

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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BLOM BANK SAL,)
Petitioner,)
v.) No. 23-1259
MICHAL HONICKMAN, ET AL.,)
Respondents.)
- - - - -

Pages: 1 through 62
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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

MICHAEL H. MCGINLEY, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

MICHAEL J. RADINE, ESQUIRE, Hackensack, New Jersey; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:56 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next this morning in Case 23-1259, BLOM
5 Bank versus Michal Honickman.

6 Mr. McGinley.

7 ORAL ARGUMENT OF MICHAEL H. MCGINLEY
8 ON BEHALF OF THE PETITIONER

9 MR. MCGINLEY: Mr. Chief Justice, and
10 may it please the Court:

11 This Court has long held that Rule
12 60(b)(6) requires extraordinary circumstances to
13 reopen a final judgment and those circumstances
14 cannot be the result of the movant's own
15 strategic choices.

16 The Second Circuit has diluted that
17 stringent standard. In its view, courts must
18 also give effect to Rule 15(a)'s liberal
19 repleading policy when considering a 60(b)(6)
20 motion seeking to replead.

21 That outlier view is wrong. It has no
22 basis in law or logic. Rather than blurring the
23 two rules, the proper approach is to keep them
24 separate. If this Court's well-settled test for
25 60(b)(6) is met, then Rule 15 comes into play.

1 Collapsing the two steps undermines
2 finality. It creates inherently -- an
3 inherently contradictory test. It invites
4 inefficient, repetitive, and costly litigation
5 that is at odds with the Federal Rules'
6 overriding objectives.

7 Here, Respondents do not qualify for
8 Rule 60(b)(6) relief. They declined multiple
9 opportunities to amend their complaint in both
10 the trial court and on appeal. Instead, they
11 made the tactical choice to stand on their
12 pleadings even when the Second Circuit ordered
13 supplemental briefing after the Kaplan decision.
14 As a result, they received a final judgment that
15 was affirmed on appeal.

16 Now they seek to restart that process
17 all over again. Doing so would effectively
18 treat the Second Circuit's original decision as
19 an advisory opinion. And Respondents have
20 offered no justification other than that they
21 mistakenly believed that their -- that their
22 original complaint was sufficient. That hardly
23 qualifies as extraordinary circumstances.

24 It is litigator's remorse, and that is
25 not enough for Rule 60(b)(6) relief. This Court

1 should reverse and bring this case to an end.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Respondent seems to
4 have premised its argument on its view of the
5 earlier Second Circuit opinion that it announced
6 a new rule. What do you think of that?

7 MR. MCGINLEY: That's not true, Your
8 Honor. There's no change in law here. Instead,
9 I would point you to my friend's brief on page
10 12, where they admit that it was just the
11 application of controlling law to their set of
12 facts.

13 I would also mention, Your Honor, that
14 what happened in this case is this case and
15 Kaplan were decided in close proximity to each
16 other both in the district court and in the
17 Second Circuit. When we went to oral argument
18 in the Second Circuit in this case, Kaplan had
19 already been argued.

20 I would point you to page 300 of the
21 JA, where the court in our case said to my
22 friend on the other side: You're aware that
23 Kaplan is sub judice before this court. You're
24 also aware, I believe, that the detailed
25 allegations in Kaplan are quite different than

1 what are at issue here in -- in Honickman. What
2 are we to do?

3 What the court ended up doing is
4 holding Honickman in abeyance until Kaplan was
5 decided. At that point, my friend on the other
6 side was fully aware that at least one member of
7 that court thought that their allegations were
8 lacking under -- as compared to Kaplan.

9 The court ordered supplemental
10 briefing. At that time, they were fully
11 capable -- and they admit this on page 40 of
12 their brief -- of asking the court to -- to
13 simply remand for them to replead if they -- if
14 the court thought that their pleadings in this
15 case weren't sufficient under the rule that was
16 announced in Kaplan.

17 In fact, that's what happened in the
18 last ATA/JASTA case that was in front of this
19 Court. This Court might remember that in the
20 Twitter case, it also had a companion case
21 called Gonzalez versus Google.

22 And at oral argument in the Google
23 case, Justice Barrett asked the plaintiff's
24 attorney: If we were to rule against your
25 client in the Twitter case, what would we --

1 what would you want us to do in this case? And
2 the attorney in that case said: We would ask
3 you to remand so that we could attempt to
4 replead.

5 The Court ended up doing that in the
6 Google case. It, of course, pointed out that
7 even in that case, the plaintiff had -- had
8 possibly waived their ability to amend because
9 they -- they sought review rather than amending
10 when the court gave them the opportunity to.
11 But that shows that they could have done that in
12 this case.

13 There was no controlling law. It was
14 a mere application. If they had wanted an --
15 another opportunity in the most efficient way
16 that would have made sense, they could have done
17 exactly what the attorney in Google did. And
18 they -- not only could they have done that at
19 oral argument, when Judge Wesley, at page 300 of
20 the JA, pointed out that their pleadings came
21 nowhere close to Kaplan, they had a brief that
22 they could have filed in the -- in the case or
23 that -- that they did file where they didn't ask
24 to replead. Instead, they said exactly what
25 they said in the district court, which is:

1 We're happy to go forward on our pleadings.

2 Please render a judgment in our case.

3 Having done that, that is their
4 tactical choice. Under Ackermann and a number
5 of other cases from this Court, it's clearly not
6 enough to come in and say, under Rule 60(b)(6),
7 oops, I made a mistake, I want a chance to -- to
8 replead now.

9 That makes sense with the structure of
10 the rules. In Liljeberg and a number of other
11 cases, including Crosby, this Court said the
12 reason you can't have a mistake or excuse,
13 excusable neglect, or some inadvertence that
14 justifies 60(b)(6) relief is because all of
15 those things are available under (b)(1) and
16 (b)(1) has a very strict one-year limitations
17 period.

18 JUSTICE SOTOMAYOR: Counsel, you're
19 addressing a question that wasn't the question
20 presented. The question presented was, does
21 15(b) get folded into 60(b) the way the Second
22 Circuit said? And the answer to that, you're
23 asking us to say, is no. But you were asked --
24 in answering Justice Thomas, you want us to go a
25 step further --

1 MR. MCGINLEY: That --

2 JUSTICE SOTOMAYOR: -- and actually
3 look at the facts here and say they weren't
4 extraordinary circumstances, correct?

5 MR. MCGINLEY: I'd say a few things on
6 that, Your Honor. So, in -- in our petition and
7 in the merits papers here, we fully raised the
8 merits question of whether or not they're
9 entitled to relief. I'd point you to page 13
10 and 26 of our cert papers.

11 JUSTICE SOTOMAYOR: But that wasn't
12 addressed below. The court below did not say
13 whether or not it thought 60(b) was met.

14 JUSTICE GORSUCH: Is --

15 MR. MCGINLEY: I -- I actually
16 disagree with that, Your Honor. So, certainly,
17 in the -- starting in the district court, what
18 the district court did was it correctly said --
19 and this is consistent --

20 JUSTICE SOTOMAYOR: I know what it
21 did. It did what you think is right. It
22 applied 60(b).

23 MR. MCGINLEY: Correct.

24 JUSTICE SOTOMAYOR: When it got to the
25 Second Circuit, the Second Circuit says you

1 apply 60(b) by looking at 15(b), correct?

2 MR. MCGINLEY: That's correct.

3 JUSTICE SOTOMAYOR: And what you're
4 saying is no, they shouldn't have. Did they
5 look at this without the 15(b) lens? Did the
6 Second Circuit look at it?

