No. 20-208

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court dismissed Ethan Volungis, Farooq Abdulla and Nighat Abdulla's complaint for insurance bad faith against Liberty Mutual for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), with prejudice. Pet. App. 18a. On appeal, the Ninth Circuit concluded dismissal with prejudice was improper because Volungis's claims for bad faith and violation of Nevada's Unfair Claims Practices Act could be cured through amendment. Pet. App. 2a. Volungis's ability to allege additional facts to state plausible claims should have been considered by the district court before dismissing his complaint with prejudice.

The Ninth Circuit recognizes district courts "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." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). This rule does not deviate from any rule articulated in the sister circuits because determining whether dismissal for failure to state a claim should be with or without prejudice rests within the sound discretion of the district court.

The question is whether a district court's decision to grant dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) with prejudice in accordance with Federal Rule of Civil Procedure 41(b) necessitates analysis under Federal Rule of Civil

QUESTION PRESENTED – Continued

Procedure 15(a)(2) to determine whether it is readily apparent that factual allegations exist to cure deficiencies in the complaint absent a formal request for leave to amend.

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The Ninth Circuit Court of Appeals' unpublished memorandum is found at 808 F. App'x 414 (9th Cir. 2020) Pet. App. 1a. The district court order dismissing Volungis's complaint is found at 2018 U.S. Dist. LEXIS 122427 (D. Nev. July 23, 2018). Pet. App. 6a.

JURISDICTION

Respondents Ethan Volungis, Farooq Abdulla, and Nighat Abdulla ("Volungis") do not challenge this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). Volungis disputes Petitioner Liberty Mutual Fire Insurance Company ("Liberty Mutual") satisfies its substantial burden to warrant review under Supreme Court Rule 10.

RULES OF CIVIL PROCEDURE INVOLVED

Rule 15 is not the only rule implicated by the question presented because the question addresses dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6). A district court's inherent discretion to grant dismissal under Rule 12(b)(6) with or without prejudice necessarily implicates Rule 41, which states, in pertinent part:

Rule 41. Dismissal of Actions

. . .

(b) INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule–except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19–operates as an adjudication on the merits.

COUNTERSTATEMENT

Contrary to Liberty Mutual's repetitive assertion, the Ninth Circuit rule does **not require** district courts to always grant represented plaintiffs leave to amend *sua sponte*. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). Liberty Mutual mischaracterizes the Ninth Circuit's rule as an outlier in comparison to its sister circuits for this exact reason. Like every other federal circuit, the Ninth Circuit rule empowers district courts to afford plaintiffs leave to amend when it is readily apparent other facts exist to cure the complaint's defects. *See, e.g.*, *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48-50 (2d Cir. 1991); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002); *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519

(7th Cir. 2015). This ensures cases are adjudicated on the merits and **not** technical pleading standards.

Nationwide, federal district courts possess the inherent discretion to allow leave to amend while considering a motion to dismiss for failure to state a claim upon which relief can be granted, irrespective of whether a formal request for leave to amend is made. This discretion is afforded to district courts because Rules 12(b)(6), 41(b) and 15(a)(2) function together by design. Rule 41(b) allows district courts to grant dismissal for failure to state a claim under Rule 12(b)(6) with or without prejudice. The discretion to dismiss with or without prejudice directly implicates Rule 15(a)(2) because it necessitates the district court to determine whether the pleading deficiencies are curable. This determination naturally calls for a case-by-case inquiry guided by this Court's longstanding view that, absent futility of amendment or another apparent reason, leave to amend shall be freely given. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). "This mandate is to be heeded." *Id.* Otherwise, district courts would not possess the discretion to dismiss a claim under Rule 12(b)(6) with or without prejudice pursuant to Rule 41(b). Even when this Court reversed the Second Circuit's determination that an alleged terrorist stated a plausible claim for relief, it instructed the Second Circuit to decide *sua sponte* whether he was able to seek leave to amend his deficient complaint from the district court. *Ashcroft v. Iqbal*, 556 U.S. 662, 687, 129 S. Ct. 1937, 1954 (2009). This court gave that instruction absent any identified request to amend at any

point after the motion to dismiss was filed or on appeal before the Second Circuit. *Id.* at 669, 1944. The law regarding amendment is well-settled throughout the federal circuits.

Liberty Mutual wants this Court to impose a bright-line rule that forbids district courts from allowing represented plaintiffs leave to amend unless they move for leave to amend after a Rule 12(b)(6) motion to dismiss is filed. The well-established principle that cases should be decided on the merits, not pleading technicalities, does not justify the application of a draconian rule to only represented plaintiffs. *Foman*, 371 U.S. at 181, 83 S. Ct. at 230. Represented plaintiffs often legitimately believe they have pleaded sufficient factual allegations to state a plausible claim. They should not be punished for taking such a position, especially when the district court can glean that other factual allegations are available to cure the complaint's deficiencies. This outcome does not reward gamesmanship by represented plaintiffs because the risk of dismissal with prejudice based on the futility of any amendment always remains.

