No. 25-344

In the Supreme Court of the United States

ROBERT CROMWELL AND SARIT L. ROZYCKI,
PETITIONERS
v.
WILLIAM TACON, AS ADMINISTRATOR OF CARIBBEAN COMMERCIAL INVESTMENT BANK LTD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Federal Rule of Civil Procedure 41(b) allows a court to dismiss the case as a sanction for the plaintiff's failure to prosecute it or certain procedural violations. The Rule specifies that the court may decide whether the dismissal should be with or without prejudice.

The question presented is whether district court has discretion to dismiss a case without prejudice under Rule 41(b) when doing so may cause the defendants to lose a speculative, unproven statute of limitations defense.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties in the court of appeals are identified in the case caption. There are no related proceedings in state or federal court, or in this Court.

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INTRODUCTION

This case doesn't warrant review. The purported split is shallower than the petition claims. This case is a bad vehicle to address any split because it was decided under a different rule than the cases in the split. The question presented isn't important because it rarely comes up and lacks meaningful stakes for most litigants. And the court of appeals reached the correct result applying longstanding legal principles. The Court should deny the petition.

This case arises from Petitioners Robert Cromwell's and Sarit Rozycki's failure to pay their debts. In 2005, Cromwell and Rozycki personally guaranteed a loan from the Caribbean Commercial Investment Bank (CCIB) to finance Indigo Holdings Ltd.'s construction of a villa in Anguilla, a British Overseas Territory in the Caribbean. Indigo defaulted on the loan. But instead of paying what they owe under the guaranty, Cromwell and Rozycki engaged in more than a decade of misdirection through bad faith settlement negotiations. Ultimately, Respondent William Tacon—CCIB's court-appointed administrator—brought suit in the Southern District of New York to get Cromwell and Rozycki to pay up.

The district court dismissed the suit as barred by New York's six-year statute of limitations for breach of guaranty, but granted leave to amend because it thought that Mr. Tacon could likely plead around the limitations problem. Pet. App. 64a n.22. Instead of continuing to spend resources litigating procedural objections, however, Mr. Tacon asked the court to dismiss the case without prejudice since he intended to refile in Anguilla, which has a longer statute of limitations. Pet. App. 5a-6a. The district court obliged,

dismissing the case without prejudice for failure to prosecute under Federal Rule of Civil Procedure 41(b). Pet. App. 15a. The Second Circuit affirmed, holding that the district court did not abuse its discretion in dismissing the case without prejudice. Pet. App. 10a-13a. The court of appeals rejected Cromwell's and Rozycki's argument that they were unfairly prejudiced by the non-merits dismissal because they would lose their statute of limitations defense, reasoning that the defense was too speculative and unproven for its loss to count as prejudicial. Pet. App. 11a.

The Second Circuit's decision does not warrant this Court's review. The claimed split is shallow and this case is a bad vehicle to address it because none of the cases in the split involved a dismissal under Federal Rule 41(b). The question presented rarely arises and is thus not important enough to merit the Court's scarce resources. And the Second Circuit's decision correctly applied longstanding principles favoring pretrial dismissals without prejudice.

1. To start, this case doesn't implicate any circuit conflict, which makes it a bad vehicle to address the question presented. Although Cromwell and Rozycki claim that there is a 4–1–3 split about whether the loss of a potential limitations defense bars dismissal without prejudice under Rule 41, in reality the relevant split is at best 2–1, with the majority of courts holding that losing an unproven limitations defense isn't prejudicial enough to bar dismissal without prejudice. But regardless of the circuit count, this case doesn't implicate any split. All of the cases in the claimed split involved dismissals under Rule 41(a)(2), the Rule of Civil Procedure that addresses when plaintiffs can voluntarily dismiss a suit. The district court here, by contrast, dismissed the case under Rule 41(b),

the Rule governing involuntary dismissals for failure to prosecute and certain other procedural violations. The two Rules are subject to different standards, and Cromwell and Rozycki don't show that courts would treat them interchangeably. Moreover, it isn't clear whether a dismissal with prejudice in this case would actually prevent Mr. Tacon from pursuing his claims in Anguilla or enforcing a judgment. That all makes this the wrong case to address the claimed split.