7 MR. MCGINLEY: So -- so that's how it
8 was presented and argued in the Second Circuit
9 because Mandala had not yet been decided. So it
10 was fully aired in the Second Circuit. When the
11 Second Circuit rendered its decision in this
12 case, the only error that it pointed out was
13 what it perceived to be the legal error of not
14 considering 15(a).

15 And I want to point you to -- there's
16 a footnote in the Second Circuit's decision that
17 I think is quite telling on this. The Second
18 Circuit couldn't even bring itself to say there
19 was an abuse of discretion here. What the
20 Second Circuit said is: We're not saying
21 there's an abuse of discretion; we're saying
22 that the district court exceeded its discretion
23 because -- solely because it made this legal --
24 legal error.

25 And I think that's because the Second

1 Circuit realized there's nothing that remotely
2 approaches extraordinary circumstances here.

3 I would also --

4 JUSTICE GORSUCH: Mr. McGinley, I'd
5 like to point you in a little different
6 direction.

7 MR. MCGINLEY: Sure.

8 JUSTICE GORSUCH: So I understand your
9 argument that 60(b) doesn't require
10 consideration of Rule 15. Does it preclude it?
11 I mean, could a district court in its discretion
12 take into account a possible need to -- or
13 leave -- leave to amend might be appropriate? I
14 mean, 60(b)(6) says something like any other
15 reason that justifies relief.

16 And you can imagine a district court
17 who perhaps sua sponte got a little fast out of
18 the gate and dismissed a case with prejudice.
19 Thirty days passes, so 59's out the door.
20 Plaintiff comes in and says: I've got a good --
21 I've got a good amended complaint here.

22 Could -- couldn't a district court
23 in -- in its discretion take into account the
24 policies of 15 in those circumstances?

25 MR. MCGINLEY: So a few answers on

1 that, Your Honor. The first --

2 JUSTICE GORSUCH: How about pick your
3 best one.

4 MR. MCGINLEY: Okay. So my best one
5 is: No if it's under 60(b)(6), because what
6 60(b)(6) says is it -- that it has to be
7 something other than what's available under the
8 other subsections of 60(b).

9 The -- the hypothetical that you posit
10 there seems to me like maybe there's an argument
11 under (b)(1). Maybe there's an argument that
12 somebody made a mistake, there was inadvertence,
13 there was surprise. If that's brought within
14 the one-year limitation for (b)(1), then it
15 might be available.

16 And I think that's what you see in
17 these 59(e) cases under Foman, is that the court
18 is saying very close in time, before there's
19 been an appeal.

20 In 59(e), of course, the Court points
21 out in Banister what happens is the judgment is
22 actually suspended for a period of time. And so
23 it's entirely appropriate in that circumstance
24 and efficient in that set of -- in that
25 circumstance to say: Okay, if somebody thinks

1 there's been a mistake, we'll consider that. We
2 might give opportunity to replead there.

3 I do think you still have to satisfy
4 the actual standard. This Court in -- in
5 Waetzig last week dealt with a 60(b) issue where
6 there was also a motion to vacate an arbitral
7 award. And at pages 5 and 6 of the slip op, the
8 Court makes it very clear that you don't blend
9 the two analyses. Instead, you take 60(b)
10 straight on. There, I think it was a mixed
11 (b)(1) and (b)(6) motion.

12 And so you decide whether 60(b) relief
13 is warranted. If so, then you can start looking
14 at liberal repleading --

15 JUSTICE JACKSON: But, Mr. McGinley --

16 JUSTICE KAGAN: Well --

17 JUSTICE JACKSON: Oh. Mr. McGinley, I
18 guess what I'm a little worried about is this
19 notion of whether or not parties are being
20 punished for exercising their right to appeal if
21 we accept the rule that you are positing.

22 And the -- the way it comes up for
23 me -- and I understand the facts of this
24 particular case, but I'm -- I'm just thinking
25 about the normal, ordinary case in which a -- a

1 district court dismisses a complaint for
2 insufficient pleading.

3 And I guess, at that point, the
4 plaintiff has a choice, especially if the
5 district court gives them leave to amend or
6 says: Hey, you can amend before I dismiss your
7 complaint. You could follow the district
8 court's recommendation and amend your complaint.
9 Or you can choose to appeal. You can say: No,
10 I actually think my complaint is sufficient and
11 I would like a court of appeals to weigh in on
12 that.

13 What I worry about is, if the district
14 courts enters their judgment -- with or without
15 prejudice, I guess. I'm not sure it matters.
16 But, if they enter a judgment, they dismiss the
17 appeal, you -- I mean, excuse me, they dismiss
18 the complaint, you exercise your right to appeal
19 and you lose, the court of appeals disagrees
20 with you, says the district court was correct, I
21 hear you saying that this part -- this
22 particular party should not necessarily have a
23 chance to amend, to cure, because they chose to
24 appeal, and I'm worried about that.

25 MR. MCGINLEY: So it's not quite what

1 I'm saying. I think what I'm actually trying to
2 say might assuage your concerns because what I'm
3 saying is what a party can't do is say: I want
4 to stand on my pleadings no matter what --
5 whatever the decision is, and then file a Rule
6 60(b)(6) after --

7 JUSTICE JACKSON: Why not? If the --
8 they're not -- what they're saying is: I
9 disagree with you, district court, that my
10 pleading is insufficient, and I have a right to
11 go to the court of appeals to have them weigh
12 in.

13 Once the court of appeals weighs in,
14 then, obviously, they can do whatever is
15 necessary to cure, I think.

16 MR. MCGINLEY: Right.

17 JUSTICE JACKSON: And I'm worried that
18 they -- you're saying they can't.

19 MR. MCGINLEY: No. What I'm saying
20 is, if they think there's some ambiguity as to
21 whether or not the facts that they've alleged
22 meet the standard that they think is the correct
23 one, then they have two options.

24 They can replead whatever facts they
25 think might clearly meet that standard. That's

1 the most efficient course.

2 But the other option they have is
3 exactly what happened in this Court in Google
4 versus Gonzalez, where they can say: If you --
5 we think the law is such, and we think our facts
6 map -- meet that. But, if you disagree with us
7 on whether our facts meet that law, then please
8 give us a chance to go back and replead.

9 The efficient way to do that is the
10 Court then says: Okay, fine, I'm going to
11 decide the case, but --

12 JUSTICE JACKSON: But I guess I don't
13 understand why that's not basically the same
14 thing. They just don't have that second
15 request. What they want to do is come back
16 after the -- we've cleared up what the standards
17 are and amend their complaint.

18 MR. MCGINLEY: No, the difference is
19 there's a final judgment at that point. And the
20 Court has always recognized and Rule 60(b)(6)
21 makes it very clear that a final judgment
22 changes things. And once there's a final
23 judgment, then you have to satisfy one of --

24 JUSTICE JACKSON: But your -- your --
25 I guess what I'm -- what I'm -- it's a final

1 judgment only insofar as the -- it -- the
2 district court at the beginning, when it issues
3 the judgment, understands that this is about
4 pleading. Most district courts say: I -- you
5 know, you -- you're going to have leave to amend
6 this complaint. It's not final in the sense of
7 you -- you forfeit your ability to bring this
8 claim.

9 And -- and -- and I guess what I'm
10 worried about is that you are making the ability
11 to bring the claim contingent on whether or not
12 you pursue your right to appeal. You're saying:
13 It's okay to amend if you don't appeal. But, if
14 you appeal and you lose, you're not going to be
15 able to amend anymore.

16 And I think that burdens the right to
17 appeal in a way that is not exactly this -- the
18 way these rules should be read.

