distinguish *Runnion* on the basis that the district court there entered judgment when it dismissed the case, whereas the district court here entered judgment seven days after dismissal. Opp. 23-24. Respondents focus on *Runnion*'s statement that the district court took "the unusual step of entering judgment at the same time it dismisse[d] the complaint," 786 F.3d at 521, but the court made clear that the unusual aspect of the disposition was not the simultaneous dismissal and judgment but the lack of opportunity to replead:

> Normally, the plaintiff would have an opportunity to … amend[] her complaint to try to add what the district court found was lacking. Here, however, the district court took an unusual step after finding that the original complaint failed to state a claim. Without affording plaintiff any opportunity

> to try to correct the deficiencies the court had identified, the district court entered final judgment[.]

Id. at 518. The simultaneous judgment in *Runnion* was significant because the dismissal order did not itself deny leave to amend, so it was the judgment that cut off the opportunity to amend. *See id.* at 518 n.2. Moreover, if the clerical matter of when judgment was entered were a basis to distinguish *Runnion* from this case, *Runnion* would be arbitrarily narrow, applying to judgments entered the day of dismissal but not judgments entered the following day. That the Seventh Circuit's holding is broader than respondents posit is confirmed by the court's own summary of its holding, which focuses on the effect, not the timing, of the judgment: "[T]he district court erred by dismissing the entire case without giving plaintiff an opportunity to amend her complaint." *Id.* at 516.

Respondents' other Seventh Circuit authorities are not to the contrary. Respondents cite *Figgie International, Inc. v. Miller*, 966 F.2d 1178 (7th Cir. 1992), but that opinion explicitly declined to decide the question posed here. *See id.* at 1180. Respondents cite *FDIC v. Meyer*, 781 F.2d 1260 (7th Cir. 1986), but that case was not about amending a complaint at all; rather, *defendants* there filed a Rule 59 motion to raise new arguments and seek more discovery. *See id.* at 1262, 1268. Finally, respondents cite *Fannon v. Guidant Corp.*, 583 F.3d 995 (7th Cir. 2009), a securities fraud case in which a heightened pleading standard applied. *Id.* at 1002. There, the district court dismissed after seeing nine individual complaints, a consolidated complaint, and a corrected consolidated complaint. *Id.* at 1001-02. Because "the plaintiffs had … a number of opportunities

to craft a complaint that complied with the [heightened] standards," and failed, the district court was "entitled to bring this litigation to a close." *Id.* at 1002; *cf. Foman*, 371 U.S. at 182 (leave to amend may be denied based on "repeated failure to cure deficiencies"). Moreover, *Fannon* explicitly distinguished the circumstances present here and in *Runnion*. *See* 583 F.3d at 1003 (recognizing there would be "a more difficult problem if this case … was a simple one in which the first action of the district court was to grant a motion to dismiss on the pleadings with prejudice, without any determination about the sufficiency of a proffered amended complaint"). Indeed, the Seventh Circuit has "repeatedly applied [*Foman*'s] liberal policy of amendment when reviewing district court decisions on post-judgment motions for leave to amend." *Runnion*, 786 F.3d at 521 (citing three prior circuit cases).

Turning to the Second Circuit, respondents focus on isolated statements in *Williams v. Citigroup Inc.*, 659 F.3d 208 (2d Cir. 2011) (per curiam), discussing finality. Opp. 13, 25. However, the fact that *Williams* considered finality did not prevent it from applying Rule 15 standards as instructed by *Foman*, *see* 659 F.3d at 213-14, any more than a reference in the decision below to Rule 15 prevented the court of appeals here from treating petitioners' motion to amend as a "disfavored" motion that the district court had "considerable discretion to deny." Pet. App. 7a.

Addressing *Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006) (en banc), respondents point to the court's statement that a district court must vacate judgment before permitting post-judgment amendment of a complaint. But that truism about the mechanics of the Rules does not address the *standard* applicable to such a

motion. As explained in *Laber*, that standard is "the same legal standard as a similar motion filed before judgment was entered" (*i.e.,* Rule 15). 438 F.3d at 428. Respondents cite *Aikens v. Ingram*, 652 F.3d 496 (4th Cir. 2011) (en banc), but that case did not discuss the amendment of complaints. Respondents also cite *Mayfield v. National Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369 (4th Cir. 2012), but that case applied the same standard as *Laber*, *see id.* at 378-79, and affirmed the denial of leave to amend based mainly on prejudice, where lengthy discovery had already occurred and plaintiffs sought to raise new claims based on a new set of events. *See id.* at 379-80.

