No.

IN THE
Supreme Court of the United States

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Petitioner,

v.

ETHAN VOLUNGIS, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When Liberty Mutual moved to dismiss Ethan Volungis's complaint alleging bad-faith handling of an insurance claim, Volungis and his counsel chose not to amend the complaint as a matter of right. When Volungis and his counsel then responded to the motion to dismiss, they did not request leave to file an amended complaint in the event the court dismissed the complaint. After the district court granted Liberty Mutual's motion to dismiss, Volungis and his counsel again chose not to move to amend the complaint. Nevertheless, in affirming the dismissal of Volungis's complaint, the Ninth Circuit held that Federal Rule of Civil Procedure 15(a) required the district court *sua sponte* to grant the leave to amend that Volungis and his counsel had repeatedly elected not to seek.

The question presented is whether Federal Rule of Civil Procedure 15(a) requires district courts to grant plaintiffs represented by counsel leave to amend their complaint *sua sponte* after granting a motion to dismiss, or whether—as every other regional circuit has held—district courts have discretion not to grant leave to amend when plaintiffs represented by counsel do not ask for it.

PARTIES TO THE PROCEEDING, RULE 29.6 STATEMENT, AND STATEMENT AS TO DIRECTLY RELATED PROCEEDINGS

In addition to the parties listed in the caption, Farooq Abdulla and Nighat Abdulla were plaintiffs-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Liberty Mutual Fire Insurance Company is a wholly owned subsidiary of Liberty Mutual Group Inc. Liberty Mutual Group Inc. is a wholly owned subsidiary of LMHC Massachusetts Holdings Inc. LMHC Massachusetts Holdings Inc. is a wholly owned subsidiary of Liberty Mutual Holding Company Inc. There is no publicly held company that owns 10% or more of the stock of Liberty Mutual Holding Company Inc.

Undersigned counsel is unaware of any directly related proceedings under this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Liberty Mutual Fire Insurance Company ("Liberty Mutual") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished memorandum opinion of the court of appeals is available at 808 F. App'x 414. Pet. App. 1a. The court of appeals' unpublished order denying rehearing and rehearing en banc is not reported. Pet. App. 19a. The district court's order dismissing Plaintiffs' complaint is available at 2018 WL 3543030. Pet. App. 6a.

JURISDICTION

The court of appeals issued its opinion on April 2, 2020, and denied Liberty Mutual's timely petition for rehearing or rehearing en banc on May 22, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 15 provides, in relevant part:

> **Rule 15. Amended and Supplemental Pleadings**
>
> (a) AMENDMENTS BEFORE TRIAL.
>
> (1) *Amending as a Matter of Course*. A party may amend its pleading once as a matter of course within:
>
> (A) 21 days after serving it, or

> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
>
> (2) *Other Amendments*. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

STATEMENT

The Ninth Circuit continues to follow, in the decision in this case and in other recent published and unpublished decisions, an archaic, 70-year-old rule that protects plaintiffs, including those represented by counsel, who fail to amend their complaint as of right or to file a timely motion for leave to amend. According to the Ninth Circuit, Federal Rule of Civil Procedure 15(a) requires that a district court *sua sponte* grant a plaintiff leave to amend after dismissing a complaint—even if the plaintiff and his counsel repeatedly declined to amend the complaint as of right or request leave to amend—unless "the pleading could not possibly be cured by the allegation of other facts." Pet. App. 4a (internal quotation marks omitted). Every other regional circuit has rejected the Ninth Circuit's view that district courts are required to do the work of plaintiff's counsel by authorizing amendments that counsel themselves never sought. And the Federal Circuit—which generally applies the procedural law of the regional circuit where the case originated—applies both approaches, depending on whether the case arose in the Ninth Circuit or elsewhere.

In addition to perpetuating this longstanding circuit split, the Ninth Circuit's approach discourages finality, rewards gamesmanship by litigants and their lawyers who do not act with diligence to protect their own interests, and places district judges in the inappropriate and untenable position of second-guessing the strategic decision-making of a represented party who elected not to amend as of right or move for leave to amend.

