

No. 25-352

IN THE
Supreme Court of the United States

JASMINE YOUNGE,

Petitioner,

v.

FULTON JUDICIAL CIRCUIT DISTRICT
ATTORNEY'S OFFICE, GEORGIA,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF OF AMICUS CURIAE MICHAEL J.
SHOWALTER IN SUPPORT OF
RESPONDENT**

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QUESTION PRESENTED

Rule 8(c) directs a defendant to plead its affirmative defenses but does not specify the consequence of omitting one. The question presented is whether a district court has discretion to consider an unpleaded affirmative defense at summary judgment when the plaintiff will suffer no prejudice.

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INTEREST OF AMICUS CURIAE

Amicus curiae Michael J. Showalter is an appellate litigator, the founding principal of Showalter PLLC, and a member of the Bar of this Court. He represents individuals and businesses with meritorious claims and defenses in the federal courts, and he has authored numerous law review articles addressing questions of federal law.¹

Amicus's interest is in the principle that the Federal Rules of Civil Procedure exist to secure the just determination of every action and to resolve disputes on their substance rather than on the relative pleading skill of trial counsel. The people and enterprises Amicus represents come to court with genuine claims and genuine defenses, and they bear the cost when an outcome turns on a technical omission that worked no prejudice. A rule that destroys a meritorious claim or defense because of a counsel's misstep at the district court, even where the opposing party suffered no prejudice, disserves that principle and the litigants who depend on it.

Respondent's brief shows why its invocation of Title VII's personal-staff exception did not amend a pleading and therefore does not fall under Federal Rules 15 or 16. Amicus agrees, and adds that even if Respondent's personal-staff argument is deemed a constructive amendment to its answer, the same no-prejudice standard applies.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY

The question presented is whether the Federal Rules grant district courts discretion at summary judgment to allow an unpleaded affirmative defense that does not prejudice the plaintiff in any way. On both text and purpose, the answer is yes. *See* Resp. Br. 16–27 (arguing that the text and structure of the Federal Rules support a prejudice test). The Rules’ touchstone for considering an unpleaded affirmative defense is notice-and-opportunity; *i.e.*, no prejudice to the plaintiff—not whether the pleadings are updated and not whether the defendant has good cause. The court below applied exactly that standard and should be affirmed. The Rules were written to resolve disputes on their merits, not on pleading missteps that harm no one. *See Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550 (2010) (emphasizing the Rules’ “preference . . . for resolving disputes on their merits”).

Rule 56, which governs summary judgments like the one entered here, confirms the point. Rule 56(f) permits a district court, “[a]fter giving notice and a reasonable time to respond,” to grant summary judgment for a nonmovant, to grant a motion “on grounds not raised by a party,” or to enter judgment “on its own” “after identifying for the parties material facts that may not be genuinely in dispute.” Fed. R. Civ. P. 56(f). A court that may raise an unpleaded affirmative defense entirely on its own, without any amendment, may *a fortiori* consider one the parties have fully briefed. The single condition Rule 56(f) imposes—notice and an opportunity to respond—was met here because Petitioner was allowed discovery and argument on the issue.

Even if raising the defense at summary judgment were deemed a constructive amendment, Rule 15—the only Rule that governs amendments, as reflected by its title—makes prejudice the standard too. Rule 15(a)(2) directs courts to “freely give leave when justice so requires,” and leave should be withheld only when there is undue prejudice. *See United States v. Hougham*, 364 U.S. 310, 317 (1960) (denying leave to amend when there is “no such prejudice” would “subvert the basic purpose of [Rule 15(a)]”). Rule 15 carries that standard through trial: an amendment to conform to the evidence is allowed unless the objecting party shows the evidence “would prejudice” it, Fed. R. Civ. P. 15(b)(1), and a defense tried by consent is treated “as if raised in the pleadings,” Rule 15(b)(2). This Court invoked Rule 15(b) even at the Supreme Court merits stage in *Brandon v. Holt*, determining that a party is “entitled to amend [its] pleadings to conform to the proof and to the District Court’s findings of fact” and ruling on the issue “without first insisting that such a formal amendment be filed.” 469 U.S. 464, 471 & n.19 (1985). Nowhere does Rule 15 require anything more than the absence of prejudice.