Respondents do not dispute that *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 367 (5th Cir. 2014), applied Rule 15's standard to a post-judgment motion seeking to amend. In trying to minimize *Spicer*'s significance, respondents cite *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003), but that case, on which *Spicer* principally relies, applied the same standard as *Spicer*. *Id.* at 864 ("[U]nder these circumstances, the considerations for a Rule 59(e) motion are governed by Rule 15(a)[.]"). Respondents also cite *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606 (5th Cir. 1993) and *Vielma v. Eureka Co.*, 218 F.3d 458 (5th Cir. 2000), but those cases concerned attempts to amend *after merits judgment*, not after dismissal on the pleadings. *S. Constructors*, 2 F.3d at 611; *Vielma*, 218 F.3d at 463, 468. In *Southern Constructors*, the court expressly distinguished motions to amend following merits judgment from motions to amend following dismissal on the pleadings, and noted that Rule 15's standard applies to the latter. 2 F.3d at 611.

In answer to the application of the Rule 15 standard in *Thomas v. Town of Davie*, 847 F.2d 771 (11th Cir. 1988), respondents point to the statement in *Jacobs v. Tempur-Pedic International, Inc.*, 626 F.3d 1327 (11th Cir. 2010), that "Rule 15(a), by its plain language," has "no application *after* judgment is entered." *Id.* at 1344. *Jacobs* is correct in the sense that, as a procedural matter, a plaintiff must move under Rule 59 to set aside a judgment, and a judgment must be set aside before the complaint can be amended. But that point does not elucidate what standard applies to the Rule 59 motion in that circumstance. *Thomas* states that standard. 847 F.2d at 773. To the extent the statement in *Jacobs* is in tension with *Thomas*, any disharmony only underscores the extent of the disarray in the lower courts.

Respondents' answer to the conflicting D.C. Circuit decisions is to point out that one quotes the other. Opp. 30. That observation does not change the fact that the cases articulate different standards. One requires that a post-judgment motion to amend be granted absent the Rule 15 ground of futility. *See Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1128 (D.C. Cir. 2015) ("unless the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency" (citation and internal quotation marks omitted)). The other applies "Rule 59(e)'s more stringent standard." *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam).

Finally, respondents take issue with the other side of the circuit split—the First, Sixth, and Ninth Circuit decisions—by pointing to aspects of these authorities other than the substantive standard applied. *See* Opp. 29 (discussing the Sixth Circuit's discussion of the relationship between Rules 15 and 59); Opp. 28-29, 29-30

(analyzing whether the First and Ninth Circuit cases would have reached the same result under a standard other than the one these courts applied). Respondents do not dispute, however, that these courts applied the strict Rule 59 standard rather than the Rule 15 standard prescribed in *Foman*.

B. As to the circuit conflict regarding how to calculate time taken to amend, *see* Pet. 14-17, respondents do not dispute petitioners' descriptions of the holding below or of the First and Third Circuit decisions agreeing with it. Rather, respondents argue that the conflicting decisions of the Second, Sixth, and Seventh Circuits are distinguishable.

Citing background irrelevant to the Second Circuit's holding in *Williams*, respondents argue that *Williams* did not hold "that the time during which a motion to dismiss is pending can never be considered as a basis for denying a party's post-judgment motion to amend." Opp. 32. In fact, that is precisely what *Williams* held: considering the proposition that the plaintiff was obliged to seek leave to replead "immediately upon answering the motion to dismiss the complaint (without yet knowing whether the court will grant the motion, or, if so, on what ground)," the court found it "unmistakably clear there is no such rule." 659 F.3d at 214.

Respondents characterize *Morse v. McWhorter*, 290 F.3d 795 (6th Cir. 2002), as "unique" for two reasons: because the plaintiffs "affirmatively requested leave to amend," and because a magistrate recommended dismissal *with* leave to amend. Opp. 33. The first circumstance is hardly "unique"; it is, in fact, true here also. Pet. App. 18a. The second circumstance shows that petitioners are *more* favorably situated than the *Morse* plaintiffs, whom the Sixth Circuit held had not unduly

delayed when they moved to amend after the district court adopted the magistrate's recommendation and dismissed the case. The magistrate judge's recommendation of dismissal (albeit with leave to amend) provided those plaintiffs with authoritative guidance that their complaint was deficient—unlike here, where the court of appeals thought that petitioners, prior to the district court's ruling, should have taken their *adversary's* word that their complaint was deficient.

As for the Seventh Circuit, respondents reprise their argument that *Runnion* is distinguishable based on the amount of time between dismissal and entry of judgment. Opp. 33. As explained, that supposed distinction relies on a cramped and untenable reading of *Runnion*. *See supra* pp. 1-2.

In sum, contrary to the decision below, the Second, Sixth, and Seventh Circuits do not count as "delay" in amending time before the district court ruled that amendment was needed. The Court should grant the petition to resolve this circuit split.

