

No. 26-105

IN THE
Supreme Court of the United States

RUBICON RESOURCES, LLC,
Petitioner,
v.
KEO RATHA, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Ninth Circuit’s decision below strikes at two foundational principles: The judicial branch says what the law is, and final judgments are final. In flouting each principle, the Ninth Circuit created two circuit splits that call for this Court’s intervention.

On the first, the Ninth Circuit held that a post-judgment legislative enactment constitutes “extraordinary circumstances” that warrant using Rule 60(b)(6) to reopen a final judgment—a position that at least three other circuits, applying *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), have rejected. On the second, the Ninth Circuit revisited the merits of the underlying summary judgment on Rule 60(b) review—a practice that this Court and at least nine other circuits have prohibited.

Respondents’ attempts to minimize the splits only end up confirming them. On the first, Respondents deny the existence of a split largely by quibbling over the weight of each case, rather than the conflict itself. What matters is that at least three other circuits would hold, contrary to the Ninth Circuit, that post-judgment legislative enactments may not reopen final judgments via Rule 60(b)(6) or any other mechanism. On the second, Respondents go further by openly acknowledging that the Ninth Circuit “reviewed the [district court’s] underlying reasons” “for granting summary judgment.” BIO 15. Yet Respondents do not address a single one of the decisions in nine other circuits that have prohibited that practice. And they ignore *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), and *Bowles v. Russell*,

551 U.S. 205 (2007), which both confirm that prohibition.

The implications of the decision below are sweeping. Under the Ninth Circuit’s approach, nearly every retroactive statutory amendment becomes a vehicle for courts to reopen final judgments. This Court should grant certiorari and correct the decision below on both questions presented.

ARGUMENT

I. By Holding That Post-Judgment Legislative Changes May Reopen Final Judgments Under Rule 60(b)(6), The Ninth Circuit Created A Split And Violated This Court’s Precedents.

1. In the Ninth Circuit, a post-judgment legislative change may constitute “extraordinary circumstances” under Rule 60(b)(6) that warrant reopening a judgment that had interpreted the statute differently. In at least three other circuits, that approach violates the separation of powers and cannot justify reopening the judgment under Rule 60(b)(6) (or otherwise). Respondents’ claim that the decision below creates no “conflict among the circuits,” BIO 8, ignores that the Seventh, Tenth, and Eleventh Circuits have recognized that *Plaut* forbids precisely what the Ninth Circuit sanctioned: using a post-judgment congressional enactment to reopen a final judgment.

The Tenth Circuit’s decision in *Oklahoma Chapter of American Academy of Pediatrics v.*

Fogarty, No. 05-5100, 2010 WL 3341881 (10th Cir. July 10, 2010), is directly on point. *Contra* BIO 8-9. There, as here, a party invoked a post-judgment legislative change to a statute, whose meaning the courts had already conclusively established in a final judgment, as “extraordinary circumstances” warranting Rule 60(b)(6) relief. Unlike the decision below, however, the Tenth Circuit rejected that position, explaining that “[t]he fact that Congress has now amended the statutory definition does nothing to call into question our interpretation of the prior definition, let alone justify the extraordinary relief sought by plaintiffs in their motion.” 2010 WL 3341881, at *2. The court “presume[d] that Congress was well aware, given the holding in *Plaut*, that the amendment could not operate to call into question the finality of [the prior] judgment.” *Id.*

Respondents’ mistaken claim that *Fogarty* addressed “a *non-retroactive* amendment” while the decision below involved “a *retroactive* amendment,” BIO 9, is beside the point and only demonstrates that the split is real. *Fogarty*’s non-retroactivity finding flowed from the constitutional prohibition. The Tenth Circuit concluded that the post-judgment legislative change “*could not* operate” retroactively “to call into question the finality of [the prior] judgment”—that the separation of powers forbade Congress from “declar[ing] by retroactive legislation” that the judgment should reopen. 2010 WL 3341881, at *2 (emphasis added) (quoting *Plaut*, 514 U.S. at 227). Yet the Ninth Circuit allowed exactly what the Tenth Circuit deemed impermissible: that a retroactive amendment effectively *compelled* reopening a final judgment. *See* Pet. App. 34a, 42a.

That *Fogarty* was “unpublished,” BIO 8, does not negate the split nor undermine review. The Court considers whether a court of appeals has “entered a decision in conflict with the decision of another United States court of appeals,” S. Ct. R. 10(a), not whether that decision carries a “published” or “precedential” label. *See also* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.11 (11th ed. 2019) (“[T]he Court grants certiorari to review unpublished and summary decisions with some frequency.” (citing numerous decisions)). And Respondents offer no basis to think the Tenth Circuit would depart from *Fogarty*.