All federal circuits recognize a district court's inherent discretion to grant dismissal under Rule 12(b)(6) with or without prejudice is predicated on a futility of amendment analysis. The Ninth Circuit rule does not deviate from this in any meaningful way. Based on the well-established law governing pleading amendments that persist throughout the circuits, there is no circuit split necessitating this Court's review.

In 2013, Ethan Volungis ("Volungis") was injured in a motor vehicle collision caused by Liberty Mutual's insured, Farooq Abdulla ("Abdulla"). Pet. App. 2a. Liberty Mutual issued a personal automobile liability insurance policy to Abdulla that provided coverage of $100,000.00 per person. Pet. App. 6a. In February 2014, Volungis made a settlement offer to Liberty Mutual for Abdulla's $100,000.00 policy limits contingent upon Liberty Mutual satisfying three simple conditions: (1) provide Abdulla's policy declarations page issued by Liberty Mutual confirming his coverage limits, (2) confirmation Abdulla carried no additional automobile insurance coverage, and (3) written acceptance of Volungis's settlement offer by a specific date and time. Pet. App. 7a. Liberty Mutual responded by untimely offering the $100,000.00 policy limits and failing to satisfy the other reasonable conditions of Volungis's offer. Pet. App. 2a. Liberty Mutual never communicated Volungis's settlement offer to Abdulla. Pet. App. 3a.

Volungis filed a personal injury lawsuit against Abdulla in Nevada state court, which culminated in the entry of a judgment for $6,798,413.07. Pet. App. 8a. As a result of the financially ruinous judgment, Abdulla, and his wife, Nighat, filed for bankruptcy protection. *Id.* In the wake of the bankruptcy filing, Abdulla assigned all of his claims against Liberty Mutual to Volungis up to the total judgment amount. *Id.* In exchange for the assignment, Volungis agreed to not execute upon Abdulla's assets to satisfy the judgment. Pet. App. 2a.

Volungis, Abdulla, and his wife filed suit against Liberty Mutual in Nevada state court alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of Nevada's Unfair Claims Practices Act. Pet. App. 2a, 8a. These claims were predicated on Liberty Mutual's failure to accept Volungis's reasonable settlement offer and failure to inform Abdulla of Volungis's settlement offer before the personal injury litigation commenced. Pet. App. 3a. Subsequently, Liberty Mutual removed the case to the U.S. District Court based on diversity jurisdiction. Pet. App. 8a.

Shortly after removal, Liberty Mutual moved to dismiss Volungis's complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Rather than concede the claims were not sufficiently pleaded, Volungis challenged Liberty Mutual's arguments in his opposition brief. *See* D.E. #12, Pls.' Opp. to Mot. to Dismiss (D. Nev. Sep. 27, 2015). Throughout the opposition brief, Volungis clarified several facts demonstrating Liberty Mutual never informed Abdulla of Volungis's settlement offer in direct contravention of its duty of good faith and fair dealing. *Id.* Volungis described the unreasonableness of Liberty Mutual's conduct in its refusal to accept the settlement offer by satisfying the reasonable conditions to adequately protect Abdulla's interests. *Id.*

The district court expressly acknowledged in its order that Volungis's opposition brief introduced facts outlining Liberty Mutual's failure to inform Abdulla of the settlement offer. Pet. App. 16a-17a. Despite the

potential for Volungis to cure the deficiencies of his pleading necessary to state plausible claims for relief, the district court dismissed the complaint for failure to state a claim. Pet App. 18a. Although the district court did not indicate dismissal was with prejudice, judgment was entered in favor of Liberty Mutual, which constituted an adjudication on the merits under Rule 41(b). *See* D.E. #29, Judgment in a Civil Case (July 23, 2018). Volungis chose to appeal the district court's judgment in lieu of filing a post-judgment motion under Rules 59(e) or 60(b) and motion for leave to amend under Rule 15(a)(2).

On appeal, the Ninth Circuit concluded Volungis's claim for breach of contract failed as a matter of law because a claim for failure to settle sounds in tort. Pet. App. 3a. The Ninth Circuit further determined Volungis failed to allege sufficient facts to state plausible claims for breach of the implied covenant of good faith and fair dealing and violation of Nevada's Unfair Claims Practices Act. Pet. App. 3a-4a. However, only "dismissal of the breach-of-contract claim with prejudice" was affirmed. Pet. App. 5a. The Ninth Circuit recognized Volungis raised additional factual issues that Liberty Mutual breached the implied covenant of good faith and fair dealing by: "(1) failing to settle his claim against Abdulla, and (2) failing to communicate his settlement offer to Abdulla." Pet. App. 3a.

Despite the existence of additional factual allegations to cure the pleading deficiencies in Volungis's complaint, the district court "dismissed Volungis's complaint with prejudice without considering whether

Volungis could have cured the deficiencies in his complaint by amending it." Pet. App. 2a. The availability of additional factual allegations for Volungis to state plausible claims for relief against Liberty Mutual was precisely why the Ninth Circuit concluded "[i]t was an abuse of discretion to dismiss those claims with prejudice and no justification for doing so." Pet. App. 4a (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). The Ninth Circuit reversed the dismissal and "remand[ed] to allow Volungis an opportunity to file an amended complaint," which is substantially similar to what this Court did in *Iqbal*. Pet. App. 4a-5a, 556 U.S. at 662, 129 S. Ct. at 1954.