2. This case isn't certworthy even ignoring the dispositive vehicle problems. The question presented rarely arises and doesn't matter to many litigants. Indeed, all of the cases in the claimed split are decades old. The Court shouldn't spend its scarce resources addressing a stale civil procedure dispute that lacks real-world stakes for most litigants.

3. Finally, even if the Court analyzes the district court's Rule 41(b) dismissal under the standards governing Rule 41(a)(2), the decision below is correct. Rule 41(a)(2) preserves a common law rule that allowed the plaintiff to dismiss his case without prejudice at any time before judgment unless doing so would cause unusual hardship to the defendant. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947). When the defendant had not already definitively won the case, the kind of hardship that could prevent without-prejudice dismissal was the loss of a "counter[claim]" or some other request for "affirmative relief." *In re Skinner & Eddy Corp.*, 265 U.S. 86, 93-94 (1924) (Taft, C.J.). A statute of limitations defense is just that—a defense. It is not the kind of request for affirmative relief that courts sought to protect against dismissals without prejudice. And what's more, losing an unproven limitations defense surely doesn't create

the kind of "plain legal prejudice" necessary to prevent dismissal without prejudice. *Cone*, 330 U.S. at 217.

The Court should deny the petition.

STATEMENT

A. Legal background

Federal Rule of Civil Procedure 41 governs two types of dismissals: voluntary and involuntary.

1. Rule 41(a) addresses voluntary dismissals. Under Rule 41(a)(1), a plaintiff can terminate a case without a court order by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment," or "a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(i)-(ii). After the defendant has answered or moved for summary judgment, Rule 41(a)(2) provides that the "action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

Voluntary dismissals under Rule 41(a) are presumptively "without prejudice." Fed. R. Civ. P. 41(a)(1)(B), (a)(2). However, a court can deny a motion for voluntary dismissal without prejudice under Rule 41(a)(2) if "the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit." *Cone*, 330 U.S. at 217. At common law, "[t]he usual ground for denying a complainant" voluntary dismissal "without prejudice" was that the defendant had pleaded a "counter" claim seeking "affirmative relief." *Skinner & Eddy*, 265 U.S. at 93-94.

2. Rule 41(b) governs involuntary dismissals. Under that rule, "[i]f the plaintiff fails to prosecute or to comply with" the Federal Rules of Civil Procedure

"or a court order, a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). Dismissals under Rule 41(b) are presumptively with prejudice and typically "operate[] as an adjudication on the merits." *Id.* Because Rule 41(b) dismissals are "harsh," courts are reluctant to grant them. *E.g.*, *LeSane v. Hall's Security Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001). And even when Rule 41(b) dismissals are granted, district courts maintain broad equitable discretion to specify that they are without prejudice. Arthur R. Miller, 9 *Federal Practice & Procedure* § 2373 (4th ed. Sept. 2025 update) (*Federal Practice & Procedure*).

B. Factual and procedural background

1. Mr. Tacon is the administrator of CCIB, a bank incorporated in Anguilla. Pet. App. 24a. Mr. Tacon was appointed by the Anguillan courts in 2016 to manage CCIB and recover assets for the benefit of its creditors. *Id.*

In 2005, an Anguillan corporation called Indigo Holdings Ltd. borrowed $667,000 to finance the construction of a villa. Pet. App. 25a. Cromwell and Rozycki personally guaranteed the loan up to the initial $667,000. Pet. App. 24a. But when Indigo defaulted on the loan in 2012, Cromwell and Rozycki did not pay what Indigo owed. Pet. App. 25a. Instead, they engaged in protracted and fruitless negotiations with CCIB's representatives for the next decade that centered on potentially selling or developing the property in lieu of collecting on the loan. Pet. App. 26a-28a.

Finally, in November 2022, CCIB sold the property at auction for $644,000. Pet. App. 29a. By then, however, Indigo's debt on the original loan had swelled to more than $1.1 million with interest. *Id.*

Cromwell and Rozycki refused to honor their guaranty and cover the difference. Pet. App. 30a.