II. The Decision Below Is Incorrect.

A. *Foman* held that Rule 15's command that leave to amend a complaint be "freely give[n]" applies even when leave to amend is sought after judgment. 371 U.S. at 182. Respondents wrongly assert that *Foman* requires only that when a district court denies leave to amend post-judgment, the court provide "any justifying reason." Opp. 12. But *Foman* cannot be reduced to a notice requirement. The Court held, "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." 371 U.S. at 182. This instruction articulates a substantive approach to amendment: courts should "afford[] an opportunity" to

test a claim on the merits, not just explain why they denied one. Moreover, *Foman* specifies grounds that justify denying leave to amend post-judgment: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Id.* These specific reasons are a far cry from "any justifying reason." That phrase appears in *Foman*'s next sentence, which explains that a court has not engaged in an "exercise of discretion" *at all* when it fails to provide "any justifying reason" for denying leave. *Id.*

Respondents alternatively urge departure from *Foman* based on the goal of finality embodied in Rule 59. However, the rule pursues that goal by providing a time limit, not a substantive standard. *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."). *Foman*, not Rule 59, specifies what substantive standard applies to a Rule 59(e) motion for leave to amend following dismissal of the complaint: the "freely give[n]" standard of Rule 15.

The rule applied below, in addition to thwarting the testing of claims on their merits, invites arbitrariness by enabling the actions of different district courts to impose different standards on different litigants. Pet. 18-19. Respondents' answer that district courts have discretion in many contexts, Opp. 35 n.5, misses the point. District courts frequently have discretion in applying an established standard. By contrast, the Eighth Circuit's approach would give district courts discretion over *which standard applies*. Deciding to dismiss a complaint without leave to amend rather than with leave effectively

moves the goalposts for amendment, replacing the Rule 15 "freely give[n]" standard with the strict Rule 59 standard requiring "manifest errors of law or fact or … newly discovered evidence." *Holder v. United States*, 721 F.3d 979, 986 (8th Cir. 2013) (citation and internal quotation marks omitted). Given the malleability of the standard in the Eighth Circuit, parties opposing a motion to dismiss lack guidance regarding the consequence of dismissal in any given case and accordingly cannot make an informed decision whether to expend the resources to file a protective motion to amend while opposing dismissal.

Finally, respondents' fear that a straightforward application of *Foman* will give plaintiffs "carte blanche power to manage the courts' dockets," Opp. 35 n.5, ignores the important limitations imposed by Rule 59 (28-day time limit) and by *Foman* (specifying grounds for denying leave to amend). In the half-century since *Foman*, there is no indication that plaintiffs' amendment power has run amok in the circuits that faithfully apply *Foman*.

B. As to the second question presented, respondents defend the decision below mainly on the alternate ground that petitioners' amendment was properly rejected because they supposedly knew all the information in the amended complaint when they filed the case. Opp. 19, 34-37. Respondents' premise is incorrect: although petitioners knew at the outset some information in the amended complaint (such as the content of their W-2s, Resp. App. 88a), they lacked other key information (such as the interrelationship between the respondent entities, Resp. App. 81a-82a). Even as to information in petitioners' possession initially, petitioners should not be penalized for relying on previous Missouri federal court

decisions to conclude that their original allegations were sufficient. Pet. 5. A rule requiring plaintiffs to "data dump" all information they know would hinder, not expedite, the work of the courts by requiring judges and litigants to wade through details not required by Rule 8's notice pleading requirement.

Respondents profess incredulity that petitioners took nine calendar days to research and prepare an amended complaint with accompanying motion. Opp. 36. But nine days is a short time, whether compared to the time limit for seeking relief from judgment (28 days), or to the time periods courts tend to allow to amend complaints following dismissal with leave to amend.*

Respondents' focus on the two days between entry of judgment and petitioners' motion makes even less sense. Petitioners could not have known in advance precisely when judgment would be entered. After dismissal, all they could do was work expeditiously to prepare their amended complaint. They did so within nine days. The notion that the outcome would have differed had the district court clerk waited two more days before entering judgment illustrates the arbitrariness of respondents' approach.

III. Respondents' Vehicle Objections Are Unfounded.

Respondents are wrong that the answers to the questions presented make no difference to the outcome of this case. Opp. 35. First, although "undue delay" is a ground for denying amendment under either Rule 15 or

* A Westlaw search on November 23, 2015, of all federal district court decisions in the previous twelve months using the query <adv: dismiss! w/10 "leave to amend" w/10 day!> yielded 374 results. Only three of the 374 cases granted leave to amend but allowed fewer than ten days to do so. In the remaining cases granting leave, courts usually allowed between fourteen and thirty days to amend.

59, the choice between the forgiving Rule 15 standard or the demanding standard applicable to other Rule 59 motions makes a difference in analyzing what constitutes undue delay. Had the Eighth Circuit followed *Foman*'s instruction to facilitate the testing of claims on their merits, it would not have understood "undue delay" to encompass "delays" in taking an action before that action became necessary. *See* Pet. 19-20.

Second, as explained above, respondents are mistaken that the decision below is justified on the alternate ground that plaintiffs knew at the outset some of the information in the amended complaint. If a court finds that a party has deliberately sandbagged her opponent or the court by raising information belatedly to gain an advantage, denial of leave to amend might well be appropriate based on bad faith. *Foman*, 371 U.S. at 182. But neither the district court nor the court of appeals made such a finding here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

BRENDAN J. DONELON
DONELON, P.C.
420 Nichols Road, Suite 200
Kansas City, MO 64112
(816) 221-7100

SCOTT MICHELMAN
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

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