REASONS FOR DENYING THE PETITION

Liberty Mutual misstates that the Ninth Circuit requires district courts to "automatically" allow plaintiffs leave to amend after granting a motion to dismiss for failure to state a claim. Pet. Writ, at p. 6. If this were true, the Ninth Circuit would not condition granting leave to amend upon the district court's determination "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 permissive nature of the Ninth Circuit rule is further underscored by recognizing district courts "should grant leave to amend even if no request to amend the pleading was made," not that it must. *Lopez*, 203 F.3d at 1127. In this case, the Ninth Circuit reasoned the district court abused its discretion in granting dismissal of Volungis's claims with prejudice because other

factual allegations existed to cure the pleading deficiencies, which the district court did not consider. Pet. App. 4a. This is precisely why district courts in the Ninth Circuit properly exercise their discretion by simply addressing whether the pleading could be saved by amendment or not saved by amendment because of futility. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

The Ninth Circuit's approach does not meaningfully deviate from the approach of all the other federal circuits because they recognize dismissal under Rule 12(b)(6) may be with or without prejudice. Several of the federal circuits acknowledge that, irrespective of whether a motion for leave to amend is filed, all plaintiffs should be afforded at least one opportunity to amend before dismissing for failure to state a claim with prejudice. *See, e.g.*, *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003); *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519 (7th Cir. 2015).

Like all other circuits, the Ninth Circuit empowers district courts to exercise their broad discretion to evaluate the possibility that the very pleading deficiencies justifying dismissal under Rule 12(b)(6) can be cured. This approach solidifies the bases supporting dismissal orders with prejudice because the district court will have already dispensed of whether any possibility for a curative amendment exists. This approach is also more efficient because it avoids further motion

practice post-judgment. Under Liberty Mutual's view, a plaintiff who believes in the sufficiency of his factual allegations should be punished for not simultaneously moving for leave to amend. This is wholly inconsistent with the universally accepted principle adopted by this Court nearly 60 years ago in *Foman v. Davis*, 371 U.S. 178, 181-82, 83 S. Ct. 227, 230 (1962) that cases should be decided on their merits rather than pleading technicalities.

Exercising the discretion to grant dismissal without prejudice is not dependent upon whether the plaintiff formally moves to amend the complaint given the interrelationship between Rules 12(b)(6), 15(a), and 41(b). Thus, the question of whether a plaintiff can allege sufficient facts needed to state a plausible claim for relief presents itself every time a motion to dismiss under Rule 12(b)(6) is decided. Liberty Mutual misconstrues the Ninth Circuit's approach to amendment in this context to support its contrived premise that a uniform rule is required. This Court should deny review because the law affording district courts discretion to grant plaintiffs leave to file an amended complaint, even in the absence of a formal request, has been consistently applied for decades.

I. THIS CASE REFLECTS THE UNIFORM VIEW AMONGST ALL CIRCUITS THAT DETERMINING WHETHER PLAINTIFFS CAN POSSIBLY CURE THEIR PLEADING DEFICIENCIES THROUGH AMENDMENT IS A RELEVANT INQUIRY FOR DISTRICT COURTS WHEN CONSIDERING DISMISSAL UNDER RULE 12(b)(6)

The Ninth Circuit does not require district courts to *sua sponte* grant plaintiffs represented by counsel leave to amend when no request is made. When a motion to dismiss is pending and a represented plaintiff has not moved for leave to amend, district courts in the Ninth Circuit and elsewhere are not required to grant leave to amend if any possible amendment is futile. Uniformity already exists amongst the district courts' application of Rule 15(a)(2) when a motion to dismiss for failure to state a claim is pending across all circuits. Liberty Mutual manufactures a circuit split where one does not exist.

A. Every Federal Circuit Recognizes District Courts May Allow Represented Plaintiffs Leave to Amend, Even When No Formal Request is Made, Because They Possess Broad Discretion to Dismiss Claims With or Without Prejudice

Liberty Mutual frames the apparent conflict as one in which the Ninth Circuit holds a district court abuses its discretion for failing to grant leave to amend when leave is not requested. This is patently false. In

actuality, the Ninth Circuit recognizes a district court's abuse of discretion derives from its failure to consider whether the allegation of other facts could plausibly state a claim for relief. The Ninth Circuit's approach is no different than any other federal circuit because it is predicated on the interplay that exists between Rules 12(b)(6), 41(b), and 15(a)(2). The discretion to dismiss a complaint without leave to amend is "severely restricted by FRCP 15(a), which directs that leave to amend shall be freely given when justice so requires." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (per curiam) (citing *Thomas v. Davie*, 847 F.2d 771, 773 (11th Cir. 1988)); *see also Maybin v. Northside Correctional Center*, 891 F.2d 72, 74 (4th Cir. 1989) ("Rules of civil procedure must be considered in relation to one another and construed together").

