No. 25-344

IN THE

Supreme Court of the United States

ROBERT CROMWELL, *et al.*,

Petitioners,

v.

WILLIAM TACON, AS ADMINISTRATOR OF CARRIBEAN COMMERCIAL INVESTMENT BANK LTD.,

Respondent.

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

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. The Question Presented Divides The Lower Courts of Appeals

Respondent concedes that the question presented implicates a circuit split. For good reason: whether a district court must dismiss a case with prejudice pursuant to Rule 41(a)(2) when a defendant has asserted a statute-of-limitations defense is a question over which "[t]he courts of appeals are divided." 9 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2364 (4th ed. 2025) (collecting cases).

This split is well-recognized, with at least eight courts of appeals having taken irreconcilable positions. Pet. 8–14. The Fifth, Seventh, Eighth, and Ninth Circuits indeed hold that the threat of a defendant facing a second suit on the same claims in another jurisdiction with a longer statute of limitations is "plain legal prejudice" *per se* (Pet. 9–11),[1] while the Fourth, Eleventh, and (via the decision below) Second Circuits squarely reject any *per se* rule. Pet. 12–14.

The best Respondent can muster in confronting the question presented is to argue that it implicates a

[1] The Sixth Circuit follows a similar approach to these circuits in cases where the statute-of-limitations defense in the pending suit is "clearly dictated." Pet. 11–12 (discussing *Grover ex rel. Grover* v. *Eli Lilly & Co.*, 33 F.3d 716 (6th Cir. 1994)). The Sixth Circuit is thus in opposition to the approach taken by the Second Circuit in the decision below.

circuit split between the Fifth Circuit, on the one hand, and the Eighth and Eleventh Circuits, on the other. Opp. 12; Opp. 2 ("[I]n reality the relevant split is at best 2–1[.]"). Respondent is wrong: The Eighth and Eleventh Circuits conflict, and the split is broader.

A. Starting with the positions of the Eighth and Eleventh Circuits, a casual read of the decisions of those courts demonstrates that Respondent's characterization is incorrect.

As Petitioners noted in their opening brief (Pet. 8), the Eleventh Circuit (in its own words) "acknowledge[s] that both the Fifth and Eighth Circuits have expressly announced their disagreement" with the Eleventh Circuit's approach. *Arias* v. *Cameron*, 776 F.3d 1262, 1274 (11th Cir. 2015). Meanwhile, the Eighth Circuit has observed the circuit split put in issue by the decision below and "respectfully disagree[d]" with the Eleventh Circuit. *Metro. Fed. Bank of Iowa, F.S.B.* v. *W.R. Grace & Co.*, 999 F.2d 1257, 1263 (8th Cir. 1993). See Pet. 10–11 (discussing Eighth Circuit's test).

B. Respondent next tells the Court that the decision below, plus the decisions of the Fourth, Sixth, Seventh, and Ninth Circuits, "aren't relevant" to the split that they acknowledge exists (at least to some extent), because—according to Respondent—these circuits have not issued published opinions on the question presented. Opp. 12. Once again, Respondent is wrong.

1. Regarding the Seventh Circuit, Respondent argues that the Seventh Circuit in *Wojtas* v. *Capital Guardian Trust Co.*, 477 F.3d 924, 925–26 (7th Cir. 2007), failed to "say how it would have ruled if—as in this case—the limitations defense had not been fully sustained and proven." Opp. 12–13. Respondent's attempted distinction makes no sense: interpreting and applying Rule 41(a)(2), the Seventh Circuit expressly adopted the test espoused by the Fifth and Eighth Circuits. Pet. 10; see also *Wojtas*, 477 F.3d at 927–28 (citing *Phillips* v. *Illinois Cent. Gulf R.R.*, 874 F.2d 984 (5th Cir. 1989), and *Metro. Fed. Bank of Iowa*, 999 F.2d at 1263). So there is no question on where the Seventh Circuit lands when confronted with the question presented, and it has issued a published decision on the matter.

Moreover, Respondent is wrong to seek to distinguish the Seventh Circuit decision on the ground that the defense in this case is "speculative." Respondent conceded the defense applied, and the district court ruled the claim was untimely unless Respondent could plead tolling; rather than attempt to do so, Respondent sought and obtained dismissal. See Pet. 6–7. That is hardly the stuff of a speculative defense.