The same constitutional prohibition in *Fogarty* applies in the Eleventh Circuit. That court has confirmed that, under *Plaut*, legislation that “command[s] the federal courts to reopen final judgments” is “unconstitutional” because legislation may not undermine “the full force and effect of federal courts’ final judgments.” *Rivera v. Allin*, 144 F.3d 719, 725 (11th Cir. 1998), *abrogated in other respects by Jones v. Bock*, 549 U.S. 199 (2007); *see also United States v. Rojas*, 53 F.3d 1212, 1214 (11th Cir. 1995). The Eleventh Circuit has specifically emphasized this prohibition in a case that, as Respondents admit, “arise[s] in the Rule 60(b) context,” BIO 10: The Eleventh Circuit has deemed it “obvious” “[t]hat Congress may not mandate the reopening of a final judgment ... in light of *Plaut*” and “doubt[ed]” that Rule 60(b)(6) could bypass that constitutional prohibition. *Raven v. Oppenheimer & Co.*, 74 F.3d 239, 243 n.9 (11th Cir. 1996).

Ignoring that emphatic language and the Eleventh Circuit’s clear confirmations of the

constitutional prohibition, Respondents attempt to pick apart the Eleventh Circuit decisions as either involving different fact patterns or presenting non-Rule 60(b) questions. BIO 9-10. But it is irrelevant whether any of those decisions individually presents a precise factual parallel to the circumstances here. Nor is it dispositive that the Eleventh Circuit has expressed the constitutional prohibition in Rule 60(b) and non-Rule 60(b) cases alike. What matters is that the Eleventh Circuit recognizes and applies the constitutional prohibition against allowing legislative enactments to reopen final judgments. That would compel a different outcome in the Eleventh Circuit than the one reached in the decision below.

The same is true in the Seventh Circuit. In affirming a Rule 60(b)(6) denial, that court has stressed that “Congress may not direct courts to disregard final judgments” because *Plaut* “closed” “th[e] door” to the possibility that even “a clear change of law, *expressly* made retroactive” by Congress, could reopen a final judgment. *Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1076-77 (7th Cir. 1997) (emphasis added). That this particular decision “deal[t] with judicial—not legislative—changes in the law,” BIO 11, only reinforces the point. The judicial change at issue there was not “anything so dramatic” as the expressly retroactive legislative change in *Plaut*, so *a fortiori* it could not warrant Rule 60(b)(6) reopening. *Norgaard*, 121 F.3d at 1077. And more broadly, Rule 60(b) does not exist to give final judgments a second life whenever “the law may evolve.” *Id.*

Other Seventh Circuit decisions embody that same principle. *See, e.g., Rodriguez v. Cook County*, 664 F.3d 627, 629-30 (7th Cir. 2011); *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1036 (7th Cir. 2020). While those cases involved state legislatures or the federal executive branch, rather than Congress, *see* Pet. 16; BIO 11, they stand for the same basic proposition: Following an Article III court’s statement of what the law is, embodied in a final judgment, other branches of government cannot change the law to reopen that judgment.

The Seventh, Tenth, and Eleventh Circuits thus would have concluded that a post-judgment congressional enactment cannot justify reopening a final judgment under Rule 60(b)(6). The Ninth Circuit’s decision below held the opposite.

2. Contrary to Respondents’ assertion, the decision below cannot be reconciled with *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). The Ninth Circuit did exactly what *Plaut* forbids: It treated a post-judgment congressional enactment as a sufficient basis—standing alone—to require reopening a judgment that previously had interpreted the law differently.

Respondents are also wrong in casting the decision to reopen as “discretionary.” BIO 13. The Ninth Circuit did not consider ATRA’s purported retroactivity “alongside” other “case-specific factors.” *Contra* BIO 14. The court plainly recognized that the parties “d[id] [not] ... ask [it] to” consider those factors. Pet. App. 42a. The Ninth Circuit explicitly held that “ATRA resolved an ambiguity and had

retroactive effect,” which is why it concluded that the district court “rel[ie]d] on an erroneous view of the law.” *Id.* The Ninth Circuit’s “legal conclusion[]” regarding ATRA’s purported “retroactive effect,” *id.*, thus was not one factor; it was the entire basis for reopening.