Like the Ninth Circuit, the District of Columbia Court of Appeals also recognizes that dismissal for failure to state a claim with or without prejudice is predicated on whether the plaintiff can cure the complaint's deficiencies. "A dismissal with prejudice is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (per curiam). A proper exercise of discretion in this context requires the district court to articulate reasons why dismissal with prejudice is appropriate. *Id.* This point was further clarified in *Belizan v. Hershon*, 434 F.3d 579 (D.C. Cir. 2006). In *Belizan*, the district court dismissed the represented plaintiff's complaint for failure to state

claims for relief under the Securities Act of 1933 and the Securities Exchange Act of 1934. 434 F.3d at 581. The *Belizan* Court acknowledged the plaintiff's attorney never formally moved for leave to amend. *Id.* at 583. Nevertheless, the *Belizan* Court reversed the district court's dismissal of the plaintiff's complaint with prejudice because the district court failed to explain why it dismissed the complaint with prejudice. *Id.* at 584. The *Belizan* Court described the standard to dismiss a complaint with prejudice as "high," and a complaint "that omits certain essential facts and thus fails to state a claim warrants dismissal pursuant to Rule 12(b)(6), but not dismissal with prejudice." *Id.* at 583. Accordingly, a thoughtful exercise of discretion to dismiss a complaint under Rule 12(b)(6) requires a determination that the allegation of other facts could not possibly cure the pleading deficiencies. *Id*.

The broad discretion afforded to district courts to grant dismissal for failure to state a claim with or without prejudice is contemplated by the manner in which Rules 12(b)(6), 41(b), and 15(a)(2) function together. This principle was comprehensively explained by Justice Kavanaugh in his concurring opinion in *Rollins v. Wackenhut Servs*., 703 F.3d 122 (D.C. Cir. 2012). Under Rule 41(b), granting a dismissal for failure to state a claim "operates as an adjudication on the merits," which is "synonymous with a dismissal with prejudice." *Id.* at 132 (Kavanaugh, J., concurring). Unless the district court exercises its discretion to state otherwise, a dismissal under Rule 12(b)(6) is typically with prejudice. *Id.* However, Justice Kavanaugh articulated

that any potential inequity resulting from this outcome is properly addressed by Rules 12(b)(6), 15(a), and 41(b):

> Moreover, under Rule 15(a), a district court in its discretion also may grant leave for a plaintiff to amend a complaint even outside the time period for amending as a matter of course. Second, under Rules 41(b) and 12(b)(6), a district court has discretion to dismiss a complaint without prejudice when the district court concludes that the circumstances so warrant. In short, Rules 12(b)(6), 15, and 41(b) work in tandem to establish a fair and efficient process for civil plaintiffs and defendants alike.

Id.

The discretion to grant dismissal for failure to state a claim with or without prejudice necessarily implores district courts to acknowledge when a plaintiff can sufficiently plead facts through amendment to state a plausible claim for relief. Additional cases from the remaining circuits acknowledge, like the Ninth Circuit, this determination should be made, irrespective of whether the plaintiff is represented or formally moved to amend.

First Circuit: "In this circuit, the phrase 'without prejudice,' when attached to a dismissal order is not to be read as an invitation to amend. . . . If leave to amend is contemplated, we require an express judicial statement to that effect. . . ." *Mirpuri v. ACT Mfg.*, 212 F.3d 624, 628 (1st Cir. 2000). The First Circuit

acknowledged its power to grant leave to amend, should the circumstances warrant, even if the represented plaintiff appealed from the judgment dismissing his complaint and never formally requested leave to amend from the district court. *Degnan v. Publicker Indus.*, 83 F.3d 27, 29 (1st Cir. 1996).

Second Circuit: "It is the usual practice upon granting a motion to dismiss to allow leave to replead." *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). "Although leave to replead is within the discretion of the district court, refusal to grant it without any justifying reason is an abuse of discretion." *Id.* "Obviously, where a defect in the complaint cannot be cured by amendment, it would be futile to grant leave to amend." *Id.* at 50. In *Cortec Industries, Inc.*, the Second Circuit remanded to allow the represented plaintiffs leave to replead one of their claims. *Id.* at 46. No formal request for leave to amend to the district court is identified in the decision. *Id*.

Third Circuit: "[I]f a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile . . . even if the plaintiff does not seek leave to amend." *Phillips v. County of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2008). *Phillips* addressed the dismissal of a represented plaintiff's claims for civil rights violations and a wrongful death claim. *Id.* at 230. Nonetheless, this rule has been applied in other contexts for represented plaintiffs who failed to formally request leave to amend by a district

court in this circuit. *See Bachtell v. General Mills, Inc.*, 422 F. Supp. 3d 900, 915 (M.D. Pa. 2019).

Fourth Circuit: It is within the sound discretion of the district court to determine whether a Rule 12(b)(6) dismissal shall be granted with or without prejudice. *Payne v. Brake*, 439 F.3d 198, 204 (4th Cir. 2006)*; see also Carter v. Norfolk Community Hospital Assoc.*, 761 F.2d 970, 974 (4th Cir. 1985). "A dismissal under Rule 12(b)(6) is generally not final or on the merits and the court normally will give the plaintiff leave to file an amended complaint." *Ostrzenski v. Seigel*, 177 F.3d 245, 252 (4th Cir. 1999) (quoting Charles Wright & Arthur Miller, *Federal Practice and Procedure* § 1357, at 360-67 (2d ed. 1990)). Even in *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993), which Liberty Mutual cites, the Fourth Circuit validated an appellate court's discretion to evaluate the grounds for dismissal under Rule 12(b)(6) to determine whether the plaintiff could save his action by amendment.

