No. 18-782

IN THE

Supreme Court of the United States

WILLIAM C. BOND,

Petitioner,

v.

UNITED STATES OF AMERICA; JOHNNY L. HUGHES, United States Marshal; KEVIN PERKINS, Special Agent in Charge; ROD J. ROSENSTEIN, United States Attorney; and UNKNOWN NAMED MARYLAND U.S. JUDGES,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

"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." *Foman v. Davis*, 371 U.S. 178, 182 (1962). To make this imperative meaningful for pro se litigants, five circuits have adopted a rule requiring that district court denials of pro se litigants' motions to amend must include the reason for that denial.[1] Pet. for Cert. ("Pet.") 13–15 (discussing the Third, Seventh, Ninth, Eleventh, and D.C. Circuits).

These circuits adopted this majority rule because pro se litigants face unique challenges when pleading their claims. *Id.* at 2–4, 17–22. As the Ninth Circuit explained, this "requirement that courts provide a pro se litigant with notice of the deficiencies in his or her complaint" is intended to "ensure that the pro se litigant can use the opportunity to amend effectively," because "without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors." *Noll*, 809 F.2d at 1448; Pet. 14–15.

Four circuits do not require district courts to

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[1] District courts are not required to issue detailed opinions but "need draft only a few sentences." *Noll v. Carlson*, 809 F.2d 1446, 1448–49 (9th Cir. 1987), *superseded on other grounds by statute as stated in Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (en banc); Pet. 21 (discussing *Noll*'s example that in a 42 U.S.C. § 1983 action, the deficiency can be identified as nothing more than the failure to allege action under color of state law).

provide a justifying reason when denying pro se litigants' motions to amend if that reason is apparent from an analysis of the record. Pet. 11–13 (discussing the First, Fourth, Fifth, and Tenth Circuits). This minority rule deprives pro se litigants of the practical ability to amend a deficient but potentially meritorious complaint because it requires pro se litigants to analyze the litigation record and both identify and comprehend the district court's reasoning. This circuit split raises issues of national importance, as nearly one-third of all civil litigants are pro se. *Id.* at 17–20. Moreover, the majority of pro se litigants are members of protected classes, bringing core constitutional claims. *Id.* at 2–4, 17–20.

Despite the gravity of these issues, Respondents' Brief in Opposition ("Opposition" or "Opp.") altogether ignores the very existence of a circuit split involving pro se litigants, arguing instead that pro se litigants should not be treated "any differently" than represented parties. Opp. 13–14. Respondents blatantly disregard this circuit split and do not cite a single case in which a circuit affirmed the unreasoned denial of a pro se litigant's motion to amend.[2]

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[2] Respondents claim that *Firestone v. Firestone*, a case Petitioner cited (Pet. 14), serves as an example of a circuit that does not require the district court to provide a reason when denying leave to amend. 76 F.3d 1205 (D.C. Cir. 1996) (Opp. 12). *Firestone* held the opposite: "Turning then to the Rule 15(a) issue, we find error in the district court's complete failure to provide reasons for refusing to grant leave to amend." 76 F.3d at 1209. Respondents

Respondents' inability to challenge the circuit split is a tacit concession that Respondents could not identify a single case involving a pro se litigant that contradicted the majority of the circuit courts. Thus, "Respondents' brief in opposition declined to contest" Petitioner's "assertion" of the circuit split and "that alone is reason to accept this as fact for purposes of" the Court's "decision in this case." *Carcieri v. Salazar*, 555 U.S. 379, 395–96 (2009).

Nothing—except the lack of relevant case law—prevented Respondents from arguing in the alternative, making the argument advanced in the Opposition alongside the argument that Petitioner's circuit split does not exist. *Cf. Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (explaining that because the "brief in opposition" did not "raise the argument as an alternative ground on which this Court could or should affirm the Court of Appeals' judgment," the "argument is properly deemed waived" (internal quotation marks omitted)). Respondents did not brief both arguments because they genuinely could not brief both arguments. As a result, there is zero circuit court authority in the Opposition calling Petitioner's circuit split into question. The Court could grant

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ignore this holding and misquote the following dictum (Opp. 12): "Moreover, the record in this case reveals none of the legitimate reasons—such as those articulated in *Foman*—that may justify denial of leave to amend." *Id.* When read in context, this dictum simply clarifies that it is not possible that the appellate court misread the district court's denial order, including by overlooking a stated reason for denial, as no reason could exist.

this Petition on that basis alone.