Plaut’s distinction between a “legislative mandate to reopen” and Rule 60(b)(6), BIO 13-14, aids Rubicon, not Respondents. As explained, Pet. 22, *Plaut* distinguished Rule 60(b)(6) on the basis that the rule itself does not violate the separation of powers because it authorizes judicial discretion. 514 U.S. at 233. But the infirmity with the decision below is not that Rule 60(b) itself compels reopening; it is that the Ninth Circuit concluded that ATRA compelled reopening. In the Ninth Circuit’s view, ATRA left no choice but to reopen because Congress’s “inten[tion] for the ATRA to have retroactive effect” “fatally undermine[d]” the district court’s judgment. Pet. App. 34a, 36a. That is precisely the legislative mandate to reopen that *Plaut* deems impermissible.

3. Finally, Respondents fail to refute that the decision below also contravened this Court’s precedents making clear that post-judgment legal changes “rarely constitute the extraordinary circumstances” warranting Rule 60(b)(6) relief. *Agostini v. Felton*, 521 U.S. 203, 239 (1997); see Pet. 19. Contrary to Respondents’ claim, BIO 12, nothing in the decision below limits courts from reopening final judgments whenever they deem a legislative change retroactive. All that mattered to the Ninth Circuit was that ATRA apparently “resolved an ambiguity and had retroactive effect.” Pet. App. 42a.

And the Ninth Circuit’s retroactivity conclusion was unrestrained, *contra* BIO 12-13, deeming the statute retroactive without looking for “any real indication of clear congressional intent of retroactivity,” Pet. App. 45a (Callahan, J., dissenting). Under the Ninth Circuit’s no-holds-barred approach, a party seeking Rule 60(b)(6) relief based on a legislative change can reopen almost any final judgment the legislation touches. Pet. 19-20.

II. By Holding That Rule 60(b) Review May Revisit The Merits Of The Underlying Judgment, The Ninth Circuit Created A Split And Violated This Court’s Precedents.

1. Respondents make a slew of concessions confirming the existence of a circuit split over the scope of Rule 60(b) appellate review.

Respondents refuse to address the actual split. They do not mention a *single one* of the numerous decisions in the other circuits making clear that Rule 60(b) review cannot encompass review of the merits of the underlying decision. Pet. 23-27. That is because Respondents have no answer to the other circuits’ decisions, which are directly contrary to the decision below.

Indeed, Respondents confirm the split by doubling down on the very opposite of what nine other circuits have held. Respondents *openly acknowledge* that the Ninth Circuit, in a Rule 60(b) appeal, “reviewed the [district court’s] underlying reasons” “for granting summary judgment.” BIO 15; *see also*, e.g., BIO 2-3 (“the court of appeals reviewed” “the

district court’s earlier reasoning” in the underlying judgment); BIO 2 (Ninth Circuit “held ... that the alternative bases in the district court’s [underlying summary-judgment] decision were incorrect as a matter of law”); BIO 6-7 (Ninth Circuit “held that the district court erred as a matter of law” “as to each of th[e] bases” “for granting summary judgment”).

Nine other circuits have squarely prohibited that exact maneuver: Rule 60(b) review “*may not extend in any way* to a consideration of the merits” of the underlying judgment. *United States v. O’Neil*, 709 F.2d 361, 373 (5th Cir. 1983) (emphasis added); *see also, e.g., In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1993) (Rule 60(b) appeal “may not review the merits of the underlying order”); *Daily Mirror, Inc. v. N.Y. News, Inc.*, 533 F.2d 53, 56 (2d Cir. 1976) (Rule 60(b) appeal “does not permit ... attack[ing] the underlying judgment for error”); Pet. 23-27 (discussing remaining circuit decisions all holding the same). Because Respondents embrace a position that plainly conflicts with those other circuits, they simply pretend that those other circuits’ decisions do not exist.

2. Equally revealing, Respondents tacitly concede that the Ninth Circuit’s stance contravenes this Court’s precedents. Respondents do not mention *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), much less confront that the decision below violates it. *Browder* held that “an appeal from denial of Rule 60(b) relief *does not bring up the underlying judgment for review.*” 434 U.S. at 263 n.7 (emphasis added). Respondents expressly argue the very opposite: that the Ninth Circuit

permissibly “reviewed the underlying reasons” “for granting summary judgment.” BIO 15.