2. In 2023, Mr. Tacon brought suit against Cromwell and Rozycki in the Southern District of New York, seeking to collect what they owed under the guaranty. *Id.* Cromwell and Rozycki moved to dismiss the action with prejudice, arguing that it was barred by New York's six-year statute of limitations for breach of a guaranty. Pet. App. 34a. The district court partially granted the motion. Pet. App. 35a-65a. The court concluded that the claims as pled were time-barred. *Id.* But the court denied Cromwell's and Rozycki's attempt to dismiss the case with prejudice, explaining that it was "not convinced that 'the flaws in the Amended Complaint are incurable … particularly given [Cromwell's and Rozycki's] protected settlement discussions with [Mr. Tacon], which, as alleged, do not necessarily evince good-faith negotiations." Pet. App. 64a-65a n.22 (alteration adopted).

The district court gave Mr. Tacon thirty days to file an amended complaint. Pet. App. 65a. But instead of filing a new complaint, Mr. Tacon asked the court to dismiss the case without prejudice since he intended to refile his claims in Anguilla rather than waste more time and money on "'litigat[ing] defenses to the statute of limitations prior to ever reaching the merits of the action.'" Pet. App. 5a-6a. The district court then dismissed the case without prejudice for failure to prosecute under Rule 41(b). Pet. App. 15a. Cromwell and Rozycki appealed the decision to dismiss without prejudice.

3. The Second Circuit affirmed in an unpublished summary order. The court held that the

district court did not abuse its discretion by deciding that under the circumstances here, equity would be best served by dismissing without prejudice. Pet. App. 10a-13a. The court rejected Cromwell's and Rozycki's argument that dismissal without prejudice would unfairly prejudice them by depriving them of their New York statute of limitations defense. The court reasoned that "the district court did not a make a final determination on the statute of limitations issue" and in fact "indicated that it believed that Tacon could still … overcom[e] the statute of limitations defense." Pet. App. 11a. Because Cromwell's and Rozycki's limitations defense was speculative and unproven, the court held rejected their position that "the possibility of the initiation of a new lawsuit in a different forum *necessarily* constitutes legal prejudice requiring a dismissal with prejudice." Pet. App. 11a-12a.

4. Cromwell and Rozycki sought rehearing en banc, which the court of appeals denied with no recorded dissents. Pet. App. 67a.

REASONS FOR DENYING THE PETITION

The Court should deny the petition. The alleged split is much shallower than Cromwell and Rozycki claim, and this case doesn't implicate it because all of the cases in the split involve voluntary dismissals under Rule 41(a)(2), while this case involves a dismissal for failure to prosecute under Rule 41(b). Apart from this dispositive vehicle problem, the question presented isn't important because it rarely comes up. And the court of appeals correctly determined that the loss of a speculative, unproven limitations doesn't satisfy the plain legal prejudice test even if it applied to this case.

I. This case doesn't implicate any circuit split, which makes it a poor vehicle to address the question presented. Cromwell and Rozycki claim that there is a 4–1–3 split, with the majority of courts holding that the loss of a potential statute of limitations defense always constitutes plain legal prejudice barring dismissal without prejudice under Rule 41. In reality, the split is at best 2–1, with the majority of courts holding that the loss of an unproven limitations defense does not constitute plain legal prejudice. But regardless of the circuit count, this case doesn't implicate the split. All of the cases cited in the petition involve voluntary dismissals under Rule 41(a)(2), while this case involves a dismissal for failure to prosecute under Rule 41(b). Because this case involves a different rule subject to different standards and objectives than the cases cited in the petition, it is a poor vehicle to address the question presented.

II. The question presented isn't important. All of the published decisions in the alleged split are decades old, which shows that question presented rarely comes up and doesn't matter to many litigants. Although Cromwell and Rozycki claim that the court of appeals' unpublished summary order will cause forum shopping and waste court resources, by their own account, the alleged split has been around since the 1980s. If allowing plaintiffs to dismiss their claims without prejudice and refile elsewhere in the face of an unproven statute of limitations defense was going to cause widespread litigation chaos, there would be evidence of it by now.