19 MR. MCGINLEY: Yeah. I --
20 respectfully, I disagree because, you know, I
21 think what -- what we're really saying is, when
22 you have opportunities to ask, you have to ask,
23 at a bare minimum, to satisfy 60(b)(6).

24 Remember what happened in Crosby,
25 where this Court said even an actual change in

1 law that changed the statute of limitations,
2 that opened the window for the -- for the
3 petitioner there to take advantage of the
4 statute of limitations, the Court said: No
5 60(b)(6) relief because you could have asked a
6 court to overrule the Artuz decision and you
7 didn't. You could have filed a cert petition at
8 this Court, which, of course, is always
9 discretionary for the Court to grant it. But
10 that was the basis on which the Court said: No
11 extraordinary circumstances.

12 So I don't think we're burdening the
13 right to appeal. Instead, what we're doing is
14 saying that a party doesn't get a -- get an
15 opportunity at a dress rehearsal, where they can
16 say: We're going to plead the bare minimum set
17 of facts that we think can satisfy the law as we
18 see it, take it all -- take a defendant all the
19 way through motion to dismiss or summary
20 judgment or trial or whatever it might be, go up
21 to the court of appeals, tell the court of
22 appeals we want it to decide the question on the
23 set of facts that we've pled.

24 JUSTICE JACKSON: No, but doesn't it
25 matter if it's just the motion to dismiss? If

1 the judgment comes after the motion to dismiss,
2 we haven't had full litigation of the claim.
3 We're in a situation in which, really, the core
4 dispute is over whether or not they have pled
5 sufficient facts to meet whatever standard it
6 is. And the court of appeals -- it says: No,
7 you haven't.

8 I -- I -- it's weird to me that after
9 a ruling of the court of appeals saying your
10 pleading is insufficient, the party goes back to
11 the district court to say: Okay, we have this
12 ruling now, we're ready to amend. I don't
13 understand why they forfeit their claims
14 ultimately in that situation.

15 MR. MCGINLEY: Because, if they
16 have -- I apologize, Your Honor.

17 JUSTICE JACKSON: Yeah.

18 MR. MCGINLEY: Because they haven't
19 diligently pursued it in the -- in the forum
20 where they could have, which is the court of
21 appeals. They can say to the court of appeals:
22 Here's what we think the rule is. Here -- we
23 think our facts satisfy the rule.

24 In this case, they had supplemental
25 briefing that allowed them to do it. I'd also

1 point out the same counsel in Kaplan as in this
2 case. In Kaplan, they ended up surviving a
3 motion to dismiss because they pled facts that
4 survived it. So the notion that they had no
5 clue how to plead some set of facts that could
6 satisfy the standard they were advocating is
7 just fanciful.

8 But also, there's no -- there's no
9 suggestion here that the facts that they claim
10 that they want to now inject into the case
11 weren't available to them. And so allowing them
12 to do it now not only puts 60(b)(6) at odds with
13 (b)(1), but it puts it at odds with (b)(2).

14 What (b)(2) says is that you can,
15 within a year, seek to reopen for facts that
16 were not previously available to you despite
17 diligent efforts.

18 Here, they admit the facts were
19 available to them. They admit that they didn't
20 plead them. They didn't raise them to the
21 Second Circuit when they had a chance to do it
22 after Kaplan.

23 And so I just don't think that they
24 can then come in and say: How could we have
25 known? Now we need the extraordinary medicine

1 of 60(b)(6) relief, and, you know --

2 JUSTICE KAGAN: Mr. McGinley --

3 MR. MCGINLEY: Yeah.

4 JUSTICE KAGAN: -- can I just make

5 this more abstract --

6 MR. MCGINLEY: Sure.

7 JUSTICE KAGAN: -- take it out of the

8 facts of this case and go back to the question

9 that Justice Gorsuch asked, which I understood

10 to be something like the following: Look, get

11 your -- your principal argument that Rule 60 is

12 Rule 60 and Rule 15 is Rule 15 and there's not,

13 like, some strange combination in the way that

14 the -- that the Second Circuit thought here.

15 But, you know, does -- is Rule

16 60(b)(6) flexible enough so that a court can, in

17 appropriate circumstances -- and maybe this case

18 is not one of those, but I really want to think

19 about this in the abstract --

20 MR. MCGINLEY: Sure.

21 JUSTICE KAGAN: -- in appropriate

22 circumstances, take into account matters

23 relating to amendment, like whether the -- party

24 has had a sufficient opportunity to amend.

25 And I understood you to say to Justice

1 Gorsuch: Well, they couldn't do it in a way
2 that evades 60(b)(1) or other of the year-long
3 provisions. And that seems totally right,
4 blackletter law.

5 But, if we put that aside, say that
6 this isn't something that falls neatly into
7 another 60(b) provision, why is it that -- that
8 your -- you seem to be saying you can't even
9 think about amendment in the 60(b)(6) inquiry.

10 And that seems wrong the other way.
11 Like, why -- why not think -- you -- you -- it's
12 a high bar, extraordinary circumstances. But
13 there's also a lot of latitude in what you can
14 consider, or so I thought, and that latitude
15 maybe should include things relating to
16 amendments in appropriate cases.

17 MR. MCGINLEY: So, yeah, and I don't
18 want to overstate our position because --
19 because I -- I don't think it's quite that you
20 can never consider the fact that it's a 60(b)(6)
21 in order to amend. What the Court has said is
22 that the extraordinary circumstances that are
23 required must match the thing that you're trying
24 to do.

25 And so, if somebody comes in and says:

1 I want to amend and I want to have that
2 opportunity through 60(b)(6), they have to show
3 extraordinary circumstances that justify that
4 desire to amend. You don't let liberality bleed
5 into the analysis because that's just not
6 appropriate at that stage.

7 But what you could say -- and this may
8 sound like an extreme example, but it comes from
9 the facts of the first case to ever apply
10 60(b)(6). Imagine a circumstance like
11 Klapprott. What happened in Klapprott, which
12 was decided one year, I believe, after 60(b)(6)
13 was adopted, is that the petitioner in that case
14 was someone who had his citizenship rights
15 stripped through a default judgment during a
16 period of time in which the U.S. Government, who
17 was his adversary in the default judgment case,
18 was detaining him and he was ill. And the Court
19 said that's enough for extraordinary
20 circumstances.

21 So you could imagine a scenario where
22 somebody files a case, there's a motion to
23 dismiss filed, maybe they even oppose that
24 motion to dismiss, they go abroad, they fall
25 ill, they are -- they -- they never find out

1 that the court has granted the motion to dismiss
2 but granted them leave to replead. They don't
3 do anything in time. The court enters a default
4 judgment. That becomes final.

5 Maybe, in that set of circumstances,
6 the person could come in and say: I had no idea
7 that this was entered against me. You gave me
8 the opportunity to replead. I had no ability to
9 take advantage of it, the same way that
10 Mr. Klapprott had no ability to oppose the
11 circumstances in his -- or the default judgment
12 in his case.

13 There, I would say I -- I think that
14 that may be appropriate under 60(b)(6).

15 JUSTICE KAGAN: So you're not saying
16 that a -- a court has to blind itself to
17 anything remotely relating to amendments?

18 MR. MCGINLEY: No.

19 JUSTICE KAGAN: You're saying the
20 60(b) standard, the extraordinary
21 circumstances --

22 MR. MCGINLEY: Right.

23 JUSTICE KAGAN: -- is the right
24 standard to use.

25 MR. MCGINLEY: Right.

1 JUSTICE KAGAN: And, of course, you
2 can't try to evade 60(b)(1), et cetera, but
3 there's -- there's -- there's -- there's no
4 greater requirement or -- or strictures that
5 you're asking for.