This case shows why prejudice is the right measure. Rule 8(c) exists to give the plaintiff notice and a fair opportunity to meet the defense, and Petitioner had both. Respondent averred her personal-staff status in its answer, and the facts establishing that status emerged principally from Petitioner’s own deposition testimony. When Petitioner objected, the magistrate judge offered her additional discovery. Petitioner was able to fully litigate the issue at summary judgment. Petitioner lost because the courts below “easily” and “decisively” found her to be personal staff, Pet. App. 94a, 105a, not

because she was denied a fair chance to litigate the merits.

Petitioner’s counterarguments cannot be squared with the Rules’ text. Rule 16(b)(4)’s “good cause” standard governs the modification of a scheduling order, Fed. R. Civ. P. 16(b)(4), and no scheduling order was modified here. And Petitioner’s reliance on Rule 8’s mandatory language attacks a strawman. The parties agree that Rule 8 directs defendants to identify affirmative defenses in their answer, but they also agree that the Rules sometimes allow an unpleaded defense. The dispute is merely over the standard. *See* Pet. Br. 26 (the “heart of the dispute” is about “which standard should be applied”).

ARGUMENT

The Federal Rules of Civil Procedure were written to resolve disputes on their merits rather than on the basis of pleading missteps that harm no one. Rule 1 directs that the Rules be construed to “secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. To that end, the Rules “provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities.” *BLOM Bank SAL v. Honickman*, 605 U.S. 204, 213 (2025) (quotation marks omitted); *see also Krupski*, 560 U.S. at 550 (observing the Rules’ “preference ... for resolving disputes on their merits.”).

The Rules’ approach “marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Its object is fair notice, and it relies on discovery and summary judgment to test the merits rather than pleading traps. *See, e.g.,*

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (the “simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims”). The Rules “promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel.” *Brandon v. Holt*, 469 U.S. at 471 n.19 (quotation marks omitted).

I. A COURT MAY CONSIDER AN UNPLEADED AFFIRMATIVE DEFENSE AT SUMMARY JUDGMENT WITHOUT ANY AMENDMENT TO THE PLEADINGS.

As Respondent explains, consideration of an unpleaded defense at summary judgment does not constitute a pleadings amendment. Rule 56 refutes Petitioner’s central premise that a defendant must amend its answer before a court may consider an unpleaded defense at summary judgment. Rule 56(f) authorizes a district court, “[a]fter giving notice and a reasonable time to respond,” to “grant summary judgment for a nonmovant,” to “grant the motion on grounds not raised by a party,” and to enter judgment “on its own after identifying for the parties material facts that may not be genuinely in dispute.” Fed. R. Civ. P. 56(f); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (a court “possess[es] the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence”). A court may thus enter judgment on a ground that no party advanced. It may enter judgment for a party that never filed a motion. It may “on its own” “identif[y]” the facts underlying the summary judgment. And it may do so

on “legal or factual grounds.” Fed. R. Civ. P. 56(f) advisory committee’s note to 2010 amendment.

Rule 56(f)’s single condition—“notice and a reasonable time to respond”—is the court below’s no-prejudice standard by another name. And the district court’s decision to act *sua sponte* is reviewed only for abuse of discretion. *See, e.g., Bennett v. City of Eastpointe*, 410 F.3d 810, 816 (6th Cir. 2005) (“The ... procedural decision to enter summary judgment *sua sponte* ... is reviewed for abuse of discretion.”).