This Court should grant review in order to establish a uniform rule governing district courts' obligation to grant leave to amend *sua sponte* in cases where the plaintiff is represented by counsel—a frequently recurring issue with far-reaching practical importance for both federal courts and federal litigants—and to reject the Ninth Circuit's outlier approach, which requires district courts to act as surrogate plaintiffs' lawyers on behalf of parties who are already represented by counsel.

1. Plaintiffs Ethan Volungis and Farooq Abdulla were involved in a motor vehicle collision in Las Vegas, Nevada in 2013. Pet. App. 6a. Abdulla had auto insurance from Liberty Mutual with a limit of $100,000 per person. *Id.* According to Volungis's complaint, he contacted Liberty Mutual and offered not to pursue litigation against Abdulla in exchange for payment of the full limit of Abdulla's policy and several other conditions. Pet. App. 2a. Liberty Mutual responded by offering to pay the full policy limit but did not meet Volungis's other conditions. *Id.*

Volungis countered by filing a personal-injury suit against Abdulla in Nevada state court and ultimately obtained a $6.8 million judgment. Pet. App. 2a. Abdulla thereafter assigned his rights against Liberty

Mutual to Volungis, in exchange for Volungis's agreement not to execute the judgment against Abdulla's assets. *Id.*

Volungis—with the representation of counsel—then sued Liberty Mutual in state court for breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of Nevada's Unfair Claims Practices Act. Pet. App. 2a. Abdulla and his wife—represented by the same attorneys as Volungis—were also named as plaintiffs in the complaint. Pet. App. 7a. Each of Plaintiffs' claims was premised on Liberty Mutual's alleged refusal to accept Volungis's settlement conditions before he filed his personal-injury suit against Abdulla. *Id.* Liberty Mutual removed the case to the U.S. District Court for the District of Nevada based on that court's diversity jurisdiction. Pet. App. 8a.

Liberty Mutual subsequently moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). Liberty Mutual's motion triggered a 21-day period for Plaintiffs to file an amended complaint, without the need for requesting consent from Liberty Mutual or leave of court, under Federal Rule of Civil Procedure 15(a)(1)(B). Plaintiffs elected not to amend their complaint and instead filed an opposition to the motion to dismiss. Nowhere in the opposition brief did Plaintiffs request leave to amend their complaint in the event that the court granted the motion to dismiss. *See* D.E. #12, Pls.' Opp. to Mot. to Dismiss (D. Nev. Sept. 25, 2017).

The district court dismissed Plaintiffs' complaint because Plaintiffs had failed to state a claim under Nevada law. Pet. App. 18a. The district court's order did not state that the dismissal was with prejudice. Nevertheless, Plaintiffs still did not move for leave to

file an amended complaint, as they would have been authorized to do under Federal Rule of Civil Procedure 15(a)(2). They instead filed a notice of appeal.

2. The Ninth Circuit affirmed the district court's dismissal of Plaintiffs' complaint. Pet. App. 5a. The court of appeals held that Plaintiffs' allegations that Liberty Mutual unreasonably failed to settle with Volungis did not state a cognizable claim for breach of contract under Nevada law; that Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing was legally deficient because they "failed to allege any unreasonable or arbitrary conduct on Liberty Mutual's part" and did "not allege that Liberty Mutual failed to communicate [Volungis's] initial settlement offer to Abdulla"; and that Plaintiffs' Unfair Claims Practices Act claim failed because they "offer[ed] no supporting facts outside of reciting the language" of the statute. Pet. App. 3a-4a.