6 MR. MCGINLEY: No. All we're asking
7 you to do is apply 60(b)(6) as you do in every
8 other circumstance that always takes into
9 account what the request is for.

10 JUSTICE GORSUCH: I -- I appreciate
11 that acknowledgment in -- in Justice Kagan's
12 question because I think -- I do think it's one
13 thing to say the district court abuses its
14 discretion in 60(b)(6) by not looking at Rule 15
15 and quite another to say the district court
16 abuses its discretion to look at Rule 15 in some
17 60(b)(6) cases.

18 MR. MCGINLEY: Right. And I just want
19 to be clear that I'm not now overselling in the
20 other direction. We -- we want --

21 JUSTICE GORSUCH: Oh, I think -- I
22 think you were selling really well just a moment
23 ago. I'm --

24 (Laughter.)

25 MR. MCGINLEY: Okay. Good. Yeah.

1 All I want to say is --

2 JUSTICE GORSUCH: I might leave it.

3 MR. MCGINLEY: Yeah. Okay. That's
4 fine, Your Honor.

5 (Laughter.)

6 JUSTICE KAVANAUGH: Well, what are
7 you -- what were you going to say?

8 (Laughter.)

9 MR. MCGINLEY: I was just going to
10 say -- I was just going to say that -- that we
11 want to be absolutely clear that doesn't mean
12 liberality creeps into the equation. All it
13 means is that the extraordinary circumstances
14 that are cited must match the request --

15 JUSTICE GORSUCH: Yeah, some
16 extraordinary circumstances in which somebody
17 was denied the right to replead, and, at that
18 point, one might take a look at -- at our
19 general presumption, you can call it Rule 15,
20 you can call it whatever, that somebody should
21 have their day in court and a -- and a fair
22 opportunity to do so. No?

23 MR. MCGINLEY: I want to be careful
24 because I -- I just -- I think that you can't --

25 JUSTICE GORSUCH: They're blameless.

1 They meet all the 60(b) standards.

2 MR. MCGINLEY: If they're blameless,
3 it's truly extraordinary circumstances, that,
4 of -- of course, means that they didn't waive
5 opportunities, that they were diligent in their
6 pursuit, I don't know what the liberality would
7 add to the equation at that point. I think that
8 60(b)(6) just gives them the opportunity to do
9 what they want to do. So --

10 JUSTICE GORSUCH: But, if a district
11 court judge cited Rule 15 in a 60(b)(6) order,
12 that would not be an abuse of discretion --

13 MR. MCGINLEY: Oh.

14 JUSTICE GORSUCH: -- would it?

15 MR. MCGINLEY: No. If all they did
16 was cite it, no. If there's evidence that they
17 let the liberality creep in in a way that
18 changed the -- the analysis that they were
19 applying --

20 JUSTICE GORSUCH: I understand that.

21 MR. MCGINLEY: -- then yes. But --
22 but, no, if all they did was cite it. I -- I
23 also would say that I think that a district
24 court could say -- if they thought it was more
25 efficient, they could say: I don't think

1 there's any chance that you could possibly meet
2 Rule 15's standard, so I'm going to deny this
3 because, no extraordinary circumstances, it
4 would be futile.

5 I think that's fine for them to do
6 that. What they can't do is grant it by
7 diluting 60(b)(6).

8 JUSTICE GORSUCH: I -- I appreciate
9 that.

10 JUSTICE BARRETT: So is one way to say
11 what you're saying that when you're in 60(b)
12 land with a 60(b) motion, the standard is always
13 extraordinary circumstances, not the liberality
14 under Rule 15, and just say no more?

15 MR. MCGINLEY: For 60(b)(6)?

16 JUSTICE BARRETT: Yes.

17 MR. MCGINLEY: Yes, that's correct.

18 JUSTICE BARRETT: Okay.

19 MR. MCGINLEY: And -- and then, of
20 course, we believe that it's fully briefed here
21 as to whether they -- or not they meet it.

22 I wanted to say one more thing. I
23 think it was Justice -- Sotomayor asked why you
24 should decide it. It's what you did in
25 Crosby -- or -- yeah, in Crosby. There were --

1 there was not a separate QP on whether 60(b)(6)
2 relief should be granted or not. The Court
3 decided the AEDPA issue, which was whether it's
4 a second or successive petition, and then it
5 said: But he can't meet 60(b)(6) here because
6 there's no extraordinary circumstances. He
7 wasn't diligent in pursuing his effort to -- to
8 do what he wanted to do.

9 That's precisely what has happened
10 here, and we would ask the Court to therefore
11 reverse.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice -- Justice -- Justice
15 Sotomayor, anything further?

16 JUSTICE JACKSON: I have a question.

17 CHIEF JUSTICE ROBERTS: Sure.

18 JUSTICE JACKSON: Yes. I -- I guess
19 what I'm still a little worried about is that
20 you are characterizing the choice to appeal the
21 district court's determination about the
22 sufficiency of your pleading as a tactical
23 waiver of your ability to amend if the court of
24 appeals disagrees with you. And I'm worried
25 about that.

1 MR. MCGINLEY: Yeah.

2 JUSTICE JACKSON: So let me give you a
3 hypo. So you have a plaintiff who files a
4 complaint that he thinks is sufficient. The
5 district court signals no, I actually think it's
6 not. The law is such and you haven't pled
7 enough facts, but I'll give you the ability to
8 amend.

9 MR. MCGINLEY: Mm-hmm.

10 JUSTICE JACKSON: And the plaintiff
11 says: No. With -- with respect, Your Honor, I
12 really do think it's sufficient. I have a right
13 to appeal your ruling. If you'd like to rule
14 that my complaint is dismissed, do so, and we'll
15 go to the court of appeals to get a ruling on
16 that.

17 MR. MCGINLEY: Yeah.

18 JUSTICE JACKSON: They go to the court
19 of appeals and the court of appeals agrees with
20 the district court.

21 What I don't understand is a rule,
22 whether it's Rule 60(b) or 15 or whatever, that
23 prevents under those circumstances the plaintiff
24 from curing by pleading the facts that he
25 originally thought and mistakenly thought were

1 not necessary. I -- I don't know why he
2 forfeits then the opportunity to proceed with
3 his litigation having gotten now a clear ruling
4 from the court of appeals about what is
5 required.

6 MR. MCGINLEY: So I'd say, in that
7 circumstance where there's never a request to
8 replead either in the trial court or in the
9 court of appeals, I think that's Ackermann,
10 which says that if you make a tactical decision
11 to induce the court to do something or -- or you
12 make a tactical decision not to do something in
13 that --

14 JUSTICE JACKSON: But why -- is -- is
15 the tactical decision choosing to appeal the
16 district court's ruling?

17 MR. MCGINLEY: No.

18 JUSTICE JACKSON: That's my question.

19 MR. MCGINLEY: No, no. It's choosing
20 not to plead the facts that you think might have
21 satisfied even the rule that you're advocating.
22 That's what happened here.

23 The -- I would also point out here --
24 and I'd point you to JA 171 through 185 -- we
25 raised all of the issues that they say that they

1 now want --

2 JUSTICE JACKSON: No, I -- I don't
3 want this case. I'm just trying to understand
4 what --

5 MR. MCGINLEY: Well --

6 JUSTICE JACKSON: Can I just change
7 the hypo a little bit?

8 MR. MCGINLEY: That's fine.

9 JUSTICE JACKSON: What if the court of
10 appeals actually partially agrees with the
11 plaintiff and changes and says neither of you is
12 right, the district court said you needed to do
13 a whole lot more, we don't think that's the
14 case, you only need to plead some subset of
15 facts?