ARGUMENT

I. RESPONDENTS' PURPORTED AUTHORITY DOES NOT INCLUDE A SINGLE CASE CHALLENGING THE MAJORITY RULE.

As discussed *supra*, Respondents do not cite a single case involving a pro se litigant's motion to amend that supports their inapposite argument that the majority rule does not exist. Opp. 10–12.[3] When addressing the minority rule, Respondents' myopia is consistent as they do not cite a single case involving or discussing a pro se litigant. Opp. 10–12.[4] Nor does Respondents' purported authority

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[3] *See* Docket, *Lake v. Arnold*, No. 3:95-cv-00245-KRG-KAP (W.D. Pa.) (plaintiff represented by counsel); Docket, *Feldman v. Am. Mem'l Life Ins. Co.*, No. 1:96-cv-03371 (N.D. Ill.) (same); *see also* Motion to Amend, *Bland v. Napolitano*, No. 1:13-cv-00491-RJL (D.D.C. Oct. 25, 2013), ECF No. 15 (plaintiff represented by counsel on motion to amend); Docket, *In re Garabed Melkonian Tr.*, No. 2:05-cv-01092-R-SS (C.D. Cal.) (trustee, the sole entity entitled to litigate the trust's claims, represented by counsel); *supra* n.2; *infra* p. 5.

[4] *See* Dockets, *United States ex rel. Kelly v. Novartis Pharms. Corp.*, Nos. 1:06-cv-10465-WGY, 1:10-cv-11728-WGY, 1:12-cv-10962-WGY (D. Mass.) (plaintiff represented by counsel); Docket, *In re PEC Sols., Inc. Sec. Litig.*, 1:03-cv-00331-GBL (E.D. Va.) (same); Docket, *Viernow v. Euripedes Dev. Corp.*, No. 2:96-cv-00243-DB (D. Utah) (same); *Ashe v. Corley*, 992 F.2d 540, 541–45 (5th Cir. 1993) (plaintiff represented by counsel in Fifth Circuit and no indication that plaintiff was not represented by counsel in district

support their argument that no circuit requires a district court to provide a justifying reason when denying a represented party's motion to amend. Opp. 12; *Nolin v. Douglas Cty.*, 903 F.2d 1546, 1550–51 (11th Cir. 1990) (affirming denial of leave to amend because the denial order "stated" the "reason for its decision"), *overruled on other grounds by McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc); *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993) (affirming denial of leave to amend based on district court order analyzing the statute of limitations, *see Moore v. Baker,* No. CV 491-93, 1991 WL 578264 (S.D. Ga. Oct. 1, 1991)).

Respondents make the unfounded claim that *Foman* requires only that the reason for denial of a motion to amend appear somewhere in the record. Opp. 6. *Foman* never says that the presence in the record of a justifying reason excuses a district court's failure to identify that reason in its denial order. In arguing otherwise, Respondents crudely tack *Foman*'s words, "from the record," onto Respondents' own proposition that "a district court's decision not to articulate its reasons for denying leave to amend is not an abuse of discretion if the court's reasons 'appear[] from the record,' *id.* at 182." Opp. 6 (alterations in original). *Foman* nowhere says that (on page 182 or otherwise).[5] In

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court, but district court docket is unavailable online).

[5] The actual quote from *Foman* establishes an altogether unrelated point: "As appears from the record, the amendment would have done no more than state an alternative theory for recovery." 371 U.S. at 182.

any event, *Foman* cannot assist Respondents because—as Respondents' own cases explain—the relevant language in *Foman* is "dictum." Opp. 7–8 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 329 (1971)).

II. DESPITE RESPONDENTS' ARGUMENT TO THE CONTRARY, THE CIRCUIT COURTS, THEMSELVES, MAKE CLEAR THAT THE MAJORITY OF CIRCUITS HAVE PROMULGATED A REVIEWABLE RULE.

Respondents advance the novel argument that this Court should only grant certiorari if a circuit split involves a "per se rule." Opp. 12. Even if Respondents' per se requirement existed (a proposition for which they cite no authority), it would not matter because the circuit courts did promulgate a per se rule.