III. The Second Circuit's decision was correct. Rule 41's plain legal prejudice test codifies longstanding common law practice providing allowing plaintiffs to dismiss their suit at any time before trial unless the

defendants would suffer unusual hardship. *Cone*, 330 U.S. at 217. When the defendant had not already won the case, the kind of hardship that qualified as plain legal prejudice at common law was the loss of a "counter[claim]" or other request for "affirmative relief." *Skinner & Eddy*, 265 U.S. at 93-94. The statute of limitations is a defense, and so losing it isn't the same as losing the ability to obtain affirmative relief. And in any event, the district court here was skeptical that this case was time barred and granted leave to amend so that Mr. Tacon could allege additional facts. Pet. App. 64a-65a n.22. Surely losing a speculative, unproven limitations defense isn't "plain legal prejudice." *Cone*, 330 U.S. at 217.

I. This case does not implicate any conflict between the courts of appeals, which makes it a poor vehicle to address the question presented.

Cromwell and Rozycki claim (Pet. 3) that there is a 4–1–3 split about whether the loss of a limitations defense constitutes plain legal prejudice that bars dismissal without prejudice under Rule 41. In reality, only three circuits—the Fifth, Eighth, and Eleventh—have addressed whether loss of a limitations defense constitutes plain legal prejudice in a case like this one where the defense isn't a sure winner. Of those, only the Fifth Circuit would find prejudice. And this case doesn't implicate any split with the Fifth Circuit because all of the cases in the alleged split involved voluntary dismissals governed by Rule 41(a)(2), while this case concerns dismissal for failure to prosecute under Rule 41(b). Because this case doesn't implicate Cromwell and Rozycki's claimed split, it is a bad vehicle to address the question presented.

A. Only the Fifth Circuit holds that the loss of a statute of limitations defense constitutes plain legal prejudice when the defense isn't certain to succeed.

Start with the split, which is much shallower than the 4–1–3 conflict that Cromwell and Rozycki claim. The Eighth and Eleventh Circuits have held that the loss of a limitations defense isn't automatically prejudicial in cases like this where the defense isn't a sure winner. The Second, Fourth, Sixth, Seventh, and Ninth Circuits haven't faced a case in a posture similar to this one. Only the Fifth Circuit holds that losing a limitations defense is always prejudicial. So in this posture, the split is at most 2–1, with the majority of circuits concluding that the loss of a limitations defense isn't plainly prejudicial enough to warrant dismissal with prejudice when it is not clear that the limitations defense will succeed.

1. The Eleventh and Eighth Circuits have held that the loss of a statute of limitations defense isn't prejudicial enough to require dismissal with prejudice under Rule 41(a)(2).

Although Cromwell and Rozycki claim (Pet. 9, 12) that the Eleventh and Eighth Circuits are on opposite sides of the alleged split, both courts agree that the loss of a statute of limitations defense doesn't automatically count as plain legal prejudice for Rule 41 purposes when it isn't clear whether the defense would succeed.

a. Eleventh Circuit. In *McCants v. Ford Motor Co.*, 781 F.2d 855, 858 (11th Cir. 1986), the plaintiff moved to voluntarily dismiss her claims without prejudice after the defendant asserted a statute of

limitations defense in its motion for summary judgment. The plaintiff admitted that she sought voluntary dismissal so that she could refile her claims in a jurisdiction with a longer statute of limitations. *Id.* The district court denied the summary judgment motion and dismissed the action without prejudice. *Id.* The Eleventh Circuit affirmed, holding that absent evidence of "bad faith" by the plaintiff, "the loss of a valid statute of limitations defense" does not "constitute a bar to dismissal without prejudice." *Id.* at 859. The court reasoned that losing a limitations defense doesn't constitute "plain legal prejudice" because the defendant faces no harm "other than the prospect of a second lawsuit on the same facts." *Id.*

b. Eighth Circuit. In *Metropolitan Federal Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1262 (8th Cir. 1993), the plaintiff moved to voluntarily dismiss without prejudice certain claims under Rule 41(a)(2) after the defendant asserted a Minnesota statute of limitations defense in a summary judgment motion. The Eighth Circuit affirmed the district court's decision to grant the motion and dismiss the claims without prejudice. *Id.* at 1263. Although the Eighth Circuit disagreed with the Eleventh Circuit "to the extent [it] would hold that the loss to the defendant of a proven, valid statute of limitations defense does not constitute legal prejudice that would bad voluntary dismissal," the court held the loss of a limitations defense doesn't constitute legal prejudice if the defense is speculative or unproven. *Id.* Because the defendant failed to show that the Minnesota statute of limitations governed the claims under the relevant choice of law rules, the court held that the district court properly dismissed the claims without prejudice. *Id.*