Despite concluding that "dismissal was proper," the Ninth Circuit further held that Plaintiffs "should have been given an opportunity to amend." Pet. App. 2a. The Ninth Circuit reasoned that "Federal Rule of Civil Procedure 15(a)(2) requires district courts to 'freely give leave [to amend] when justice so requires'" and that "[t]his policy is 'to be applied with extreme liberality.'" Pet. App. 4a (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (per curiam)) (first alteration in original). According to the Ninth Circuit, a "'district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Id.* (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc)). "Amendment is futile," the court continued, "only if no set of facts can

be proven under the amendment that would constitute a valid and sufficient claim." *Id.* (citing *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)).

Thus, even though Plaintiffs and their counsel had bypassed multiple opportunities to amend as of right or to seek leave to amend in the district court, the Ninth Circuit concluded that "[i]t was an abuse of discretion to dismiss these claims with prejudice and no justification for doing so" because Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing and their claim under the Unfair Claims Practices Act supposedly "could be cured through amendment." Pet. App. 4a (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). The court therefore "remand[ed] to allow [Plaintiffs] the chance to amend." Pet. App. 2a.

3. The Ninth Circuit denied Liberty Mutual's timely petition for rehearing or rehearing en banc without requesting a response from Plaintiffs. Pet. App. 19a-20a.

REASONS FOR GRANTING THE PETITION

Federal Rule of Civil Procedure 15(a) authorizes plaintiffs to amend their complaint once as a matter of course, within certain time limits, or "[i]n all other cases . . . only with the opposing party's written consent or the court's leave," which the court "should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit, however, requires that, after granting a motion to dismiss, a court *automatically* grant plaintiffs leave to amend, including where the plaintiff is represented by counsel; this requirement applies "'even if no request . . . was made, unless [the court] determines that the pleading could not possibly be cured by the allegation of other facts.'" Pet. App. 4a (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127

(9th Cir. 2000) (en banc)). The Ninth Circuit applied its 70-year-old rule in this case to hold that the district court should have *sua sponte* afforded Plaintiffs an opportunity to amend their complaint even though their counsel never once requested leave to amend in the district court and instead forwent multiple opportunities to amend as of right and to move for leave to amend.

The Ninth Circuit's extraordinarily permissive approach to amendment conflicts with the approach of every other regional circuit, none of which requires district courts to grant leave to amend *sua sponte* to plaintiffs represented by counsel. It also undermines the finality of district court dismissals, eviscerates the discretion afforded to district courts by Rule 15(a)(2), compels judges to evaluate hypothetical amended complaints without the benefit of briefing, and results in undue leniency for plaintiffs whose counsel fail—for strategic reasons or due to mere lack of diligence—to amend a complaint as of right or to file a motion for leave to amend.

The question whether a district court is obligated *sua sponte* to grant a plaintiff represented by counsel leave to amend has profound practical consequences. Indeed, the question is implicated every time a district court dismisses a complaint in the absence of a request to amend—which undoubtedly happens hundreds of times a year in federal courts across the country. This Court should grant review to establish uniform nationwide application of Rule 15(a) so that a plaintiff who files suit in the Ninth Circuit is subject to the same amendment rules as plaintiffs who file suit in every other circuit.

I. THE DECISION BELOW PERPETUATES A SPLIT BETWEEN THE NINTH CIRCUIT AND EVERY OTHER REGIONAL CIRCUIT REGARDING WHETHER A DISTRICT COURT MUST GRANT A REPRESENTED PLAINTIFF LEAVE TO AMEND *SUA SPONTE*.

The Ninth Circuit has charted its own course on plaintiffs' right to amend under Federal Rule of Civil Procedure 15(a). The eleven other regional circuits all reject the Ninth Circuit's antiquated approach requiring district courts to grant leave to amend *sua sponte* even where a represented plaintiff never requested leave to file an amended complaint. And, as a result of this division among the regional circuits, the Federal Circuit is itself split on this question because it generally applies the procedural law of the circuit in which the case arose.

Only this Court can restore uniformity to the circuits' interpretation and application of Rule 15(a).

A. Every Regional Circuit Other Than The Ninth Circuit Has Held That A District Court Is Not Required To Grant A Represented Plaintiff Leave To Amend *Sua Sponte*.