Before "dismissing a pro se complaint *the district court must provide* the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (emphasis added); *Firestone*, 76 F.3d at 1209 (explaining that "*a proper exercise of discretion requires* that the district court provide reasons" for denying a pro se litigant leave to amend (emphasis added)). It is unclear what more Respondents imagine a per se rule to entail if the use of directives ("must") and prerequisites ("requires") does not satisfy the criteria.

Respondents are also incorrect when arguing that Petitioner's cases do not depend on the litigant's pro se status. Opp. 13–14; *see, e.g.*, *Phillips*

v. Ill. Dep't of Fin. & Prof'l Regulation, 718 F. App'x 433, 436 (7th Cir. 2018) (Pet. 14) (reminding district courts of their "special responsibility" to pro se litigants, mandating that leave to amend "should be granted" for "unclear" pro se complaints); *Flynn v. Dep't of Corr.*, 739 F. App'x 132, 136 (3d Cir. 2018) (Pet. 14) (requiring that district courts "offer amendment in pro se civil rights cases unless doing so would be inequitable or futile" (internal citations and quotations omitted)).

III. RESPONDENTS' CLAIM THAT THE CIRCUIT SPLIT IS NOT "OUTCOME-DETERMINATIVE" AND THEREFORE NOT WORTHY OF CERTIORARI IS BOTH FACTUALLY AND LEGALLY INCORRECT.

Respondents' argument that the circuit split is not "outcome-determinative" because an appellate court can affirm based on harmless error is a non sequitur. Opp. 6, 15–16. If a pro se litigant is denied leave to amend, Federal Rule of Civil Procedure 15 allows that litigant to move for leave again, proposing new amendments that cure the deficiency identified by the district court, including by adding new defendants.[6] *See, e.g.*, *Hill v. Allianz Life Ins. Co. of N. Am.*, No. 6:14-cv-950-Orl-41KRS, 2014 WL

[6] The right to seek leave to amend is not without limit. The "repeated failure to cure deficiencies by amendments previously allowed" is a legitimate basis for denying leave to amend. *Foman*, 371 U.S. at 182; *cf. Slack v. McDaniel*, 529 U.S. 473, 489 (2000) (explaining that the Federal Rules of Civil Procedure "vest the federal courts with due flexibility to prevent vexatious litigation").

12617784, at *1–3 (M.D. Fla. Dec. 5, 2014) (granting in part second motion to amend, including to add a new party, after denying first motion to amend); *Mondier v. Fugate*, No. 02-CV-933-TCK-SAJ, 2008 WL 906180, at *1 (N.D. Okla. Mar. 27, 2008) (reciting procedural history, including denial of pro se litigant's first motion to amend and grant of second motion to amend).

Even if leave to amend is denied as futile, including that reason in the denial order still matters because the pro se litigant can cure futility in a subsequent amendment. *E.g.*, *Wagner Equip. Co. v. Wood*, 289 F.R.D. 347, 349–51 (D.N.M. 2013) (granting second motion to amend after denying first motion to amend for futility, *see Wagner Equip. Co. v. Wood*, No. 11-466 MV/ACT, 2012 WL 988022, at *1–4 (D.N.M. Mar. 20, 2012)); *Ward v. Deboo*, No. 1:11cv68, 2012 WL 2359440, at *1 (N.D. W. Va. Jan. 18, 2012) (same).

Respondents' subsidiary argument that the majority rule is improper because it provides preferential treatment to pro se litigants is misplaced. Opp. 14. This Court has repeatedly provided reasonable accommodations to pro se litigants.[7] *See, e.g.*, *Castro v. United States*, 540 U.S.

[7] Petitioner does not dispute that pro se litigants generally should abide by the Federal Rules of Civil Procedure. Opp. 14 n.3. If Respondents are arguing, however, that providing reasonable accommodations to pro se litigants is improper, the Eleventh Circuit disposes of this claim: "although pro se litigants are still bound by rules of procedure, this court has explained that they should not be held to the same level of knowledge as an

375, 377, 381–84 (2003) (requiring district courts to warn pro se litigants of consequences before re-characterizing pleading as a habeas motion).