In short, although the Eleventh and Eighth Circuits employ slightly different reasoning, both agree that the loss of a statute of limitations defense doesn't bar dismissal without prejudice when it isn't clear that the defense applies.

2. The Second, Fourth, Sixth, Seventh, and Ninth Circuits haven't addressed whether loss of a statute of limitations defense counts as plain legal prejudice when the defense is unproven.

The Second, Fourth, Sixth, Seventh, and Ninth Circuits aren't relevant to the alleged split. The Seventh Circuit hasn't addressed whether the loss of an unproven statute of limitations defense counts as plain legal prejudice. And the Second, Fourth, Sixth, and Ninth Circuits haven't addressed whether the loss of any statute of limitations defense—proven or speculative—counts as plain legal prejudice in a published opinion. Those circuits haven't decided "whether … a district court may dismiss a plaintiff's case without prejudice under Rule 41, if the defendant has a time-bar defense in the forum where the case is pending." Pet. i. (question presented).

a. Seventh Circuit. In *Wojtas v. Capital Guardian Trust Co.*, 477 F.3d 924, 925-26 (7th Cir. 2007), the plaintiff moved for voluntary dismissal without prejudice under Rule 41(a)(2) so that she could refile her suit in Illinois state court after the defendant raised a Wisconsin statute of limitations defense in a motion for judgment on the pleadings. The district court denied the motion for voluntary dismissal and dismissed the case with prejudice as time barred. *Id.* at 926. The plaintiff appealed the

voluntary dismissal ruling, but did not contest that her claim was time-barred under Wisconsin law. The Seventh Circuit affirmed, holding that allowing the plaintiff to evade a proven and sustained statute of limitations defense would constitute legal prejudice. *Id.* at 927. The Seventh Circuit didn't say how it would have ruled if—as in this case—the limitations defense had not been finally sustained and proven.

b. The Second, Fourth, Sixth, and Ninth Circuits haven't taken a side in the alleged split. None of those courts have addressed in published opinions whether the loss of a statute of limitations defense counts as plain legal prejudice for Rule 41 purposes.

For example, the Second Circuit's decision in this case is an unpublished summary order. Pet. App. 2a. And *Camilli v. Grimes*, 436 F.3d 120, 124 (2d Cir. 2006), addressed whether losing the opportunity to bring a malicious prosecution claim against the plaintiff counts as plain legal prejudice, not whether losing a statute of limitations defense is prejudicial.

Similarly, in *Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987), the Fourth Circuit held that losing the benefit of favorable orders interpreting state law doesn't count as plain legal prejudice for Rule 41 purposes. Although the court described the Eleventh Circuit in *McCants* as holding "that the loss of a valid statute of limitations defense does not constitute a bar to dismissal under Rule 41(a)(2)," *id.* at 1275, it did not address whether losing a statute of limitations defense is plainly prejudicial. And while *Dean v. Gilmer Industries, Inc.*, 22 F. App'x 285, 287 (4th Cir. 2001), summarily affirmed a district court ruling that the "loss of … a valid limitations defense" did not constitute plain legal prejudice, that case is both

unpublished and thus not binding on Fourth Circuit courts. Indeed, even citing it is "disfavored." 4th Cir. L.R. 32.1.

In *Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718-19 (6th Cir. 1994), the Sixth Circuit held that dismissal without prejudice would cause "plain legal prejudice" when the defendant had won a ruling from the Ohio Supreme Court on certification that the plaintiffs lacked a valid cause of action, and the plaintiffs wished to dismiss the suit without prejudice in case the Ohio Legislature changed the law in their favor. Once again, the court did not address whether losing a statute of limitations defense counts as plain legal prejudice. And although *Burns v. Taurus International Manufacturing, Inc.*, 826 F. App'x 496, 503 (6th Cir. 2020) addressed a statute of repose, that case was unpublished.