Fifth Circuit: "In view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of the pleadings, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable. . . ." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002); *see also Weigel v. Maryland*, 950 F. Supp. 2d 811, 825 (D. Md. 2013) (When a plaintiff fails to state a claim, he should generally receive the chance to amend the complaint before dismissal with prejudice unless

there is no set of facts available to cure the pleading deficiencies).

Sixth Circuit: "Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003). The *Bledsoe* Court allowed leave to amend, in part, because the plaintiff first learned from the district court's order that his claims were subject to a higher pleading standard. *Id.* Nonetheless, the rule has still been generally followed and applied in the Sixth Circuit to represented plaintiffs. *See, e.g.*, *United States ex rel. Griffith v. Conn*, 117 F. Supp. 3d 961, 988 (E.D. Ky. 2015); *Southwell v. Summit View of Farragut, LLC*, 494 F. App'x 508, 513 (6th Cir. 2012).

Seventh Circuit: "Ordinarily, however, a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to amend her complaint before the entire action is dismissed." *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519 (7th Cir. 2015). Leave to amend should be granted "[u]nless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted." *Id.* (quoting *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F.3d 682, 687 (7th Cir. 2004)). "This is the ordinary practice in an ordinary civil case where the party is represented by counsel." *Abu-Shawish v. United States*, 898 F.3d 726, 738 (7th Cir. 2018).

Eighth Circuit: A district court possesses the discretion to dismiss a pleading for failure to state a claim with or without prejudice. *Orr v. Clements*, 688 F.3d 463, 465 (8th Cir. 2012). Dismissal with prejudice may be justified when any proposed amendment is futile and the plaintiff "has not indicated how it would make the complaint viable . . . or indicating somewhere in its court filings what an amended complaint would have contained." *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 782 (8th Cir. 2009).

Tenth Circuit: "A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006); *see also Sheldon v. Vermonty*, 269 F.3d 1202, 1207 n.5 (10th Cir. 2001) ("As a general matter, a party should be granted an opportunity to amend his claims prior to a dismissal with prejudice").

Eleventh Circuit: Liberty Mutual correctly states a district court is not required to grant a represented plaintiff leave to amend her complaint *sua sponte* in the absence of a motion or request for leave to amend. *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002). "Nevertheless, a court may *sua sponte* grant a counseled plaintiff leave to amend [w]here a more carefully drafted complaint might state a claim. . . ." *Trimark Foodcraft, LLC v. Selma Dev., LLC*, Case No. 18-00259-JB-N, 2018 U.S. Dist. LEXIS 150652, at *15 (S.D. Ala. Aug. 31, 2018) (internal quotations omitted); *see also Eiber Radiology,*

Inc. v. Toshiba Am. Med. Sys., 673 F. App'x 925, 926 (11th Cir. 2016) (per curiam) (acknowledging district court previously dismissed represented plaintiff's complaint for failure to state a claim and offered leave to amend); *Scheider v. Leeper*, Case No. 3:15-cv-364-J-34JRK, 2016 U.S. Dist. LEXIS 30839, at *9-10 (M.D. Fla. Mar. 10, 2016) (district court considered whether to grant represented plaintiffs leave to amend *sua sponte* with no formal request because they raised "a number of factual allegations" in response to the motion to dismiss).

Contrary to Liberty Mutual's assertion, every federal circuit recognizes the district court's inherent authority to grant dismissal for failure to state a claim without prejudice to afford plaintiffs an opportunity to amend their complaints. The Ninth Circuit rule, which has stood for more than 20 years, is consistent with every other circuit.

B. The Ninth Circuit Does Not Automatically Require District Courts to Grant Represented Plaintiffs Leave to Amend *Sua Sponte*, which Negates Any Perceived Circuit Conflict

Like every other circuit, the Ninth Circuit recognizes the broad discretion afforded to district courts in dismissing a complaint without prejudice to allow plaintiffs leave to amend. Liberty Mutual tries to characterize the Ninth Circuit's rule to grant represented plaintiffs leave to amend *sua sponte* as mandatory to

no avail. By making such a claim, Liberty Mutual inexplicably ignores that district courts are not required to grant leave to amend if they determine the complaint cannot be saved by any amendment due to futility. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam). The futility analysis that informs a district court's decision to grant dismissal under Rule 12(b)(6) without prejudice and allow leave to amend is rooted in the Ninth Circuit's recognition that "where it is shown that other facts exist, which, if alleged, would cure the defects, leave to amend should be granted." *Sidebotham v. Robison*, 216 F.2d 816, 826 (9th Cir. 1954).