16 MR. MCGINLEY: Right.

17 JUSTICE JACKSON: In those -- in that
18 situation, does the plaintiff get to go back and
19 do what the court of appeals says is now
20 required?

21 MR. MCGINLEY: They can ask to do so.
22 They admit this on page 40, I believe, of their
23 brief, that they could have asked the Second
24 Circuit to do that. They -- that's what
25 happened in the Google case. It's what happened

1 in the Schwab case that they cite.

2 JUSTICE JACKSON: But, if they don't,
3 you're saying they can't go to the district
4 court and ask?

5 MR. MCGINLEY: Not on a 60(b)(6).
6 Now, I mean, the other thing they could have
7 done here -- and this -- and I'm not just trying
8 to make this about this case. I'm saying a
9 plaintiff even in this -- the --

10 JUSTICE JACKSON: Yes.

11 MR. MCGINLEY: -- circumstances that
12 you're positing. Say they -- they mistakenly
13 think that they can meet even the standard that
14 the Second Circuit or the court of appeals is
15 advocating, but the court rules against them.
16 They could file a rehearing motion and they
17 could say: Your Honors, we're sorry, we should
18 have asked you at the outset, but we're asking
19 you now, we think there might be facts that
20 could replead.

21 Obviously, they're going to have to
22 labor under the rehearing standard at that
23 point, but that's still better than a 60(b)(6),
24 which is an attack on a final judgment that's
25 already been affirmed on appeal.

1 JUSTICE JACKSON: Thank you.

2 MR. MCGINLEY: Thank you. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Radine.

6 ORAL ARGUMENT OF MICHAEL J. RADINE

7 ON BEHALF OF THE RESPONDENTS

8 MR. RADINE: Mr. Chief Justice, and
9 may it please the Court:

10 The answer to the question presented
11 is that Rule 60(b)(6)'s standard does apply
12 here, and the circumstances of this case clearly
13 meet that standard. The plaintiffs here did
14 everything you'd want litigants to do. They
15 didn't waste the district court's time with
16 futile amendments given the district court's
17 erroneous standards. They appealed an incorrect
18 decision, secured a corrected pleading standard
19 and substantive legal standards from the
20 circuit, and then, armed with those
21 clarifications, promptly sought an opportunity
22 to amend from the court tasked with making those
23 decisions, the district court.

24 The circuit acknowledged that
25 plaintiffs faced an impossible situation,

1 including the district court's soup-to-nuts
2 incorrect standards, from every one of the
3 relevant JASTA standards to the direct evidence
4 knowledge pleading standard, which most
5 plaintiffs could not hope to meet.

6 And it acknowledged that the district
7 court was confused given ambiguous circuit law
8 on JASTA. It's fundamentally unfair to lay the
9 consequences of that confusion at plaintiffs'
10 doorstep.

11 But, when presented with a motion for
12 vacatur, the district court exalted finality
13 without balancing that principle against the
14 Federal Rules' preference for deciding cases on
15 their merits, a preference which is at its peak
16 at the initial stages of litigation where
17 discovery has not even begun.

18 The circuit recognized that the fair
19 thing to do was to give plaintiffs a chance to
20 meet the corrected standards in a first amended
21 complaint. The panel then issued the summary
22 order below, which included the author of the
23 prior affirmance on other grounds, effectively
24 undoing that affirmance, and attempting to clean
25 up a very strange and unfair situation.

1 That's why Petitioner is forced to
2 manufacture waivers by plaintiffs that the
3 circuit simply never found. Like many cases
4 involving extraordinary circumstances under Rule
5 60(b)(6), crafting a universal rule from unusual
6 facts of this case is very difficult, but we
7 know that Rule 60(b)(6) makes an exception to
8 finality intended for unusual cases like this
9 one.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Wouldn't you be in a
12 stronger position had you taken up the district
13 court's offer to amend your complaint?

14 MR. RADINE: The offer from the
15 district court was to meet the standards urged
16 by defendant, which were entirely incorrect,
17 and, as of oral argument, included the Kaplan I
18 standard for impleading knowledge that the
19 defendant read or was aware of the sources cited
20 to convey knowledge. That's something that we
21 couldn't prove -- allege, much less plead to.

22 JUSTICE THOMAS: But, even if -- if
23 you look at the first opinion by the court of
24 appeals, didn't it affirm the district court?

25 MR. RADINE: On other grounds, Your

1 Honor. And --

2 JUSTICE THOMAS: I know, but is -- but
3 the point was that your complaint as it stood
4 did not even meet that standard even if it
5 wasn't the correct standard.

6 MR. RADINE: It didn't meet the
7 clarified standard that the district court --
8 sorry, the circuit court provided. The circuit
9 court provided a standard that -- in what Judge
10 Wesley called a law that was recasting itself in
11 an ambiguous and evolving legal situation that
12 gave us, among other things, a new knowledge
13 pleading standard as near as we can tell. This
14 is the public sources versus publicly available
15 evidence distinction. And it identified
16 specific and I'd add non-intuitive defects in
17 the complaint, defects that we can remedy but
18 not defects that necessarily should have been
19 obvious to us before.

20 JUSTICE KAVANAUGH: The other side
21 says that once you have an affirmance of the
22 dismissal, though, that you should have sought
23 rehearing or asked the Second Circuit to modify
24 the decision to remand and -- and to permit
25 the -- you all to amend the complaint.

1 Why didn't you do that? And why isn't
2 that the answer?

3 MR. RADINE: There's no obligation to
4 do that. And, in fact, in the Second Circuit,
5 there's not only no obligation, but it appears
6 to be a regular enough practice to go back to
7 the district court.

8 So, for example, in the Mandala en
9 banc dissent, four of the judges of that court
10 encouraged the plaintiffs to go back to the
11 district court and seek vacatur under Rule
12 60(b)(6) and amendment, the same thing we did
13 here.

14 The Ninth Circuit in Nguyen v. United
15 States, relying on this Court's decision in
16 Rogers v. Hill, said that so long as the mandate
17 from the circuit doesn't say you can't amend,
18 then you are free to go back and ask the
19 district court for leave to do so under Rule 60.

20 And then the Tenth Circuit also
21 commented this in Pierce v. Cook, telling the
22 district court I understand you might have been
23 unsure if you could grant that relief, you can.

24 JUSTICE KAGAN: Mr. Radine --

25 JUSTICE GORSUCH: Counsel --

1 JUSTICE KAGAN: -- if I understood
2 your introduction, you said the right standard
3 is the 60(b)(6), extraordinary circumstances,
4 and, here, it's met. That's not what the Second
5 Circuit said, is it?

6 MR. RADINE: The summary order below I
7 don't think is a picture of clarity.

8 JUSTICE KAGAN: Well, it's kind of
9 clear. It just doesn't say what you say it
10 says. It says the district court erred
11 because -- and I'm quoting here -- "it evaluated
12 Plaintiff's motion under only Rule 60(b)'s
13 standard." And then it says: What was it
14 required to do instead? It was -- and I'm
15 quoting again -- "required to consider Rule
16 60(b) finality and Rule 15(a) liberality in
17 tandem."

18 So that's to say it's not just the
19 Rule 60(b) standard where the plaintiff comes in
20 and says it wants to amend, you know, that
21 there's some kind of mishmash of a standard,
22 which is part 60(b) and part 15(a). And as I
23 understood your introduction, you have given up
24 on that. And, I mean, we seem to have a lot of
25 people giving up on things, properly so, because

1 we seem to have a lot of outlier positions
2 today. And if it's an outlier position, why
3 don't we just say the outlier position is wrong,
4 go back and try it again?