With the exception of the Ninth Circuit, every regional circuit has concluded that a district court is not obligated to afford plaintiffs who are represented by counsel the opportunity to amend their complaint where they do not affirmatively seek leave to amend. *See*, *e.g.*, James W. Moore et al., *Moore's Federal Practice 3d* § 15.14[2] at 15-38 to -38.2 & nn. 23, 24 & 24.1 (3d ed. 2020) ("The majority of circuits hold that it is not an abuse of discretion for the court to fail to grant leave to amend when leave was not sought. The court is not required to grant leave *sua sponte*.").

In *Williams v. Citigroup Inc.*, 659 F.3d 208 (2d Cir. 2011), for example, the Second Circuit rejected the plaintiff's "assertion that the district court erred by dismissing the complaint and closing the case without granting leave to replead *sua sponte*." *Id.* at 212. The court explained that it "ha[d] described the contention that 'the District Court abused its discretion in not permitting an amendment that was never requested' as 'frivolous'" and that it therefore could "see no abuse of discretion in the district court's failure to grant leave to replead *sua sponte*." *Id.* (quoting *Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249-50 (2d Cir. 2004) (per curiam)).

Similarly, in *Wagner v. Daewoo Heavy Industries America Corp.*, 314 F.3d 541 (11th Cir. 2002) (en banc), the en banc Eleventh Circuit held that a "district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Id.* at 542. In so holding, the Eleventh Circuit brought itself "in line with the majority of [its] sister circuits" and adopted a rule that "is designed to secure efficiency and to reduce costly, additional litigation." *Id.* at 544-45 (citing the Ninth Circuit's decision in *Doe v. United States*, 58 F.3d 494 (9th Cir. 1995), as an example of a ruling that does not follow the majority approach).

Other cases from the eleven circuits that follow the majority approach include the following:

First Circuit: *Royal Bus. Grp., Inc. v. Realist, Inc.*, 933 F.2d 1056, 1066 (1st Cir. 1991) (refusing to grant leave to amend where the "plaintiffs claim[ed] for the first time, in a footnote to their brief on appeal,

that, if the lower court found the complaint's allegations too exiguous, it should have granted leave to amend").

Third Circuit: *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 210 & n.152 (3d Cir. 2019) ("[I]n non-civil rights cases, district courts have no obligation to offer leave to amend before dismissing a complaint unless the plaintiff properly requests it.") (internal quotation marks omitted).

Fourth Circuit: *Domino Sugar Corp. v. Sugar Workers Local 392*, 10 F.3d 1064, 1068 n.1 (4th Cir. 1993) ("In a related argument, the Company contends that the district court erred by not providing the Company leave to amend its complaint in response to the Union's motion to dismiss. This argument fails, however, because the Company never requested leave to amend.").

Fifth Circuit: *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994) ("Appellant did not ask the district court for leave to amend; his brief to this Court is his first such request. Moreover, Appellant has failed to indicate specifically how he would amend his complaint to overcome the 12(b)(6) dismissal. Therefore, we have no basis on which to find an abuse of discretion by the district court.").

Sixth Circuit: *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 844 (6th Cir. 2012) ("[O]ur default rule is that if a party does not file a motion to amend or a proposed amended complaint in the district court, it is not an abuse of discretion for the district court to dismiss the claims with prejudice.") (internal quotation marks omitted).

Seventh Circuit: *James Cape & Sons Co. v. PCC Constr. Co.*, 453 F.3d 396, 400-01 (7th Cir. 2006) (rejecting the argument that "even though [the plaintiff] did not properly request leave to amend its complaint, the district court was *required* by Rule 15 to dismiss without prejudice and/or *sua sponte* grant leave to amend the complaint").

Eighth Circuit: *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 665 (8th Cir. 2012) ("A district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading.") (internal quotation marks omitted).

Tenth Circuit: *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1238 n.4 (10th Cir. 2013) ("Where a plaintiff does not move for permission to amend the complaint, the district court commits no error by not granting such leave.").