Liberty Mutual's apparent dispute with the Ninth Circuit rule is that district courts are tasked to determine whether a plaintiff could ever allege sufficient facts to cure the deficiencies in the complaint. This contention is unfounded. A district court's decision to grant dismissal for failure to state a claim with or without prejudice will always be predicated on whether the plaintiff can ever conceivably set forth other factual allegations to state a plausible claim. The Ninth Circuit rule merely reflects, like all other federal circuits, the discretion district courts are afforded to grant dismissal with or without prejudice in accordance with Rule 12(b)(6) and Rule 41(b). Rule 15(a)(2) is always implicated in this context because the nature of the relief requested directly relates to the sufficiency of the factual allegations. In effect, all circuits recognize the district court's inherent authority to grant leave to amend is not dependent upon the filing of a

formal motion for leave to amend. Otherwise, every circuit would forbid a district court from granting dismissal for failure to state a claim without prejudice unless a plaintiff filed a contemporaneous motion for leave to amend, which is inconceivable under Rule 41(b).

"Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2008). It is axiomatic that a district court possesses a keen ability to determine, from the face of the complaint and the briefs addressing dismissal, whether a plaintiff could ever plead other facts to state a plausible claim for relief. The Ninth Circuit does not deviate from this universally recognized standard because its rule merely allows district courts to exercise discretion they inherently possess. Therefore, Liberty Mutual frames an alleged circuit split to this Court in a manner that intentionally distorts the Ninth Circuit's rule as compulsory when it is not.

"A district court does not err in denying leave to amend where the amendment would be futile." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). Even a district court's failure to specifically articulate why granting leave to amend would be futile does not provide a basis to overturn the decision. *Id.* at 1061. Yet, Liberty Mutual implies the Ninth Circuit demands district courts to grant leave to amend *sua sponte* in every circumstance. In actuality, the Ninth Circuit has affirmed numerous

decisions by district courts denying leave to amend *sua sponte* because they actually considered whether the pleading could be cured through amendment. *See, e.g.*, *Thinket Ink*, 368 F.3d at 1061 (finding the district court did not err in dismissing the action without leave to amend, though remanding back to the district court to determine whether leave to amend should be granted based on a change in the law); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (affirming district court's dismissal without leave to amend because "any amendment would be futile"); *Reddy v. Litton Indus.*, 912 F.2d 291, 296 (9th Cir. 1990) (affirming dismissal of RICO claims with prejudice because amendment would not cure complaint's factual deficiencies); *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002) (affirming dismissal with prejudice because the district court properly analyzed the alleged facts and determined plaintiffs could not cure the flaws in their complaint).

The Ninth Circuit also observes that "where the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its claims, [t]he district court's discretion to deny leave to amend is particularly broad." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (internal quotations omitted). This is not unlike the other federal circuits' view that plaintiffs should be granted leave to amend at least once before dismissal for failure to state a claim is granted with prejudice. *See, e.g.*, *Great Plains Trust Co. v.*

Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003); *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519 (7th Cir. 2015).

The Ninth Circuit's approach to providing leave to amend for plaintiffs facing dismissal of their complaints for failure to state a claim is not a drastic departure from the way other federal circuits handle similar circumstances. There is no true division in authority because the federal circuits all acknowledge granting leave to amend, even in the absence of a formal request for leave, is discretionary. Practically speaking, this means plaintiffs across the country do not have to formally request leave to amend when faced with a Rule 12(b)(6) motion to dismiss if the district court concludes there are facts that allow plaintiffs to cure their respective pleading deficiencies. This Court need not grant review because there is no appreciable difference in the federal circuits' application of procedural rules governing leave to amend in relation to dismissal for failure to state a claim under Rule 12(b)(6).

II. DETERMINING WHETHER LEAVE TO AMEND SHOULD BE GRANTED WHEN CONSIDERING A RULE 12(b)(6) MOTION TO DISMISS IN THE ABSENCE OF A FORMAL REQUEST PROMOTES DECIDING CASES ON THE MERITS

There is nothing "unorthodox" about the Ninth Circuit's view that district courts should afford plaintiffs leave to amend in lieu of dismissal with prejudice when the complaint can be cured. Pet. Writ, at p. 16. Even in the absence of a formal request for leave to amend, exercising the discretion to grant a plaintiff leave to amend when warranted under the facts promotes decisions on the merits and preserves judicial economy.

A. The Liberal Amendment Standard Underlying Rule 15 Justifies Allowing Leave to Amend *Sua Sponte* When the Complaint's Defects Can be Cured

The plain language of Rule 15(a) does not prohibit district courts from granting plaintiffs leave to amend in the absence of a formal motion. In fact, under subsection 2 of Rule 15(a), leave to amend should be granted "freely" when justice requires it. Furthering the ends of justice is ever present and should not be eroded merely because a plaintiff, whether represented by counsel or not, decides to stand on the merits of her alleged claims rather than lend credence to the opposing party's contentions. If a district court finds it readily apparent that a plaintiff can cure the identified

pleading deficiencies, there is no legitimate reason why that plaintiff should not be allowed to proceed with her action once those defects are cured. Such a policy embodies the purpose to liberally allow leave to amend under Rule 15 to assure adjudication on the merits. *Attestor Value Master Fund v. Republic of Arg.*, 940 F.3d 825, 833 (2d Cir. 2019) (per curiam) (The liberality of Rule 15(a)(2)'s amendment standard is "consistent with [the] strong preference for resolving disputes on the merits"). The Federal Rules of Civil Procedure "not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373, 86 S. Ct. 845, 851 (1966).