Respondents likewise ignore *Bowles v. Russell*, 551 U.S. 205 (2007), which held that the statutory time limits for appeal are jurisdictional. Together with *Browder*, 434 U.S. at 263 n.7, *Bowles* establishes that plenary merits review of the underlying judgment on a Rule 60(b) appeal amounts to a jurisdictionally impermissible second appeal. *See Bell v. McAdory*, 820 F.3d 880, 883 (7th Cir. 2016) (allowing such review “would be equivalent to accepting a jurisdictionally untimely appeal”). Respondents do not grapple with the Ninth Circuit’s breach of that prohibition.

3. Respondents attempt to brush aside their glaring omissions by claiming that the Ninth Circuit was allowed to “review th[e] reasoning [of the underlying judgment] to the extent that it had been incorporated” into the district court’s Rule 60(b) decision. BIO 2-3. This defense is legally flawed.

“Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue.” Pet. 32 (quoting *CNF Constructors, Inc. v. Donohoe Constr. Co.*, 57 F.3d 395, 400 (4th Cir. 1995)). Thus, litigants “requesting relief under Rule 60(b) [are] not entitled to a review of the merits of the underlying judgment.” *Tinsley v. City of Indianapolis*, 92 F.3d 1187 (7th Cir. 1996). District courts cannot incorporate those merits into a Rule 60(b) ruling, because it is “clearly improper” for district courts to consider those issues that are not before them. *CNF Constructors*, 57 F.3d at 400 (citation omitted). And appellate courts on Rule 60(b)

review “may not extend in any way to a consideration of the merits of the [underlying] case.” *O’Neil*, 709 F.2d at 373; *see Browder*, 434 U.S. at 263 n.7.

In short, what the movant cannot raise, the district court cannot “incorporate,” and the appellate court cannot review. Pet. 31-32. Respondents deny none of that and thereby concede all of it. Any “incorporation” theory thus is legally impermissible thrice over.

Respondents’ final salvo is to make the unremarkable point that courts apply de novo review to questions of law. BIO 16. That is irrelevant. The decisions Respondents cite address de novo review of legal questions regarding *the litigants’ asserted Rule 60(b) grounds*—not independent grounds of the underlying judgment that the Rule 60(b) motion never raised. Respondents’ reliance on *United States v. Kayser-Roth Corp.*, 272 F.3d 89 (1st Cir. 2001), illustrates their error. There, the issue of law that the court of appeals reviewed de novo concerned whether an intervening decision afforded a meritorious defense: a legal question squarely within the scope of the asserted Rule 60(b)(5) ground, not the underlying liability judgment. 272 F.3d at 100-01.

More importantly, the standard of review does not and cannot override the flat prohibition, recognized by at least nine other circuits, against using Rule 60(b) review to bring up the merits of the underlying judgment. Respondents conflate the standard of review, which allows appellate courts to review de novo legal issues pertaining to the Rule 60(b) motion at issue, with the scope of review, which prohibits

appellate courts from reaching beyond the Rule 60(b) motion to revive the underlying judgment's merits.

Respondents' attempts to salvage the decision below thus run headlong into their own tacit concessions. Respondents admit that the Ninth Circuit reviewed the merits of the underlying summary judgment on Rule 60(b) review, fail to address the nine other circuits holding otherwise, ignore this Court's precedents foreclosing the Ninth Circuit's position, and never deny that their asserted incorporation justification is both factually and legally wrong.

III. This Case Is A Clean Vehicle To Address The Exceptionally Important Questions Presented.

Respondents offer no serious vehicle objection, because there is none. Both questions are squarely presented: the Ninth Circuit expressly treated ATRA's retroactivity as an extraordinary circumstance compelling reopening, Pet. App. 42a, and expressly reviewed the underlying summary-judgment grounds *de novo*, Pet. App. 36a-39a. Resolving either question in Petitioner's favor requires reversal. Had the court followed *Plaut*, it could not have found ATRA a permissible basis for reopening. Had it respected Rule 60(b)'s limits, it could not have overturned the alternative grounds for summary judgment.

The importance of these questions cannot be overstated. Under the decision below, a retroactive statutory amendment relevant to a case can become a

vehicle to reopen final judgments conclusively interpreting prior statutory text; a district court's mere acknowledgment of the grounds of the underlying judgment in a Rule 60(b) denial can open the door to plenary appellate merits review. The result is a perpetual threat to the finality on which litigants across the nation's largest circuit rely. This Court's intervention is necessary to restore the separation of powers and the protections that Rule 60(b) intends to preserve.

CONCLUSION

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

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