Nothing in Rule 56(f)’s text excludes unpleaded affirmative defenses, and this Court’s cases indicate that the district court’s *sua sponte* authority encompasses them. In *Day v. McDonough*, the Court held that district courts are “permitted, but not obliged, to consider, *sua sponte*,” a statute-of-limitations defense the defendant had failed to plead. 547 U.S. 198, 209 (2006). The *Day* Court found “no difference between a district court’s ability to raise a forfeited limitations defense *sua sponte* and its ability to notice the State’s forfeiture and permit an amended pleading under Rule of Civil Procedure 15.” *Wood v. Milyard*, 566 U.S. at 476–77 (Thomas, J., concurring in the judgment); *Day*, 547 U.S. at 209 (“no dispositive difference”). And in *Wood v. Milyard*, the Court confirmed that “courts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative.” *Wood*, 566 U.S. at 473 (majority opinion). A statute of limitations is a paradigmatic affirmative defense, enumerated in Rule 8(c)(1). The upshot is that “affirmative defenses may be raised at any time, even after trial, so long as the plaintiff suffers no prejudice.” *Clews v. County of Schuylkill*, 12 F.4th 353, 358 (3d Cir. 2021).

This Court’s rule that a district court may take up such a defense entirely on its own is fatal to Petitioner’s insistence that the defense may only enter through a formal Rule 15(a)(2) amendment. And because a district court may enter judgment on an unpleaded affirmative defense *sua sponte*, the court *a fortiori* may consider a defense that a party did advance and that the parties briefed. Petitioner offers no reason the Rules would forbid the smaller step while authorizing the larger one. A district court overseeing adversarial briefing on an unpleaded affirmative defense at summary judgment is simply exercising its Rule 56(f) authority.

Rule 15(b)(2), moreover, establishes that an unpleaded affirmative defense may sometimes be *tried* even when no amendment is ever made. That Rule identifies formal amendments and litigated-but-unpleaded issues as distinct categories: “[w]hen an issue not raised by the pleadings is tried by the parties’ express or implied consent, it must be treated in all respects as if raised in the pleadings,” and “failure to amend does not affect the result of the trial of that issue.” Fed. R. Civ. P. 15(b)(2). Despite the “failure to amend,” the issue is “treated in all respects” as raised. The Rules thus attach an amendment’s full legal effect to a litigated-but-unpleaded issue with no motion to amend ever filed.

Petitioner’s premise—that a formal amendment is the sole gateway to an unpleaded defense—cannot survive this Rule. Under Petitioner’s theory, failure to amend *does* affect the result because it means the affirmative defense cannot be considered. Rule 15(b)(2) amounts to nothing less than “circumvention” of Rule 15(a)(2), in Petitioner’s world. Pet. Br. 32. Either Rule 15(b)(2) is wrong or Petitioner is.

Petitioner attempts to wave this problem off by mislabeling Rule 15(b)(2) an “exception” to the other Federal Rules, Pet. Br. 13, but she identifies no conflict between Rule 15(b)(2) and the Rules’ typical scope. In reality, Rule 15(b)(2) is a window into how the Rules operate.

The approach in most circuits, accordingly, is that a district court “may (though it need not) permit an untimely affirmative defense, provided the plaintiff does not suffer prejudice from the delay.” *Global Tech. & Trading, Inc. v. Tech Mahindra Ltd.*, 789 F.3d 730, 731 (7th Cir. 2015). The district court, in other words, may “authorize a litigant to assert an affirmative defense despite its omission from the answer.” *Id.* at 733; *see also id.* at 732 (district court “[a]lternatively” “might have turned to Rule 15(a)(2)” and “reached the same functional result”).

II. EVEN IF THE DEFENSE IS DEEMED A CONSTRUCTIVE AMENDMENT, RULE 15 ESTABLISHES THE PREJUDICE STANDARD APPLIED HERE.

Even if raising an affirmative defense at summary judgment is deemed a constructive amendment of the answer (and it is not), Rule 15 supplies the standard, and the standard is prejudice. The “rules governing the amendment of pleadings” are intentionally “liberal.” *United States v. Hougham*, 364 U.S. 310, 316 (1960). Rule 15 thus “facilitate[s] the amendment of pleadings except where prejudice to the opposing party would result.” *Id.* Rule 15(a)(2) sets a default in favor of amendment: “The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). That is a “mandate . . . to be heeded.” *Foman*, 371 U.S. at 182.