The limitation recognized amongst the federal circuits that dismissal with prejudice is warranted when any amendment to cure the pleading defects is futile stems from this Court's interpretation of Rule 15(a). *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). In *Foman*, this Court articulated various reasons that may justify the denial of leave to amend, including "futility of the amendment." *Id.* This is the guiding principle used by district courts across the country to determine whether dismissal under Rule 12(b)(6) should be granted with or without prejudice. In the Ninth Circuit, a district court's abuse of discretion for failing to allow leave to amend stems from its failure to recognize that a plaintiff can plead other factual allegations to overcome dismissal with prejudice under Rule 12(b)(6). *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). Liberty Mutual never accurately apprises this Court of the scope and effect

of this rule because it regularly states the Ninth Circuit "requires" district courts to grant represented plaintiffs leave to amend *sua sponte*. Pet. Writ, at pp. 7, 13, 17.

The concerns raised in *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541 (11th Cir. 2002) about the problems arising from allowing represented plaintiffs leave to amend *sua sponte* are much ado about nothing. Upholding the district court's discretion to grant leave to amend when the circumstances warrant, even in the absence of a formal request, does not unfairly prolong litigation. It safeguards litigation by empowering district courts to test the merits of a case by carefully evaluating the underlying factual predicate to determine whether additional facts exist needed to cure the complaint's defects. The notion that protecting the well-founded policy favoring adjudication on the merits should be subverted merely because a plaintiff might incorrectly believe her complaint states a plausible claim does nothing to advance the purpose of the Federal Rules of Civil Procedure. *Foman*, 371 U.S. at 181, 83 S. Ct. at 230 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . ").

Wagner's concern that a rule affording district courts with the discretion to grant leave to amend *sua sponte* encourages plaintiffs to "sit idly by" and not seek leave to amend knowing they may receive that chance on appeal is shortsighted. 314 F.3d at 543. The *Wagner* Court overlooks that a district court's

consideration of whether pleading deficiencies can or cannot be cured by amendment alleging other facts is always implicated because dismissal under Rule 12(b)(6) may be granted without prejudice. *See* Fed. R. Civ. P. 41(b). In fact, it is more efficient for a district court to consider amendment futility as part of its evaluation of a Rule 12(b)(6) motion because it avoids subsequent motion practice to alter, amend, or set aside the judgment under Rules 59(e) or 60(b) and for leave to amend under Rule 15(a)(2). Thus, a district court's express determination that a plaintiff cannot cure his complaint because any factual amendment would be futile actually bolsters the bases supporting its decision. Practically speaking, a plaintiff is less likely to receive "two bites of the apple" on appeal because the district court will have already determined leave to amend should not be granted because any amendment would be futile. *Wagner*, 314 F.3d at 543. An appellate court is less likely to reverse and remand when the district court has already vetted the futility of any potential curative amendment as part of its inherent discretion to grant dismissal for failure to state a claim. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) ("Denial of leave to amend is reviewed for abuse of discretion").

The Ninth Circuit approach, like every other federal circuit, honors the spirit and purpose of Rule 15(a)'s liberal amendment policy and its direct relevance to dismissals for failure to state a claim. *See* 5B Charles Wright & Arthur Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2020) ("The federal rule

policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading"). Even in those instances when a district court doubts a plaintiff can cure the flaws in her pleading, it is a "wise judicial practice (and one that is commonly followed) . . . to allow at least one amendment regardless of how unpromising the initial pleading appears. . . ." *Id.*

Liberty Mutual's belief that the 2009 amendment to Rule 15(a) is intended to force plaintiffs to amend their complaint when faced with a Rule 12(b)(6) motion to dismiss is not persuasive. Liberty Mutual fails to consider other prevailing considerations that undercut the notion that Rule 15(a) was amended to undermine the liberal standard to allow amendment of pleadings that has stood for decades. "The 2009 amendment did not impose on plaintiff's choice a pleading regime of 'one-and-done.'" *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 522 (7th Cir. 2015). Rather, the 2009 amendment was designed to convince some plaintiffs to amend deficiencies that were easily curable in response to a Rule 12 motion to dismiss in lieu of spending time and money via unnecessary motion practice. *Id.* at 523.

> But a plaintiff who receives a Rule 12(b)(6) motion and who has good reason to think the complaint is sufficient may also choose to stand on the complaint and insist on a decision without losing the benefit of the well-established liberal standard for amendment

> with leave of court under Rule 15(a)(2). That subsection was not amended and still applies after the right to amend as a matter of course has lapsed. The need for a liberal amendment standard remains in the face of uncertain pleading standards after *Twombly* and *Iqbal*.

Runnion, 786 F.3d at 523.