2. Respondent tries to convince the Court that the Second Circuit (via the decision below) and the Fourth, Sixth, and Ninth Circuits, "haven't taken a side" on the question presented because "[n]one of those courts have addressed [the question presented] in published opinions." Opp. 13. This argument fails.

In each of these circuits, the court addressed the question presented by applying a broader rule settled by way of a published decision. For instance, in the decision below, the Second Circuit expressly applied the test articulated in *Camilli* v. *Grimes*, 436 F.3d 120, 123–24 (2d Cir. 2006). Respondent acknowledges this (Opp. 13), yet claims this fact is irrelevant. *Ibid.* But the point is that the Second Circuit thought that the question presented was controlled by a previously published decision.

The story is similar for the Fourth, Sixth, and Ninth Circuits. In each of those Circuits, the court resolved the question presented by relying on published decisions that concerned a variation of it. See *Dean* v. *Gilmer Indus., Inc.*, 22 F. App'x 285, 287 (4th Cir. 2001) (relying on published Eighth and Eleventh Circuit decisions); *Burns* v. *Taurus Int'l Mfg., Inc.*, 826 F. App'x 496, 499 (6th Cir. 2020) (relying on published Sixth Circuit decision); *Tibbetts By & Through Tibbetts* v. *Syntex Corp.*, 996 F.2d 1227 (9th Cir. 1993) (Tbl.) (relying on published Fifth Circuit decision). The fact that these courts thought they were controlled by, or were adopting, the reasoning of prior published decisions only highlights the circuit split.

In any event, certiorari is warranted even if the decisions are evaluated on their own, because their unpublished status "carries no weight" in determining whether certiorari is appropriate. *C.I.R.* v. *McCoy*, 484 U.S. 3, 7 (1987); see also *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from

denial of certiorari) (considering the "unpublished" nature of the decision to be "yet another *reason to grant* review" (emphasis added)). The Court regularly grants review of unpublished decisions as a result. See, *e.g.*, *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1 (2022) (reviewing unpublished Second Circuit decision); *Plumhoff* v. *Rickard*, 572 U.S. 765 (2014) (same).[2] It should do so here.

C. As a final fallback, Respondent argues that no split is implicated because the *district* court dismissed under Rule 41(b), not Rule 41(a)(2). But the *court of appeals* reviewed the dismissal under Rule 41(a)(2).

The Second Circuit made this explicit. It evaluated the district court's dismissal using the factors developed in its Rule 41(a)(2) jurisprudence, explaining that this made sense given that the district court dismissed the case at the plaintiff's request. See Pet. App. 8a–10a (applying *Zagano* v. *Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990)); Pet. App. 9a n.3 ("We have utilized [the *Zagano*] factors in the context of

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[2] See also *E. Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 61 (2000) (granting certiorari to review unpublished Fourth Circuit decision); *Lynce* v. *Mathis*, 519 U.S. 433, 436 (1997) (granting certiorari to resolve conflict between unpublished Eleventh Circuit decision and Tenth Circuit precedent); *Old Chief* v. *United States*, 519 U.S. 172, 177 (1997) (reviewing unpublished Ninth Circuit opinion); *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari "to end the division of authority" between published and unpublished circuit court decisions); *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (reviewing unpublished Sixth Circuit decision); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 452–54 (1993) (reviewing unpublished Ninth Circuit decision).

motions for voluntary dismissal by plaintiffs under Federal Rule of Civil Procedure 41(a)(2) . . . . [T]he *Zagano* factors provide a helpful framework for analyzing the district court's determination in light of the fact that the dismissal without prejudice was requested by the plaintiff.").

II. The Question Presented Is Important

Respondent asks the Court to ignore the circuit split presented by this petition because, according to Respondent, the question presented "rarely arises," and the forum-shopping and judicial-economy concerns identified by Petitioners are "overblown." Opp. 19. This is just rhetoric.

A. The question presented arises regularly. *E.g.*, *Kranz* v. *Midland Credit Mgmt., Inc.*, 2020 WL 2326140, at *3–4 (W.D. Tex. May 8, 2020) (applying Fifth Circuit test); *Cox* v. *BenBella Books Inc.*, 2019 WL 1556085, at *4 (N.D. Tex. Apr. 10, 2019) (same); *Wurtzberger* v. *Buhler Versatile, Inc.*, 2019 WL 6023043, at *2–3 (E.D. Mo. Nov. 14, 2019) (applying Eighth Circuit test); *Weissgerber* v. *Portfolio Recovery Assocs., LLC*, 2025 WL 1455798, at *1–2 (M.D. Fla. Jan. 30, 2025) (applying Eleventh Circuit test); *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 299146, at *1–2 (M.D. Ga. Jan. 19, 2010) (same). So Respondent's claim is simply wrong. Moreover, the key point is that different established rules govern in different circuits regarding a plaintiff's right to dismiss without prejudice.