Denying leave to amend when there is “no such prejudice” would “subvert the basic purpose of the Rule.” *Hougham*, 364 U.S. at 316–17; *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330–31 (1971) (district court was “required to take into account any prejudice”). But “the grant of leave” to amend the pleadings under Rule 15(a) is “within the discretion of the trial court.” *Zenith Radio*, 401 U.S. at 330; *see also Krupski*, 560 U.S. at 553 (“Rule 15(a) gives discretion to the district court in deciding whether to grant a motion to amend.”).

Petitioner treats Rule 15(a) denials and grants as if they stand on equal footing, but that misreads the Rule’s text and this Court’s cases. Because leave is the rule and denial is the exception, a court that denies leave must give a “justifying reason.” *Foman*, 371 U.S. at 182. *Foman* identifies possible justifying reasons: “undue delay, bad faith or dilatory motive,” “repeated failure to cure deficiencies,” and “undue prejudice to the opposing party.” *Id.* These reasons are grounds for denying leave, not elements a movant must prove to obtain it. *Id.* (condemning “outright refusal to grant the leave without any justifying reason appearing for the denial”). In practice, undue delay is a proxy for prejudice: unexcused delay matters because it is the mechanism by which belated assertion works unfair surprise. But leave should be granted “except where [there is] prejudice.” *Hougham*, 364 U.S. at 316; *see also, e.g., Cornell & Co. v. OSHRC*, 573 F.2d 820, 823 (3d Cir. 1978) (“It is well-settled that prejudice to the non-moving party is the touchstone.”).

Petitioner reads the *Foman* list upside down, treating reasons to withhold leave as preconditions to granting it. She describes them, without substantiation, as “circumstances in which

permission to amend can and should be denied.” Pet. Br. 2. But *Foman* cabins the district court’s discretion in denying leave that generally should be “freely given”; it does not reach the district court’s discretion to grant leave, which is Rule 15(a)(2)’s default. *Foman*’s enumerated factors appear in a sentence describing when leave may be withheld, not as elements of a grant.

Here, in any event, none of the *Foman* reasons are present: the defense turns on Petitioner’s own job duties, it is meritorious rather than futile, the record contains no suggestion of a dilatory motive, and the courts below found no prejudice. If the district court’s discretion was constrained, it was only toward granting.

Rule 15 carries this prejudice standard through trial itself, and that is fatal to Petitioner’s theory. When a party objects *at trial* that evidence falls outside the pleadings, Rule 15(b)(1) provides, “the court should freely permit an amendment” unless the objecting party shows that the evidence “would prejudice that party’s action or defense on the merits.” Fed. R. Civ. P. 15(b)(1). Reinforcing that prejudice is the only blocker, Rule 15(b)(1) then states that the court may grant “a continuance” for the objecting party to “meet the evidence.” Rule 15(b)(1) allows a defendant to inject an unpleaded matter at the latest and highest-stakes moment in a case—mid-trial, over objection—so long as there is no prejudice.

This Court has even invoked Rule 15(b) at the Supreme Court merits stage. In *Brandon v. Holt*, the Court concluded that “petitioners are entitled to amend their pleadings to conform to the proof and to the District Court’s findings of fact.” 469 U.S. 464, 471 (1985). Under Rule 15(b), the Court explained, an

“amendment to conform to evidence may be made at any time” and is allowed so long as the opposing party “has not been prejudiced” in presenting its case. *Id.* at 471 n.19. The Court then “proceed[ed] to decide the legal issues without first insisting that such a formal amendment be filed.” *Id.* at 471.