B. Liberty Mutual's Proposed Uniform Rule Seeks to Reward Defendants at the Expense of Freely Allowing Plaintiffs Leave to Amend to Ensure Cases are Adjudicated on the Merits

Rule 15(a) was not amended to punish plaintiffs who choose to believe their factual allegations state plausible claims for relief even though the defendants may disagree. Under Liberty Mutual's warped view, all represented plaintiffs faced with a motion to dismiss under Rule 12(b)(6) should prophylactically move to amend their complaints to address the alleged deficiencies identified by the defendant or forfeit the right to amend later under the liberal amendment standard.[1] This not only unfairly places substantial power in

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[1] If dismissal is granted and judgment is entered, a plaintiff must move to alter or amend the judgment under Rule 59(e) or set aside the judgment under Rule 60(b) and secure such relief before leave to amend may be granted under Rule 15(a)(2). One view is the plaintiff must satisfy the burden to alter, amend, or set aside the judgment first before satisfying the burden to obtain leave to amend. *Metzler Inv. GmbH v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 142-43 (2d Cir. 2020). A different view is a Rule 59(e) motion is controlled by the same considerations under Rule 15(a). *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir.

the hands of defendants, but also directly subverts the liberal amendment standard that has always remained in full force and effect since *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). No matter the complexity of the claims or the amount of damages at stake, defendants often strategically file Rule 12(b)(6) motions. Liberty Mutual believes the alleged pleading defects identified by any defendant in a Rule 12(b)(6) motion should be deemed *per se* valid before the district court has even determined whether the alleged defects are meritorious. Adopting this rule would deprive district courts of their authority to meaningfully judge the merits of a Rule 12(b)(6) motion and eviscerate their broad discretion under *Foman* to afford plaintiffs leave to amend if warranted by the facts. 371 U.S. at 182, 83 S. Ct. at 230.

The Ninth Circuit's affirmation of a district court's discretionary power to grant leave to amend without a formal request so long as the complaint can be cured through amendment is equally followed by all federal circuits. This undermines the notion that granting Liberty Mutual's petition will address a frequently prevailing issue that has far-reaching effects on district courts in the Ninth Circuit or litigants who file actions

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2003). A plaintiff should not be forced to satisfy the heavy burden to alter, amend, or set aside a judgment merely because she refused to accept the defendant's view that the factual allegations in her complaint were insufficient to state a claim before the district court's evaluation and decision. Alternatively, the interests of judicial economy are better served if a district court exercises its discretion to grant dismissal under Rule 12(b)(6) without prejudice and allow a plaintiff leave to amend rather than wait to do so until after judgment is entered and two motions are filed.

in other federal circuits. There is no meaningful circuit split that necessitates this Court's review to impose a nationally uniform rule because each and every district court is free to grant leave to amend *sua sponte* by granting dismissal under Rule 12(b)(6) without prejudice. The Ninth Circuit's approach does not transform that discretion into a requirement to always grant leave to amend *sua sponte*. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) ("Under Ninth Circuit case law, district courts are only required to grant leave to amend if a complaint can possibly be saved").

III. SHOULD THIS COURT FIND IT NECESSARY TO DEVIATE FROM THE NINTH CIRCUIT'S RULE, ANY NEW RULE SHOULD BE APPLIED PROSPECTIVELY TO AVOID DEPRIVING VOLUNGIS OF THE CHANCE TO ADJUDICATE HIS CLAIMS ON THE MERITS

Liberty Mutual wants this Court to adopt a uniform rule requiring represented plaintiffs to always move for leave to amend in response to a Rule 12(b)(6) motion or risk losing the benefit of liberally receiving leave to amend if the complaint is dismissed with prejudice. Ratifying such a drastic rule will nullify the current view shared by all circuits that district courts possess the inherent discretion to allow leave to amend *sua sponte* so long as the complaint's deficiencies can be cured through amendment. If this Court is so

inclined to embrace a new rule, Volungis contends that rule should be applied prospectively.

Three separate factors are evaluated to determine whether a new rule of law in a civil case shall be applied prospectively: (1) whether a new rule of law is established that "[overrules] clear past precedent on which litigants may have relied," (2) evaluating the purpose and history of the rule to determine "whether retrospective operation will further or retard its operation," and (3) the potential inequities resulting from retroactive application. *Chevron Oil Co. v. Hudson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 355 (1971). Here, each of the factors weigh in favor of prospective application of any new rule that deprives district courts from exercising their discretion to grant represented plaintiffs leave to amend *sua sponte*. The first factor favors prospective application because the Ninth Circuit rule has stood for over twenty years. The second factor supports prospective application because retroactive application contravenes the overarching purpose reflected in the Federal Rules of Civil Procedure that cases should be decided on their merits. *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 545 (11th Cir. 2002).[2] Finally, retroactive application will unfairly punish Volungis for relying on a rule recognizing a district court's discretion to grant leave to amend *sua sponte* when ruling on a Rule 12(b)(6) motion to dismiss that

[2] In *Wagner*, which Liberty Mutual cites extensively, the Eleventh Circuit applied its new rule no longer requiring district courts to grant represented plaintiffs leave to amend *sua sponte* prospectively. 314 F.3d at 545.

is not appreciably different from any other federal circuit's rule. Retroactive application is particularly inappropriate given Volungis amended his complaint and defeated, in part, Liberty Mutual's second Rule 12(b)(6) motion to dismiss. *See* D.E. #75, Order (D. Nev. Oct. 21, 2020).

CONCLUSION

Liberty Mutual's petition for a writ of certiorari should be denied.

Respectfully submitted,

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