B. Respondent's claim that Petitioners overstate the importance of the question presented (Opp. 19–20) is also wrong. As the cases mentioned just above demonstrate, the problem implicated by this case and its attendant question appears with sufficient frequency to justify this Court's review.

There is a compelling interest in ensuring the uniform application of the federal rules across the federal circuits. *Becker* v. *Montgomery*, 532 U.S. 757, 762 (2001); *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965). The Court thus grants review to resolve splits concerning the interpretation of the Federal Rules of Civil Procedure. *Waetzig* v. *Halliburton Energy Servs., Inc.*, 604 U.S. 305, 310 (2025); *Kemp* v. *United States*, 596 U.S. 528, 532 (2022) (interpreting Rule 60(b)); *Banister* v. *Davis*, 590 U.S. 504, 511 (2020) (interpreting Rule 59(e)); *Hall* v. *Hall*, 584 U.S. 59, 62, 64 (2018) (interpreting Rule 42(a)). That is so even when the respondent claimed that the issue arose infrequently. *Compare*, Respondent's Opposition to Petition for Certiorari, *Waetzig* v. *Halliburton Energy Servs., Inc.*, No. 23-971, 2024 WL 2979709, at *17 (June 10, 2024) (opposing certiorari and arguing that question involving interpretation of Fed. R. Civ. P. 41(a)(1) is unimportant because "the issue rarely arises"), *with Waetzig*, 604 U.S. at 310 ("We granted certiorari to decide whether a Rule 41(a) dismissal without prejudice is a 'final judgment, order, or proceeding' under Rule 60(b).").

Respondent also argues that the question presented is unimportant because the circuit split

"has been around since at least the 1980s." Opp. 20. But this is a reason to *grant* this petition, not deny it. As this Court recognized at least twice just last year, "longstanding circuit split[s]" are worth this Court's attention. *Dep't of State* v. *Muñoz*, 602 U.S. 899, 907 n.3 (2024) ("We granted certiorari on this very question to resolve a longstanding circuit split."); *Smith* v. *Spizzirri*, 601 U.S. 472, 475 & n.1 (2024) (resolving decades-long circuit split on interpretation of 9 U.S.C. 3); see also *Longoria* v. *United States*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., and Gorsuch, J. dissenting from denial of certiorari) ("This petition implicates an important and longstanding split . . . ."). So the circuit split's vintage does nothing to diminish the importance of the question presented—if anything, it enhances it.

III. The Decision Below Is Wrong

The Second Circuit's decision is wrong because Cromwell and Rozycki suffered plain legal prejudice from the loss of their limitations defense. While at common law, a plaintiff had an "unqualified right . . . to take a nonsuit in order to file a new action after further preparation," it is "Rule 41(a)(1) [that] preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to" the defendant's answer or motion for summary judgment, not Rule 41(a)(2). *Cone* v. *W. Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947). And while *Cone* recognized that Rule 41(a)(2) generally protects the plaintiff when it faces "a technical failure of proof" that could be remedied in a second lawsuit, *id.* at 217 n.5, *Cone*

also recognized that without-prejudice dismissals are improper if "the defendant would suffer some plain legal prejudice other than the prospect of a second lawsuit." *Id.* at 217. The mere prospect of a second suit correcting an evidentiary error may not be plain legal prejudice, but the loss of a limitations defense strips the defendant of "an absolute defense to the suit" and is thus plainly prejudicial, *Phillips*, 874 F.2d at 987, so the decision below should be reversed.

And again, Cromwell and Rozycki's defense was not "speculative" or "unproven." Opp. 22. As the court below noted, the plaintiff had conceded that the limitations period applied, and the district court ruled that it barred the New York suit. In any case, a defendant suffers plain legal prejudice when deprived entirely of the *opportunity* to assert a nonfrivolous defense, whether proven or not. *Ikospentakis* v. *Thalassic S.S. Agency*, 915 F.2d 176, 179 (5th Cir. 1990) ("[W]hether appellants can sustain this defense beyond the shadow of a doubt in federal court is not the point of the inquiry concerning legal prejudice.").

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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