Petitioner’s theory cannot coexist with Rule 15(b)(1). Petitioner says a defense missing from the answer can be considered only on a showing of good cause. Yet Rule 15(b)(1) lets a party put unpleaded matter into the case at trial—later than summary judgment, after every deadline has run—on a showing of no prejudice, with no requirement of diligence or good cause. A defense that is waived the instant it is left out of the answer could not be added mid-trial, but Rule 15(b)(1) says it can. Either Rule 15(b)(1) is wrong or Petitioner is.

That problem aside, Petitioner’s position again requires a jarring incongruity. *See United Savings Association of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 374 (1988) (rejecting interpretation that would “make[] nonsense of” a neighboring provision); *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (a court “must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into an harmonious whole’”). If the Rules tolerate constructive amendments at trial and even at the latest stage of an appeal, they cannot conceivably be understood to implicitly forbid the lesser step of considering an unpleaded defense at summary judgment. But that is what Petitioner’s position entails.

Unsurprisingly, Petitioner’s theory produces nonsensical results: a defendant who can show

absence of prejudice but cannot show good cause could stay silent through summary judgment and then spring its defense at trial, where Rule 15(b)(1) would admit it. A reading of the Rules that rewards sandbagging and makes trial a safer time to raise a defense than summary judgment inverts the Rules' maturation logic. It is Petitioner's rule, not the Eleventh Circuit's, that would reward dilatory conduct.

Petitioner's own authorities confirm that Rule 15's no-prejudice standard governs constructive amendments. The Tenth Circuit, for example, which Petitioner holds out as an exemplar, treats an unpleaded defense raised at summary judgment as a constructive amendment and applies "the same standards that govern motions to amend." *Ahmad v. Furlong*, 435 F.3d 1196, 1201–02 (10th Cir. 2006) (cited at Pet. Br. 29, 32). *Ahmad* names no good-cause requirement. Instead, the court held that the defense could be raised for the first time at summary judgment and that refusing to consider it would have been an abuse of discretion because the plaintiff identified no prejudice. *Id.* at 1204. Petitioner's model case comes out Respondent's way.

III. THIS CASE ILLUSTRATES WHY THE PREJUDICE STANDARD EXISTS.

This case highlights why the prejudice standard exists. The answer itself averred that Petitioner "was a member of the District Attorney's executive and/or personal staff" and reserved the right to rely on defenses that became "available or apparent during the course of discovery." Answer, ECF No. 53, at 10, 18. Discovery then developed the exclusion from every angle: the record "contains copious discovery evidence

concerning each of the six factors,” Pet. App. 12a; discovery “focused on matters highly relevant to the ‘personal staff’ exemption,” Pet. App. 12a (quotation marks omitted); and Respondent described Petitioner as “personal staff” five separate times in its discovery responses, Pet. App. 12a n.6. When Petitioner nonetheless objected, the magistrate judge invited her to take additional discovery on the exclusion. Pet. App. 13a; *compare* Rule 15(b)(1) (district courts may respond to an objection by allowing the opposing party a continuance to meet the evidence). Both the magistrate judge and the district court found no unfair surprise and no prejudice.

Petitioner lost because she does not have a winning claim, not because she was denied a fair opportunity to litigate the exclusion. Petitioner’s rule would invert that result. It would impose the most severe sanction available (loss of a meritorious defense) for a harmless omission while handing Petitioner a windfall judgment on a claim Title VII does not reach because of a pleading misstep. Subordinating the merits to procedural rigidity in that way, where no unfairness offsets the loss, is the very outcome the prejudice standard, and the Federal Rules, exist to prevent.