5 MR. RADINE: Well, I think all that
6 the circuit meant about considering the rules in
7 tandem was balancing finality against Rules 15's
8 preference for hearing cases on their merits.
9 The -- I don't think that's contrary to Rule 60.

10 Rule 60(b) doesn't have the word
11 "finality" in it. It doesn't have the word
12 "extraordinary circumstances" in it.

13 JUSTICE KAGAN: Well, it -- it says --
14 and this goes back to Justice Gorsuch's question
15 to Mr. McGinley. I mean, it says: You are
16 required to consider what 15(b) tells you about
17 amendments. And you're -- and -- and -- and --
18 and, you know, that -- that provision, it really
19 does set forth a standard, which is like
20 60(b)(6), high bar; 15(b), low bar. Put them
21 together, medium bar. That's -- that's
22 different from what even you are saying is the
23 right way to look at this.

24 MR. RADINE: Yeah, I think that Rule
25 15 here helps illustrate what might be

1 extraordinary, as in denying the opportunity to
2 amend. I think that Rule 15(a) also gives us
3 some insight at the importance of the stage this
4 happens at.

5 At an early stage, amendment is freely
6 given. We're not asking for amendment to be
7 freely given here, simply saying it reflects an
8 understanding that the court should be more
9 permissive at the early stages of litigation,
10 but, ultimately, those are all built in to Rule
11 60, as this Court --

12 JUSTICE GORSUCH: Ah. So, if they're
13 all built in, Mr. Radine, what -- what objection
14 would you have to a -- a -- a short opinion from
15 this Court saying simply that the Rule 60(b)
16 standard applies, there isn't this mishmash, as
17 Justice Kagan, I think, referred to it, between
18 15 and 60, go back and try again? Because I
19 hear most of your argument saying we can meet
20 60(b).

21 MR. RADINE: Yes. I think this Court
22 could issue a -- a ruling saying that 60(b)
23 governs; Rule 15 is not governing here. But, if
24 I can help with the opinion --

25 JUSTICE GORSUCH: Period. Well, how

1 about putting a period there?

2 MR. RADINE: Sure. I think so. I
3 mean, I think that, as this Court held in
4 Waetzig just the other day, that Rule 60
5 balances finality in the interest of justice.

6 JUSTICE GORSUCH: It's already in
7 there. It's baked in.

8 MR. RADINE: It's already in there,
9 Your Honor.

10 JUSTICE GORSUCH: Okay. Thank you.

11 JUSTICE JACKSON: Can I have you speak
12 to the genesis of the extraordinary
13 circumstances? I mean, that language doesn't
14 appear in (a)(6). Any other reason that
15 justifies relief says the actual provision.

16 So I know we came up with it, I think.

17 MR. RADINE: Yeah.

18 JUSTICE JACKSON: Can you just talk
19 about that a little bit?

20 MR. RADINE: Yes. As my friend
21 mentioned, it's from the case, Klapprott, where
22 a plaintiff essentially misses a summons because
23 he's in jail and ill, and the -- the reason why
24 the Court identified the extraordinary nature of
25 that was to point out the lack of fault.

1 So it was extraordinary in that he
2 wasn't just sitting around ignoring a -- a court
3 order. There was a lack of fault issue.

4 It's not -- to be clear, the
5 extraordinary circumstances test is not a
6 frequency test. It's not that, oh, this is
7 very, very rare. I don't think being sick or
8 being in jail really necessarily is that rare.

9 JUSTICE JACKSON: I see. So it's more
10 like akin to you say lack of fault?

11 MR. RADINE: Yes.

12 JUSTICE JACKSON: Now counsel on the
13 other side kind of points the finger at you all
14 and says --

15 MR. RADINE: Absolutely.

16 JUSTICE JACKSON: -- in this case, you
17 were at fault.

18 MR. RADINE: Right.

19 JUSTICE JACKSON: So why -- why is he
20 wrong about that?

21 MR. RADINE: Well, the two invitations
22 we get from the district court are, as Judge
23 Wesley said, impossible for us to meet. They're
24 premised on incorrect standards. The correct
25 thing to do there is to appeal.

1 Rule 60, for example, is not a
2 substitution for appeal. We -- moreover, I
3 think it's -- it would be needless to go back to
4 the district court and say: Oh, I think you
5 made a mistake and got every single thing wrong.

6 The thing to do in that situation is
7 to appeal. When we get to the circuit, why
8 didn't we ask the circuit to amend? Naturally,
9 we think we're right. We don't think we're --
10 that we have failed to meet some standard that
11 we're advocating for.

12 And, indeed, where we fall down in the
13 Second Circuit is in what appears to be a new
14 knowledge pleading standard, but also, it's not
15 the Second Circuit's job to grant us leave to
16 amend.

17 JUSTICE JACKSON: Was there an
18 opportunity for you to, as Justice Kavanaugh
19 pointed out, ask the circuit even after they
20 clarified? I mean, I know that there's a --
21 there's a point at which --

22 MR. RADINE: Yeah.

23 JUSTICE JACKSON: -- you come to the
24 circuit and you could have said or, in the
25 alternative, you know, let us amend to begin

1 with, but then, once the Second Circuit
2 clarified, okay, so this is the standard, was
3 that the moment at which you were supposed to
4 ask about --

5 MR. RADINE: We could have petitioned
6 for --

7 JUSTICE JACKSON: -- amend?

8 MR. RADINE: -- a panel rehearing,
9 but, as I mentioned, it seemed to be the
10 practice in the circuit --

11 JUSTICE JACKSON: Mm-hmm.

12 MR. RADINE: -- to take that back to
13 the district court. And I don't see that
14 there's any rule that suggests that we should be
15 essentially punished for making a reasonable
16 choice of who to bring that issue to.

17 JUSTICE GORSUCH: Well, I think
18 Mr. McGinley would -- would probably object to
19 that on the grounds that we have a final
20 judgment. You know, you -- you didn't ask the
21 circuit to -- for leave. Now I'm not sure we
22 need to get into any of this for reasons we've
23 already discussed, but if we were to, not having
24 asked the circuit for any further relief beyond
25 we win or we lose, why wouldn't that normally be

1 the end of the case?

2 MR. RADINE: Well, I think -- first of
3 all, I think that just to note that in any
4 appeal where you think the standards are wrong,
5 I suppose it's implicit that the appellant --

6 JUSTICE GORSUCH: You have a final
7 judgment in the district court on appeal --

8 MR. RADINE: Right.

9 JUSTICE GORSUCH: -- yes or no, not
10 asking for further proceedings, court says no.
11 That's usually it, right?

12 MR. RADINE: I think it's the Second
13 Circuit practice, as expressed in Mandala, to
14 take that back to the district court. It
15 certainly was something we reasonably relied on
16 as an understanding of how the Second Circuit
17 operates.

18 If the Court were to -- this Court
19 were to make a rule --

20 JUSTICE GORSUCH: I understand that
21 you think that's how -- I'm -- I'm just
22 struggling to understand how that -- how that
23 might operate given you have a final judgment
24 that's been --

25 MR. RADINE: Well, this is the

1 purpose --

2 JUSTICE GORSUCH: -- you know,

3 affirmed.

4 MR. RADINE: -- of -- of Rule 60(b).

5 JUSTICE GORSUCH: Oh, that's

6 different. I'm asking about you didn't -- the

7 absence of leave to amend being requested in the

8 appeal. The appeal is over. It's done. Case

9 closed.

10 MR. RADINE: Right. The only time --

11 the way to -- right. It's closed. We didn't

12 ask for an amendment because we didn't think we

13 needed one. Why would we?