D.C. Circuit: *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 515 (D.C. Cir. 2016) ("When a plaintiff fails to seek leave from the District Court to amend its complaint, either before or after its complaint is dismissed, it forfeits the right to seek leave to amend on appeal.") (internal quotation marks omitted).

Thus, in every regional circuit other than the Ninth Circuit, the law is clear: "District judges are not mind readers" and are not required *sua sponte* to grant leave to amend that plaintiffs and their counsel fail to request themselves. *James Cape & Sons Co.*, 453 F.3d at 401.

B. The Ninth Circuit Continues To Apply Its Longstanding Rule That District Courts Are Required To Grant Represented Plaintiffs Leave To Amend *Sua Sponte*.

In contrast to every other regional circuit, the Ninth Circuit stands alone in staking the position that a district court must grant leave to amend *sua sponte* to a plaintiff represented by counsel, unless the court affirmatively finds that any amendment would be futile.

In the decision below, the Ninth Circuit applied its idiosyncratic view of Federal Rule of Civil Procedure 15(a) to hold that the district court abused its discretion in failing to grant Plaintiffs leave to amend *sua sponte* because the district court did not "determine[ ] that the pleading could not possibly be cured by the allegation of other facts." Pet. App. 4a (internal quotation marks omitted). The Ninth Circuit reached that conclusion even though Plaintiffs and their counsel declined to amend their complaint as of right after Liberty Mutual filed its motion to dismiss and failed to request leave to amend either in opposing the motion to dismiss or after the motion to dismiss was granted. *See* D.E. #12, Pls.' Opp. to Mot. to Dismiss (D. Nev. Sept. 25, 2017).

The decision in this case is no aberration for the Ninth Circuit. Instead, it is a manifestation of the circuit's settled 70-year-old rule requiring district courts to grant leave to amend *sua sponte* to both represented and *pro se* plaintiffs. Tracing its roots to *Sidebotham v. Robison*, 216 F.2d 816 (9th Cir. 1954), the Ninth Circuit reaffirmed its approach in a 2000 en banc decision, *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (en banc), where the court expressly endorsed

its "line of cases stretching back," at the time, "nearly 50 years" under which "'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Id.* at 1127 (quoting *Doe*, 58 F.3d at 497, and citing five other cases applying the same rule, including *Sidebotham*). The en banc court emphasized that, in the case before it, "neither the magistrate judge nor the district court found the pleading could not be cured by the allegation of other facts," and concluded that the "dismissal without leave to amend was therefore contrary to [the Ninth Circuit's] longstanding rule that 'leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect.'" *Id.* at 1130-31 (quoting, *inter alia*, *Breier v. N. Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 790 (9th Cir. 1963)) (alteration omitted).

Although *Lopez* involved a prisoner's *pro se* claim, its liberal approach to amendments is by no means limited to *pro se* cases, as *Lopez* itself makes clear. *See* 203 F.3d at 1131 ("The district court's action was *also* inconsistent with our precedent because Lopez was a pro se plaintiff.") (emphasis added). Indeed, in the twenty years since *Lopez*, the Ninth Circuit has repeatedly applied its rule requiring district courts to grant leave to amend *sua sponte* in cases—such as the decision below—where a plaintiff represented by counsel failed to request leave to amend. *See Mitchell v. WinCo Foods, LLC*, 743 F. App'x 889, 889 (9th Cir. 2018) (concluding that the "district court erred . . . in failing to grant leave to amend" even though the plaintiff "did not move for leave to amend"); *JH Kelly, LLC v. Tianwei New Energy Holdings Co.*, 706 F. App'x 414, 415 (9th Cir. 2017) ("Even absent an express request for leave to amend, [the plaintiff's] fraud-based

claims should not have been dismissed with prejudice."); *Smith v. Bank of Am., N.A.*, 679 F. App'x 549, 551 (9th Cir. 2017) (noting the obligation under *Lopez* to grant leave to amend *sua sponte* where the plaintiffs failed to establish Article III standing in their complaint); *United States v. Corinthian Colls.*, 655 F.3d 984, 994-97 (9th Cir. 2011) (remanding with instructions to grant leave to amend "[a]lthough [the plaintiffs] did not seek leave to amend before the district court").