It is the same story in the Ninth Circuit. In *Westlands Water District v. United States*, 100 F.3d 94, 96 (9th Cir. 1996), the court held that "the threat of future litigation" from a dismissal without prejudice "which causes uncertainty" and "could adversely affect the financial viability of the defendant[] … is insufficient to establish plain legal prejudice." Although the court noted that other "courts have examined whether a dismissal without prejudice would result in the loss of a … statute-of-limitations defense," the court didn't address that issue itself. *Id.* at 97 (citing the Fourth Circuit's decision in *Davis*, 819 F.2d at 1276). And while *Tibbetts v. Syntex Corp.*, No. 91-16637, 1993 WL 241567, at *1 (9th Cir. July 2, 1993), discussed the loss of a statute of limitations defense, that case is a pre-2007 unpublished decision that can't even be cited for its persuasive value in the Ninth Circuit. *See* 9th Cir. L.R. 36-3(c).

3. Only the Fifth Circuit holds that the loss of a statute of limitations defense always causes plain legal prejudice.

The Fifth Circuit is the only circuit that would find plain legal prejudice based on the loss of an unproven statute of limitations defense. In *Phillips v. Illinois Central Gulf R.R.*, 874 F.2d 984, 987 (5th Cir. 1989), the Fifth Circuit held that "loss of a statute of limitations defense constitutes the type of clear legal prejudice that precludes granting a motion to dismiss without prejudice." Subsequently, in *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 319 (5th Cir. 2002), the court clarified that losing a limitations defense is prejudicial regardless of "whether the defense will ultimately be successful."

Thus, all told, the split is at most 2–1. The Eleventh and Eighth Circuits permit plaintiffs to voluntarily dismiss their claims without prejudice under Rule 41(a)(2) when doing so would prevent adjudication of an unproven statute of limitations defense. By contrast, the Fifth Circuit would not allow voluntary dismissal when an unproven limitations defense is at stake. The other circuits cited in the petition haven't decided in precedential opinions whether loss of an unproven limitations defense causes the sort of plain prejudice sufficient to deny voluntary dismissal without prejudice.

B. This case doesn't implicate any split with the Fifth Circuit because the dismissal here was under Rule 41(b), rather than Rule 41(a)(2).

Even if there's a 2–1 split, this case doesn't implicate it. All of the cases cited in the petition involved motions for voluntary dismissal under Rule 41(a)(2).

In this case, by contrast, the district court dismissed Mr. Tacon's claims for failure to prosecute under Rule 41(b).

That difference matters. Rule 41(a)(2) governs efforts to voluntarily terminate the case "at the plaintiff's request." Fed. R. Civ. P. 41(a)(2). Courts universally agree "that dismissal should be allowed" under Rule 41(a)(2) without prejudice "unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit." *Federal Practice & Procedure* § 2364 & n.21 (collecting cases). By contrast, Rule 41(b) governs dismissal by the court as a sanction for "fail[ure] to prosecute or to comply with [the federal] rules or a court order." Fed. R. Civ. P. 41(b). In assessing whether dismissal with prejudice under Rule 41(b) is proper, courts consider "equitable considerations," *Federal Practice & Procedure*, *supra*, § 2373, that turn on the severity of the plaintiff's misconduct, the prejudice to the defendants from further delay, and the availability of lesser sanctions. *Id.* § 2370.1 (collecting factors the lower courts consider). In other words, Rules 41(a)(2) and 41(b) serve different purposes, and courts use different tests to evaluate whether to dismiss with prejudice under each rule. The petition is all about the plain legal prejudice test, but Cromwell and Rozycki fail to show that it would apply to a Rule 41(b) case like this one.