14 JUSTICE GORSUCH: No, I -- I -- I

15 appreciate that the -- the circumstances here

16 might lead to a 60(b), but I think that would be

17 the recourse, right? I mean, it's -- you did

18 not --

19 MR. RADINE: Oh, to ask the --

20 JUSTICE GORSUCH: Yeah. You didn't --

21 MR. RADINE: -- the panel?

22 JUSTICE GORSUCH: Yeah, in --

23 otherwise, you're stuck with 60(b), right?

24 MR. RADINE: Yes, but I don't -- but

25 60(b)(6), I -- I don't think, is -- is quite the

1 mountain that my friend wants it to be.

2 JUSTICE GORSUCH: I -- I appreciate
3 that. I appreciate that.

4 JUSTICE BARRETT: So, speaking of
5 mountain, let me just ask you a follow-up
6 question about that which goes to some of your
7 responses to Justice Jackson.

8 Do you think the extraordinary
9 circumstances test is wrong?

10 MR. RADINE: No, Your Honor.

11 JUSTICE BARRETT: So you think the
12 extraordinary circumstances test is right, but
13 maybe it's just a lower mountain?

14 MR. RADINE: Yes, Your Honor.

15 JUSTICE BARRETT: Lower altitude?

16 MR. RADINE: A lower altitude
17 mountain, yes.

18 JUSTICE BARRETT: Okay. Well, our
19 precedent hasn't treated it that way, and pretty
20 much the uniform practice in the court of
21 appeals so far as I'm aware is to say
22 extraordinary circumstances really are
23 extraordinary because we do have a preference in
24 favor of letting final judgments be final.

25 MR. RADINE: Yes, Your Honor, but the

1 extraordinary circumstances show up more often
2 than just someone being ill and in jail. I
3 think they happen here, where a plaintiff has
4 not had an opportunity to amend his or her
5 complaint even once on the actual defects
6 identified in that case.

7 As my friend mentioned, you know, it's
8 not so extraordinary to have the law change over
9 time. That's true. But, when it happens in
10 that case and then the same circuit essentially
11 takes back the affirmance in the summary order,
12 as they did here --

13 JUSTICE BARRETT: So is your argument
14 then that if you went back to the Second
15 Circuit, you would be able to satisfy the
16 extraordinary circumstances test? You don't
17 really need the liberality standard from Rule
18 15?

19 MR. RADINE: I think it's -- it's
20 built into Rule 60, which, as this Court says,
21 balances finality against the interests of
22 justice.

23 JUSTICE BARRETT: So you're not giving
24 up that Rule 15's liberality standard is
25 peppered in in this circumstance?

1 MR. RADINE: I -- I -- I think -- like
2 this -- Court said in Krupski, I think that it,
3 along with the rest of the Federal Rules, helps
4 express a -- a preference for trying cases on
5 their -- on their preferences. Whether this
6 Court says that you get there by invoking the
7 words "Rule 15" or not I don't think changes
8 that analysis, though.

9 JUSTICE KAVANAUGH: Are you arguing
10 that you were misled in some respects -- maybe
11 "misled" is a little strong -- but by the Second
12 Circuit's practice?

13 MR. RADINE: Well, I think that the
14 normal case for a circuit in its position would
15 be to remand. So for -- on -- on its own. We
16 see this in Marranzano, for example. The D.C.
17 Circuit says nobody's right here, go back and
18 try again. And I think that's what the circuit
19 should have done here. I think that's where,
20 once we get --

21 JUSTICE KAVANAUGH: But, once they
22 affirm, you said --

23 MR. RADINE: Once they affirm.

24 JUSTICE KAVANAUGH: -- you didn't ask
25 for rehearing because you thought -- and maybe

1 fill in the blank there -- you thought?

2 MR. RADINE: That that is a decision
3 for the district court in the first instance,
4 which the circuit agreed with. When we went
5 back on the -- on the summary order below, the
6 circuit doesn't say: I don't know why you
7 bothered the district court with that. You
8 should have come to us.

9 The circuit, which is in charge of its
10 own, you know, docket and rules and so on, said:
11 You're right, you should probably get another
12 crack at that or at least a district court
13 should think further about it.

14 JUSTICE JACKSON: And, in Mandala,
15 that's what --

16 MR. RADINE: That's what four judges
17 of the court recommended.

18 JUSTICE JACKSON: -- that's what four
19 judges of the court of appeals said.

20 MR. RADINE: That's right.

21 JUSTICE JACKSON: You should go back
22 to the district court, so --

23 MR. RADINE: That's right.

24 JUSTICE KAVANAUGH: So the answer, I
25 think, is you feel like you were a bit misled by

1 the practice?

2 MR. RADINE: It -- to the -- if that
3 were to be impermissible, then yes.

4 JUSTICE KAVANAUGH: Mm-hmm.

5 MR. RADINE: I think we were following
6 the circuit instructions as shown in the summary
7 order itself.

8 JUSTICE ALITO: Under (b)(4) and (5),
9 the circumstances are such that allowing the
10 judgment to stand would arguably work a -- a --
11 a really serious injustice. The judgment is
12 void. The judgment has been satisfied, et
13 cetera.

14 So do you think it would be fair to
15 infer that the reason under (6) has to be of
16 comparable magnitude?

17 MR. RADINE: Well, no, because, if it
18 were, then why not just be of comparable
19 magnitude of (1), which excusable neglect
20 does --

21 JUSTICE ALITO: Well, because (1) has
22 the one-year limitation.

23 MR. RADINE: I see. I don't think
24 that -- I think that what (6) is appreciating is
25 that cases can be strange and unusual, to quote

1 Judge Wesley, unusual and quirky, as they were
2 here.

3 I don't think that it means that it
4 has to be on a severity of (4) and (5). The
5 rule, 60(b)(6), still has a reasonable time
6 limitation, for example. Courts have rejected
7 this sort of relief in shorter periods of time
8 because the plaintiff didn't jump to seek the
9 amendment. We did. In 11 days, we were back
10 before the district court seeking relief.

11 JUSTICE ALITO: Well, I -- I thought
12 you said that extraordinary doesn't mean
13 infrequent. And then you said, well, it could
14 be extraordinary if it's quirky. So what is the
15 difference?

16 MR. RADINE: Well, I just mean that
17 it's hard to fashion a rule about situations
18 like this. It's hard to say that extraordinary
19 circumstances are met when you were given
20 incorrect standards and you appealed it and you
21 were largely vindicated, but then the circuit
22 adopted a new knowledge standard and identified
23 some defects, and you promptly went back, but
24 they had affirmed. They didn't -- they undid
25 the affirmation essentially. You know, it's

1 a -- it's, to me, a textbook situation for the
2 circuit monitoring its own cases.

3 JUSTICE JACKSON: Mr. McGinley says
4 that you should have at least pled the facts
5 that you thought, you know -- under these other
6 hypothetical or potential standards. Like, why
7 didn't you do that?

8 MR. RADINE: Well, we did under the
9 standards that we understood to be the case.
10 The -- the -- the allegations we pled were
11 similar to allegations that had survived motions
12 to dismiss in other cases, like Weiss, as we
13 point out in our -- in our brief.

14 The -- the -- the circuit court's
15 distinction, for example, about publicly
16 available evidence versus public sources, that
17 was not just new. It -- I read it as, in fact,
18 contrary to their Nomura decision that says
19 publicly available information is sufficient to
20 show circumstantial knowledge.

21 Or -- or -- or take the cash as
22 untraceable. The circuit said we had to
23 specifically plead that cash was untraceable.
24 We didn't think that that was necessary. We
25 thought that was an inherent part of cash, but,

1 fine, we can amend to meet that.