In addition, under the compulsion of *Lopez* and other Ninth Circuit appellate decisions, district courts within the Ninth Circuit regularly grant leave to amend to plaintiffs represented by counsel where the plaintiffs themselves did not request leave to amend. *See*, *e.g.*, *King v. U.S. Bank Tr., N.A.*, 2019 WL 5102646, at *6 (S.D. Cal. Oct. 11, 2019) (granting a represented plaintiff leave to amend even though "Plaintiff d[id] not request leave to amend, and the Court [was] skeptical, based on the documents in the record, that Plaintiff can allege facts that would support her theory"); *Vossoughi v. AIG Prop. Cas. Co.*, 2017 WL 2505904, at *3 (S.D. Cal. June 9, 2017) (same ruling); *Johnson v. Bank United*, 2011 WL 4829404, at *4 (E.D. Cal. Oct. 11, 2011); *Nava v. VirtualBank*, 2008 WL 2873406, at *11 (E.D. Cal. July 16, 2008).

The implications of the Ninth Circuit's outlier approach to amendment are not confined to the Ninth Circuit itself. They also extend to the Federal Circuit, which has held, in the patent setting, that "[t]he denial of a motion to amend a pleading under Rule 15(a) is a procedural matter governed by the law of the regional circuit" in which the case arose. *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1318 (Fed. Cir. 2009) (applying First Circuit principles to review

a district court decision from Massachusetts). Thus, in cases arising out of the Ninth Circuit, the Federal Circuit has applied the Ninth Circuit's permissive standard that a "'simple denial of leave to amend without any explanation by the district court is subject to reversal.'" *Advantek Mktg., Inc. v. Shanghai Walk-Long Tools Co.*, 898 F.3d 1210, 1217 (Fed. Cir. 2018) (quoting *Sharkey v. O'Neal*, 778 F.3d 767, 774 (9th Cir. 2015)). In patent cases arising from every other regional circuit, however, the Federal Circuit applies the majority rule that district courts are not required to grant leave to amend *sua sponte*. *See*, *e.g.*, *Huster v. j2 Cloud Servs., Inc.*, 682 F. App'x 910, 917 n.3 (Fed. Cir. 2017) (refusing to grant leave to amend in an appeal from the Northern District of Georgia because the plaintiff "did not ask for that relief in the district court, and '[a] district court is not required to grant a plaintiff leave to amend his complaint sua sponte'") (quoting *Wagner*, 314 F.3d at 542) (alteration in original).

The lower courts' disagreement as to when leave to amend must be granted *sua sponte* under Rule 15(a) seriously undermines one of the core objectives animating the Federal Rules of Civil Procedure: "provid[ing] uniform guidelines for all federal procedural matters." *Sayre v. Musicland Grp., Inc.*, 850 F.2d 350, 354 (8th Cir. 1988). As a result of this division in authority, a plaintiff whose attorney declines to request leave to amend in response to a motion to dismiss will nevertheless be afforded leave to amend in a case filed in Los Angeles or Seattle, while a similarly situated plaintiff in Dallas, Miami, or Boston will not be permitted to amend. This Court should grant review so that plaintiffs in federal courts across the country are held to the same procedural standards when it comes to amending complaints.

II. THE DECISION BELOW CONFLICTS WITH THE TEXT, PURPOSE, AND HISTORY OF FEDERAL RULE OF CIVIL PROCEDURE 15(A).

The Ninth Circuit's unorthodox view—that district courts must afford a plaintiff represented by counsel leave to amend *sua sponte* in the absence of any request by the plaintiff—is impossible to reconcile with the text, purpose, and history of Federal Rule of Civil Procedure 15(a).