IV. FEDERAL RULE OF CIVIL PROCEDURE 52(A)(3) HAS NO BEARING ON THIS PETITION.

Respondents' comment that the decision below is supported by Rule 52(a)(3)—which does not require a district court to "state findings or conclusions when ruling on a motion"—can be disposed of quickly. Opp. 7. *First*, Respondents cannot seriously offer this argument, which, if carried to its logical conclusion, would mean that a district court could always insulate itself from review by declining to issue a reasoned opinion and rubberstamping its docket.

Second, Respondents' reading of Rule 52(a)(3) contravenes the spirit and intent of the Federal Rules of Civil Procedure, which were:

> designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

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attorney, and, therefore, additional notice may be appropriate." *Pierce v. City of Miami*, 176 F. App'x 12, 14–15 (11th Cir. 2006).

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

Third, the circuits can and do impose requirements on the district courts greater than Respondents' view of Rule 52(a)(3). *Higdon v. Tusan*, 673 F. App'x 933, 937 (11th Cir. 2016) ("We've instructed district courts to provide sufficient explanations of their rulings so that we have an opportunity to engage in meaningful appellate review.").

V. IN ARGUING THAT THE QUESTION PRESENTED RAISES A NEW ISSUE NOT PROPERLY BEFORE THE COURT, RESPONDENTS IGNORE THE APPELLATE RECORD.

Rather than engage with the circuit split, Respondents argue that the Petition should be denied because it presents the issue "in the first instance." Opp. 13. This argument ignores the record. In the briefing below, Petitioner repeatedly invoked his pro se status as the main reason that the district court's denial was improper. For example, Petitioner criticized the Government because it did not cite a single "case supporting its contention that pro se litigants can be left guessing about why the district court thought its complaint fell short." Pet. C.A. Reply Br. 6–8; Pet. C.A. Br. 35–37 ("Requiring a district court to actually consider the allegations of an amended complaint is all the more important in a pro se case."). The impact of Petitioner's pro se status on the district court's obligation to him was squarely before the Fourth Circuit when it issued the decision below and is thus properly before this Court for review.

VI. THE DECISION BELOW IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT SPLIT.

The decision below tees up the circuit split as the district court denied leave to amend without providing a reason and the Fourth Circuit issued an opinion demonstrating that pro se litigants are not entitled to more. Pet. 22–24. The decision below remains an ideal vehicle for resolving this dispute for all the reasons discussed in the Petition. *Id.*

Yet Respondents now claim that the Petition is not an ideal vehicle, arguing that the decision below does, in fact, state a reason for its denial, citing the Second Denial Order's naked reference to the First Denial Order and the MTD Order.[8] *See* Opp. 6. Respondents make this argument despite acknowledging that the decision below observes that the Second Denial Order "does not explicitly state whether [petitioner's] second motion to amend was being denied for prejudice, bad faith, or futility." *Id.* at 5 (alteration in original) (quotation marks omitted). The argument that the mere reference to the MTD Order and the First Denial Order provides a stated reason ignores the rationale motivating the majority rule in the circuit courts.

The First Denial Order did nothing more than cite the docket number of the MTD Order—a 28-page opinion identifying numerous reasons for dismissing the complaint. Pet. 5–9. For this opaque

[8] Petitioner herein incorporates the nomenclature used in the Petition concerning the district court orders granting the motion to dismiss and denying the motions to amend. *See* Pet. 5–8.

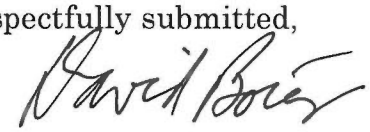
reference to provide notice of the deficiencies, the pro se litigant must comprehend and analyze the 28-page opinion, identifying and deciphering the holdings that apply to the new factual allegations in the Second Amended Complaint.

The point of the majority rule is to ensure that pro se litigants receive notice and the opportunity to cure. Proposed amendments "that are made without an understanding of underlying deficiencies are rarely sufficient to cure inadequate pleadings." *Noll,* 809 F.2d at 1448. Respondents' argument that the Second Denial Order provided sufficient notice would be rejected by each of the majority circuits because it does not serve as a reason based on the explicit rationales of those circuit courts. Pet. 13–15. As such—and for the additional reasons identified in the Petition—the Petition is an ideal vehicle for resolution of this circuit split. *Id.* at 22–24.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition should be granted.

Respectfully submitted,



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