To be sure, the Second Circuit in this case borrowed principles from its Rule 41(a)(2) cases in analyzing the district court's dismissal order. Pet. App. 9a n.3. But the court's order was unpublished. The Second Circuit's other cases use a separate test to evaluate whether dismissals for failure to prosecute under Rule 41(b) should be with or without prejudice, which focuses on whether dismissal without prejudice

would be proportionate to the failure to prosecute. *See, e.g.*, *Thrall v. Central New York Regional Transportation Authority*, 399 F. App'x 663, 666 (2d Cir. 2010). So it's not clear whether the Second Circuit thinks that standards governing dismissals under Rule 41(a)(2) apply to dismissals under Rule 41(b). More importantly, Cromwell and Rozycki don't cite any authority showing that the Fifth Circuit or any of the other lower courts would analyze a district court's decision to dismiss without prejudice under Rule 41(b) using the plain legal prejudice test. So whatever the merits of their claimed split, this case doesn't implicate it.

C. This case is a bad vehicle to address the question presented.

All of this makes this case a poor vehicle to address the question presented.

First, the question presented isn't "squarely implicated." *Contra* Pet. 16. Because the district court dismissed Mr. Tacon's suit under Rule 41(b) rather than Rule 41(a)(2), resolving the question presented would only matter to the parties if the Court determines that dismissals under Rule 41(b) are governed by the plain legal prejudice test. But the lower courts haven't explored that question, and this Court should not address it in the first instance. The Court should instead await a case involving a dismissal under Rule 41(a)(2).

Second, it is far from clear that the question presented is "outcome-dispositive" in this case even if the Court assumes that the plain legal prejudice test applies to Rule 41(b) dismissals. *Contra* Pet. 16. Cromwell and Rozycki want the judgment here converted to a dismissal with prejudice because they hope

to argue that principles of claim preclusion would prevent Mr. Tacon from reasserting his claims in Anguilla, or prevent a U.S. court from enforcing an Anguillan judgment. But if this Court reverses the Second Circuit and holds that the district court was not allowed to dismiss this case without prejudice, the district court on remand will likely exercise its discretion to Mr. Tacon another opportunity to file an amended complaint in light of the change in law. In that scenario, this case's outcome would hinge on whether Mr. Tacon's amended complaint could plead claims that aren't time barred, rather than this Court's answer to the question presented. The Court should thus await a case where the lost statute of limitations defense is a sure winner, rather than taking a case where the issue might not matter.

Even if the district court declines to give Mr. Tacon leave to amend and converted its dismissal to one with prejudice, it still isn't clear that Cromwell and Rozycki would win. To start, the Second Circuit has held that dismissals under New York statutes of limitations do "not preclude the same claim from being brought in another jurisdiction with a longer statute of limitations." *Cloverleaf Realty of New York, Inc. v. Town of Wawayanda*, 572 F.3d 93, 96 (2d Cir. 2009). Although there is debate among lower courts about whether *Cloverleaf*'s interpretation of New York law was correct, *see Joseph v. Athanasopoulos*, 648 F.3d 58, 63 (2d Cir. 2011), it is far from a sure thing that a dismissal with prejudice in this case would have claim preclusive effect.

Relatedly, Cromwell and Rozycki haven't presented any evidence that the courts of Anguilla, where Mr. Tacon has refiled his suit, would give claim preclusive effect to the district court's dismissal under

New York's statute of limitations. That wouldn't be automatic in U.S. federal courts, which have sometimes "held that if" the plaintiff "alleges new facts for the first time, and it was the absence of these facts that made the first complaint defective, the earlier dismissal will not bar a second action." *Federal Practice & Procedure*, *supra*, § 2373 & n.44 (collecting cases). The Court should await a case in which is clear that a dismissal with prejudice would actually bar a second suit or prevent enforcement of a judgment in that suit, rather than accepting this case on the unproven assumption that Anguillan courts wouldn't allow Mr. Tacon's claims to proceed.

II. The question presented is not important.

A. The question presented rarely arises, and is thus not worth spending this Court's scarce time and resources. All of the published decisions in the alleged split are between 18 and 40 years old, *supra* pp. 10-15, which shows that the question presented seldom matters to litigants. The Court should reserve its time for resolving issues that matter to more than a handful of litigants every few years.