Nothing in the plain language of Rule 15(a) requires a district court to grant leave to amend *sua sponte*. Rule 15(a) specifies three limited circumstances in which a plaintiff may amend a complaint "as a matter of course": 21 days after serving the complaint, as well as 21 days after service of a motion to dismiss or 21 days after service of a responsive pleading, whichever is earlier. Fed. R. Civ. P. 15(a)(1). The rule further provides that "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

The language of Rule 15(a) is silent, however, as to any supposed obligation on the part of a district court to grant a plaintiff represented by counsel leave to amend *sua sponte* "'unless,'" in the words of the Ninth Circuit, the court "'determines that the pleading could not possibly be cured by the allegation of other facts.'" Pet. App. 4a (quoting *Lopez*, 203 F.3d at 1127). To be sure, district courts generally possess the discretion to grant leave to amend *sua sponte* when they believe that "justice so requires." Fed. R. Civ. P. 15(a)(2). But there is no support in the language of Rule 15(a) for the Ninth Circuit's categorical rule that a district court necessarily abuses that discretion

where it fails to grant leave to amend *sua sponte* to a plaintiff represented by counsel in the absence of a finding of futility. Indeed, the fact that Rule 15(a)(1) expressly identifies three limited circumstances in which a plaintiff may amend a complaint as of right is powerful interpretive evidence undermining the Ninth Circuit's position, which is tantamount to a rule that a plaintiff may *also* amend as of right after a motion to dismiss has been granted. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("'The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)'") (quoting Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012)).

In addition, the Ninth Circuit's approach is at odds with the purposes animating Rule 15(a), as well as the Federal Rules of Civil Procedure more broadly. As the Eleventh Circuit explained in its en banc decision in *Wagner v. Daewoo Heavy Industries America Corp.*, the majority rule—which rejects any obligation on the part of district courts to grant a represented plaintiff leave to amend that the plaintiff has not requested—"is more efficient" than the Ninth Circuit's alternative approach, which prolongs litigation by requiring district courts to grant represented plaintiffs leave to amend *sua sponte*. 314 F.3d at 542. The majority rule is also "in line with the critically important concept of finality in our judicial system" and promotes the purpose of the Federal Rules of Civil Procedure "'to secure the just, speedy, and inexpensive determination of every action.'" *Id.* at 542-43 (quoting Fed. R. Civ. P. 1). The Eleventh Circuit further explained that its approach avoids the problem of the plaintiff who "could sit idly by" awaiting the district court's ruling on the motion to dismiss—not amending his complaint as a matter of right and not seeking leave to amend—while secure in the knowledge that

he would be entitled to a second "bite[ ] at the apple" in the event the district court granted the motion to dismiss. *Id*. at 543. Such strategic maneuvering by plaintiffs, the Eleventh Circuit emphasized, creates "great trouble, time, and expense for defendants and the courts." *Id.*

The history of Rule 15(a) underscores the flaws in the Ninth Circuit's contrary approach. Before 2009, Rule 15(a) authorized a plaintiff to amend a complaint "'once as a matter of course at any time before a responsive pleading is served,'" even if the plaintiff declined to amend the complaint before the ruling on a motion to dismiss. *Doe*, 58 F.3d at 496-97 (quoting pre-2009 version of Fed. R. Civ. P. 15(a)).

In 2009, however, Rule 15(a) was amended to add language providing that, where a motion to dismiss is filed, the right to amend "as a matter of course" terminates 21 days after the filing of the motion. *See* Fed. R. Civ. P. 15(a)(1)(B). As the accompanying Committee Notes make clear, the purpose of this amendment was to eliminate a plaintiff's right to amend at any point before the filing of an answer in cases where a motion to dismiss is filed. The Committee Notes explain that the 2009 amendment to Rule 15 "force[s] the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion" to dismiss. Fed. R. Civ. P. 15 advisory committee's note. In so doing, the amendment helped to streamline the resolution of cases by encouraging plaintiffs to amend their complaints promptly and limiting belated attempts to amend a deficient complaint after the resolution of a motion to dismiss. *See id.* ("A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues

that otherwise might be raised seriatim."). The Committee further emphasized that, after the expiration of the period to amend as of right, "[l]eave to amend still can be *sought* under Rule 15(a)(2)"—without making any mention of an obligation on the part of district courts to grant leave to amend *sua sponte* where deficiencies in the complaint could potentially be cured. *Id.* (emphasis added).