IV. PETITIONER’S COUNTERARGUMENTS FAIL.

A. Rule 16 governs modification of a scheduling order.

Petitioner’s principal counterargument is that Rule 16(b)(4)’s good-cause requirement applied, Pet. Br. 8, but Rule 16(b)(4)’s plain text governs the modification of a scheduling order. It directs that a scheduling order “must . . . limit the time to . . . amend

the pleadings,” Fed. R. Civ. P. 16(b)(3)(A), and that the order “may be modified only for good cause and with the judge’s consent,” Fed. R. Civ. P. 16(b)(4). No scheduling order was modified here. Respondent did not ask the district court to move any deadline or to reopen anything. It made an argument on the record as it stood, within the schedule the court had set. Rule 16(b)(4) had nothing to operate on. And Petitioner’s reliance on Rule 16(b)(3)(A) fares no better. That provision directs only that a scheduling order set a deadline to amend; it says nothing about the consequence of missing one. *See Global Tech.*, 789 F.3d at 732 (“Rule 8(c) does not specify a consequence for the omission of an affirmative defense.”).

Rule 16 and Rule 15 measure different things. Because Rule 16(b)(4) is a docket-management rule, and a scheduling-order modification disturbs the schedule the court set, Rule 16 establishes a good-cause standard that is about the defendant’s conduct—whether it was diligent, and whether it had a real excuse for missing the deadline. *See* Pet. Br. 8 (good cause “requires a demonstration that the moving party could not meet the scheduling order deadline despite due diligence”). Rule 15’s prejudice standard, on the other hand, is about the opposing party’s position—whether she was unfairly surprised or harmed. The decisions Petitioner marshals in which a court denied leave to amend for want of diligence yet considered the same defense at summary judgment for want of prejudice, Pet. Br. 33, show two standards protecting two different interests.

Rule 15(b)(1) confirms that an amendment is not a scheduling-order modification. It permits a party to amend the pleadings at trial—long after any scheduling-order deadline has passed—on a showing

that turns on prejudice alone, with no mention of good cause. Fed. R. Civ. P. 15(b). Petitioner's theory cannot coexist with Rule 15(b)(1).

B. Rules 8 and 12 do not address the standard for allowing unpleaded defenses.

Petitioner spills much ink emphasizing Rules 8 and 12's requirement that "a defendant 'must' plead its affirmative defenses," Pet. Br. 6, but that has never been disputed. The parties agree that the Rules require a defendant to plead its affirmative defenses, and a defendant that omits one fails to comply with that command. But Petitioner's own theory permits defendants to assert unpleaded affirmative defenses with good cause. Her Rules 8 and 12 argument proves too much.

The "heart of the dispute" is only about "which standard should be applied" to late amendments, Pet. Br. 26, and the text of Rules 8 and 12 provides no answer. Rule 8(c)(1) commands that a party must state its affirmative defenses; it prescribes no consequence for a failure to do so. Fed. R. Civ. P. 8(c)(1). The Rule is addressed to the litigant, not the court. Petitioner is correct that a deadline exists but does not answer what discretion the court holds over a missed deadline. The mandatory command and the governing standard are different subjects.

* * *

At every turn, Petitioner places form over substance and seeks doctrinal rules that would make a hash of the Federal Rules. If Petitioner's arguments win, district courts will have full discretion to raise

unpleaded affirmative defenses *sua sponte*—but not with adversarial briefing, because that would mean Rule 16 is suddenly in play. District courts will be directed to allow pleadings amendments under a no-prejudice standard at trial—but months earlier at summary judgment will allow amendment only under the “more stringent” good-cause standard. And while this Court will have discretion to consider unpleaded affirmative defenses under *Brandon v. Holt*, the district courts closest to the facts will be required to complete a formal process under a standard more demanding than the one *Holt* recognized. That is not the system the Federal Rules created.

Petitioner was aware of the personal-staff facts from the answer forward, reaffirmed in Respondent’s discovery responses; she took discovery on each of the six factors and declined the magistrate judge’s offer of more; and the argument Respondent raised was “decisively” meritorious on Petitioner’s own testimony alone. Undoing that judgment—reviving a claim the courts found meritless because of a pleading omission that cost the plaintiff nothing—would sacrifice merits to formalities against the text and purpose of the Federal Rules.

CONCLUSION

The judgment below should be affirmed.

August 10, 2026 Respectfully submitted,
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