B. Cromwell and Rozycki argue that allowing plaintiffs to avoid dismissal without prejudice so they can refile potentially time-barred claims in another forum "encourages forum shopping" and "undermines judicial economy." Pet. 15-16. But those concerns are overblown. Plaintiffs always have an incentive to file their claims in a forum with a favorable statute of limitations. At best, Cromwell's and Rozycki's preferred rule would encourage a few more plaintiffs each decade to be more cautious about statute of limitations issues before filing, but it wouldn't substantially influence plaintiffs' choice of forum.

Moreover, the claimed split has been around since at least the late 1980s. *See supra* pp. 10-15. If allowing plaintiffs with potentially time-barred claims to refile in other forums was causing serious disruption or waste of court resources, there would be some evidence of it by now.

III. The Second Circuit correctly held that Cromwell and Rozycki did not suffer plain legal prejudice from the district court's without-prejudice dismissal.

Even if the Court applies the plain legal prejudice test to the district court's Rule 41(b) dismissal, the court of appeals correctly held that the dismissal did not cause Cromwell and Rozycki plain legal prejudice. The rule at common law, which was preserved in Rule 41(a)(2), is that a plaintiff could voluntarily dismiss her claims without prejudice at any time before the defendant finally won the case unless the defendant had pled a counterclaim requesting affirmative relief. A statute of limitations defense is not the kind of affirmative relief that counts as legal prejudice.

A. At common law, "a plaintiff … had an unqualified right, upon payment of costs, to take a nonsuit in order to file a new action after further [factual] preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit." *Cone*, 330 U.S. at 217. Rule 41(a)(2) preserved the common law rule. *See id.* & n.5. "The usual ground for denying a complainant" at common law "the right to dismiss his [complaint] without prejudice … [wa]s that the case ha[d] proceeded so far that the defendant [was] in a position to demand on the pleading[] … affirmative relief and he would be prejudiced by being remitted to a separate action" where

his "counter case" might not be adjudicated. *Skinner & Eddy*, 265 U.S. at 93-94. Courts thus found plain legal prejudice when, at the time the plaintiff attempted to dismiss the case, the defendant had requested "affirmative relief" that if proved would "'entitle[] himself to a decree." *City of Detroit v. Detroit City Railway Co.*, 55 F. 569, 572 (C.C.E.D. Mich. 1893) (Taft, J.) (defendant filed countersuit requesting an injunction); *see also, e.g.*, *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U.S. 138, 147 (1898) (defendant had obtained an injunction and sought a declaration voiding the lease); *Hat-Sweat Manufacturing Co. v. Waring*, 46 F. 87, 87-88 (C.C.S.D.N.Y. 1891) (defendant requested cancellation of the plaintiff's patent); *Electrical Accumulator Co. v. Brush Electric Co.*, 44 F. 602, 605 (C.C.N.D. Ohio 1890) (same). That focus on counterclaims is maintained in Rule 41(a)(2)'s text, which provides that "[i]f a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication." Fed. R. Civ. P. 41(a)(2).

By contrast, courts did not find legal prejudice when the defendant would merely lose a defense to the plaintiff's claim. In *Jones v. SEC*, 298 U.S. 1, 22 (1936), for example, this Court applied the common law rule to reject the Securities & Exchange Commission's arguments that companies should not be allowed to withdraw and resubmit defective registration statements to prevent the SEC from issuing "'a stop order.'" And in *Cone*, this Court held that a district court may allow a plaintiff to voluntarily dismiss his case without prejudice at trial when faced with a meritorious motion for judgment notwithstanding the

verdict "[i]f satisfied … that the ends of justice would be best served by allowing [the plaintiff] another chance" to prove his case in "a new trial." 330 U.S. at 217.

B. The Second Circuit correctly held that Cromwell's and Rozycki's loss of an unproven statute of limitations defense does not constitute plain legal prejudice. The statute of limitations is a defense to liability rather than a request for affirmative relief and its loss would not have been considered legal prejudice at common law. Moreover, as the Second Circuit correctly observed, the district court granted Mr. Tacon leave to amend because it thought he could likely plead around Cromwell's and Rozycki's limitations defense. Pet. App. 11a, 64a-65a n.22. If nothing else, losing a speculative, unproven defense is not "plain[ly]" prejudicial. *Cone*, 330 U.S. at 217.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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