The 2009 amendment to Rule 15 and the accompanying committee report confirm that the rule is not intended to afford plaintiffs an open-ended right to amend their complaints and that, although a plaintiff may *seek* leave to amend after a motion to dismiss has been granted, Rule 15 does not require district courts to grant leave to amend *sua sponte* to a plaintiff whose counsel has forgone that opportunity.

The Ninth Circuit's contrary rule has no footing in the language, objectives, or history of Rule 15(a). It also conflates the distinct roles of district judges and plaintiffs' lawyers by compelling judges to step into the shoes of counsel to evaluate whether a plaintiff could possibly file a hypothetical amended complaint that might survive a motion to dismiss, even though counsel has not sought leave to file such a complaint. None of the traditional interpretive guideposts supports the Ninth Circuit's outlier position.

III. THE QUESTION PRESENTED HAS FAR-REACHING PRACTICAL IMPLICATIONS FOR FEDERAL DISTRICT COURTS AND FEDERAL COURT LITIGANTS.

This case is an ideal vehicle for resolving the longstanding circuit split on district courts' obligation to grant *sua sponte* amendments, which is a frequently recurring question with substantial practical

implications for both federal courts and the parties who litigate in those courts.

In the year ending March 31, 2020, there were more than 275,000 civil cases (excluding prisoner cases) filed in the federal district courts. *See* Administrative Office of the United States Courts, Federal Judicial Caseload Statistics 2020, Tbl. C-2, https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2020/03/31. Even if it is estimated conservatively that only half of these non-prisoner cases involve plaintiffs represented by counsel and that only 1% of those cases is dismissed without a request for leave to amend, the question presented would still arise in more than a thousand cases *every year*.

Until this Court grants review, the plaintiffs who file those cases will continue to be subject to different amendment rules depending on whether they file suit in the Ninth Circuit or elsewhere. And the already-overburdened district courts within the Ninth Circuit will continue to be required to provide represented plaintiffs an opportunity to cure pleading defects that their counsel never sought leave to remedy—thereby prolonging the litigation, exacerbating the burden on the court's resources, and imposing further legal expenses on defendants.

There is no realistic prospect that the Ninth Circuit will reconsider its aberrant approach of its own accord. The Ninth Circuit has adhered to its view for 70 years, and its rule that district courts must grant plaintiffs leave to amend *sua sponte* is embodied in an en banc opinion that the Ninth Circuit has shown no interest in revisiting, let alone overturning. *See Lopez*, 203 F.3d at 1130. Indeed, Liberty Mutual's petition for rehearing en banc in this case did not even

elicit a call for a response from one of the Ninth Circuit's 29 active judges, even though it highlighted at length that the Ninth Circuit is seriously out of step with the other circuits on this question. *See* D.E. #47, Liberty Mutual Pet. for Rehearing or Rehearing En Banc 9-13 (9th Cir. Apr. 14, 2020).

That basic question of federal civil procedure requires a nationally uniform answer. This case provides the Court with a perfect opportunity to provide that answer because Plaintiffs have never contested that they failed to request leave to amend in the district court. *See* D.E. #31, Pls.' Reply Br. 29 (9th Cir. June 5, 2019) ("Appellants were not required to file a motion for leave to amend to preserve the issue for appeal") (capitalization altered). The case therefore presents the issue in a procedurally straightforward, factually undisputed posture.

The Court should take advantage of this valuable opportunity by granting review and rejecting the Ninth Circuit's obsolete, legally flawed, and practically problematic approach to district courts' obligations under Rule 15(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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