2 I think what we don't want is a rule
3 where plaintiffs have to load up dockets with
4 amended complaints trying every which
5 combination of facts. For example, what if the
6 circuit had said, you know, you say that Hamas
7 operates openly in Lebanon? How do you know?
8 What -- what are the -- how does Lebanon react
9 historically to terrorist groups?

10 We could have written 30 pages on
11 that. We are going to lose short and plain
12 statements if we have a rule that makes
13 plaintiffs try to essentially guess at every
14 future ruling or lose their right to amend
15 forever.

16 JUSTICE SOTOMAYOR: I'm sorry, I --
17 I -- I understood here that you came in in your
18 initial complaint and said basically, they knew
19 that these people were tied to Hamas, the people
20 who were on their board of directors --

21 MR. RADINE: Right.

22 JUSTICE SOTOMAYOR: -- the money that
23 was given. The district court, I agree, said
24 that's not enough. Public information is not
25 enough to give knowledge. But, even if it

1 was -- this was their alternative reason --
2 there's no reason to know that this information
3 was in their possession at the time of -- of the
4 attack that occurred here for which you're
5 seeking recompense.

6 I understood when you went up to the
7 Second Circuit, the Second Circuit agreed with
8 you it -- that public information would be
9 enough to give knowledge, but its of alternative
10 ground for affirming was: But the district
11 court was right, none of the information was
12 clearly present at the time the alleged aid to
13 this attack occurred.

14 So you could have cured that below on
15 the first round. Nothing about that was a
16 surprise either in the district court or the
17 court of appeals. But you chose not to.

18 MR. RADINE: Well, when the district
19 court told us that we had to plead that BLOM --
20 or, you know, acts or statements from BLOM or
21 BLOM employees that they had read or were
22 aware -- aware of sources, it -- I don't think
23 there's any benefit to us saying, well, we don't
24 have that, but here are just some more
25 allegations that are going to fail to meet your

1 standard. It's a frivolous amendment at that
2 point.

3 We had what we thought were
4 sufficient. And if you look at the actual
5 defects identified by this circuit, I -- I think
6 they're really quite narrow. For example, the
7 cash one or making clear at what time people
8 knew that Sheikh Qaradawi was the chair of the
9 Union of Good, which we took to be clear --

10 JUSTICE SOTOMAYOR: Those are not
11 inconsequential facts. Those are the very
12 essence of the case.

13 MR. RADINE: I -- I -- for -- for
14 example, in Weiss, a case where -- that said it
15 is reasonable to assume that a bank -- and banks
16 have know-your-customer obligations and so on --
17 that a bank would look to foreign designations
18 of their customers or perhaps their
19 counterparties, and that's why these role
20 designations --

21 JUSTICE SOTOMAYOR: But your complaint
22 never said they had been identified at the time
23 at issue.

24 MR. RADINE: Oh, no, no. The -- the
25 complaint says that the Union of Good was -- was

1 designated by Israel in 2002 and that the
2 counterparties, which were sending millions of
3 dollars that BLOM was converting into cash for
4 these entities, were designated already by
5 Israel.

6 The AAF, the Al-Aqsa Foundation, had
7 been shuttered by Germany in its own
8 headquarters in 2002, during the relevant
9 period. HLF was a known Hamas financier that
10 would soon get shut down during the relevant
11 period, shut down at the beginning of the
12 relevant period.

13 And -- and when that's shut down by
14 the U.S., there's -- the bank doesn't then say:
15 You know, my goodness, I can't believe we've
16 been receiving millions of dollars from this
17 terrorist organization. What account is that
18 going into? Who are these people?

19 They just move right over to the next
20 transferor, KindHearts, until that one's
21 eventually shut down years later.

22 JUSTICE SOTOMAYOR: Thank you,
23 counsel.

24 MR. RADINE: Sure.

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas, anything further? No?

2 Thank you, counsel.

3 MR. RADINE: Thank you, Court.

4 CHIEF JUSTICE ROBERTS: Rebuttal,
5 Mr. McGinley?

6 REBUTTAL ARGUMENT OF MICHAEL H. MCGINLEY

7 ON BEHALF OF THE PETITIONER

8 MR. MCGINLEY: I think my friend on
9 the other side has all but conceded the Rule
10 60(b)(6) question, and I think his very first
11 line standing before you today invited you to
12 rule on the merits of whether 60(b)(6) relief is
13 warranted here. I think everything he said
14 shows that it's not. There are not
15 extraordinary circumstances here.

16 I want to point out something that
17 didn't come up, I don't think, in either side of
18 the arguments, but it's really worth
19 emphasizing. The denial of 60(b)(6) is deny --
20 is reviewed for abuse of discretion, and I think
21 that's why this Court can very easily cut
22 through and -- and reverse entirely in this
23 case, because there's no abuse of discretion
24 here whatsoever.

25 Even if my friend is right that they

1 mistakenly thought that they didn't need to
2 plead the facts that turned out to be necessary
3 under the very standard that they claim that
4 they were advocating, that's at most a mistake,
5 it's inadvertence, it's excusable neglect under
6 (b)(1).

7 I would also point out that it's just
8 simply not true that they had no notice that
9 those defects existed before the district court
10 issued her decision. On pages 171 and -- to 185
11 of the JA -- this is our motion to dismiss.
12 This is before the district court has issued any
13 ruling -- we point out every single defect that
14 the Second Circuit ended up affirming based on.

15 And I think, if you look at that and
16 you match it up to pages 49 through 52 of the
17 JA, you'll see that everything the Second
18 Circuit said was a problem we said was a
19 problem. At that point, they had the
20 opportunity to amend.

21 I also would say that the notion that
22 somehow their case is the one that changed the
23 law is fanciful not only because there's no
24 change of law, but, really, what they're saying
25 is Kaplan was some kind of new decision that

1 they needed a chance to address.

2 They had a chance to address it. That
3 was the entire point of the supplemental
4 briefing. At page 300 of the JA, Judge Wesley
5 said to them -- the same counsel as in Kaplan --
6 he said: You recognize that your facts pled
7 here are nowhere close to what's in Kaplan.

8 We agree they're nowhere close to
9 what's pled in Kaplan. Even the proposed
10 amended complaint is nowhere close to Kaplan.
11 As my friend's own argument shows today, all of
12 the allegations they want to make are about
13 non-customers, not about BLOM's customers but
14 about third parties.

15 And I would point you to page -- to
16 Footnote 20 in the Second Circuit's decision,
17 which points out that even if they fixed the
18 defects that they think the Second Circuit was
19 talking about, they still lose because, when all
20 you're doing is talking about non-customers with
21 nothing more, that's not enough to plead general
22 awareness.

23 I'd also point out just to make you
24 feel a little more comfortable, I think, that we
25 also won on substantial assistance in the

1 district court. The Second Circuit didn't
2 address it because it affirmed on general
3 awareness. I think, if you look at what was
4 alleged even in the amend -- the proposed
5 amended complaint, it's nowhere close to what
6 this Court required in Twitter.

7 The problem with their case is that it
8 simply does not meet the standards for JASTA.
9 And we won dismissal -- the case was filed in
10 2019. It's about events that occurred 25 years
11 ago. We won dismissal in 2021, we won
12 affirmance in 2022, and somehow we're here three
13 years later talking about a zombie case that
14 should have been over years ago.

15 They simply do not meet 60(b)(6), and
16 we would ask the Court to reverse and render
17 judgment in our favor. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 The case is submitted.

21 (Whereupon, at 11:49 a.m., the case
22 was submitted.)
23
24
25

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