No. _____

IN THE

Supreme Court of the United States

LINDA ASH; ABBIE JEWSOME,

Petitioners,

v.

ANDERSON MERCHANDISERS, LLC; WEST AM, LLC; ANCONNECT, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a district court dismisses a complaint without leave to amend, should a subsequent motion for leave to amend be judged by ordinary Federal Rule of Civil Procedure 15(a)(2) standards (as the Second, Fourth, Fifth, Seventh, and Eleventh Circuits have held), or is a post-judgment motion seeking leave to amend a "disfavored" motion that the court has "considerable discretion to deny," as the Eighth Circuit (joining the minority view of the First, Sixth, and Ninth Circuits) held here?

2. When considering whether a plaintiff has unduly delayed seeking leave to amend after a dismissal for failure to state a claim, must the court count only the time from the date on which the motion was *granted* (as the Second, Sixth, and Seventh Circuits have held), or may the court penalize the plaintiff for not seeking to amend while the motion was pending by counting the time from the date on which a motion to dismiss was *filed*, as the Eighth Circuit (in accord with the views of the First and Third Circuits) held here?

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INTRODUCTION

Under Federal Rule of Civil Procedure 15, leave to amend a complaint is "freely give[n]," to further the goal that claims be tested "on the merits" rather than dismissed on technicalities. *Foman v. Davis*, 371 U.S. 178, 182 (1962). When a complaint is dismissed without leave to amend, a plaintiff who wishes to amend does so by moving to reconsider in order to permit amendment. *See id.*

Despite *Foman*'s decision to apply Rule 15's liberal standard to post-dismissal motions for leave to amend, the courts of appeals are broadly and deeply divided about what standard governs a district court's discretion to grant or deny reconsideration and amendment in that circumstance. Five circuits have held, in line with *Foman*, that Rule 15(a)(2) governs, because a party's ability to have her claim tested on the merits should not depend on whether the district court chose to grant leave to amend when it dismissed the complaint. Four circuits (including the court of appeals here) have held that a post-judgment motion for leave to amend must satisfy a stricter standard than a pre-judgment motion seeking the same result. One circuit has issued contradictory opinions on this question.

The conflict implicates basic principles of federal pleading procedure. If, as the First, Sixth, Eighth, and Ninth Circuits hold, the standard for amendment differs based on whether the district court happened to grant leave to amend upon dismissal, then a litigant's window of opportunity to plead correctly and the consequences for inadequate pleading will vary from judge to judge. That result diminishes both predictability and fairness, as different plaintiffs in the same courthouse will be held to different standards. The better rule is that applied by

this Court in *Foman* and by the Second, Fourth, Fifth, Seventh, and Eleventh Circuits: Rule 15's command that leave to amend be freely given (except in case of futility, prejudice, undue delay, or bad faith) applies whether amendment is sought before or after a Rule 12(b)(6) dismissal, so that all plaintiffs have an equal opportunity to correct their pleading deficiencies and thereby to enable their claims to be tested on the merits.

A related question, also central to the decision below and also a subject of a circuit split, is how to measure a plaintiff's "delay" in amending a complaint. The First, Third, and Eighth Circuits hold that a district court should measure delay from the filing of a motion to dismiss, which puts the plaintiff on notice only that her complaint *might* be deficient. This approach is problematic because it forces a plaintiff to seek amendment before knowing whether the motion will be granted — that is, to assume that the motion *will* be granted and to spend the additional resources to develop an amended complaint that will not be necessary if the motion is denied. The better rule, applied by the Second, Sixth, and Seventh Circuits, is that delay in amending should be measured from the event that necessitates the amendment — the granting of the motion to dismiss.

This Court should grant certiorari to resolve both of these conflicts among the courts of appeals and ensure that amendment standards are uniform.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at 799 F.3d 957 and reproduced in the appendix at 1a. The unreported decisions of the district court dismissing the case and denying reconsideration and amendment are reproduced in the appendix, at 12a and 20a, respectively.

JURISDICTION

The court of appeals entered its judgment on August 21, 2015. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 15(a)(2) provides:

> In all other cases [i.e., when amendment by right is not permitted], a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Federal Rule of Civil Procedure 59(e) provides:

> A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

STATEMENT

Petitioners Ash and Jewsome, plaintiffs in this action, sued respondents for violations of the Fair Labor Standards Act (FLSA). The district court granted a motion to dismiss for insufficient pleading and denied petitioners' subsequent motion for leave to amend the complaint to correct the deficiency. The court of appeals affirmed the denial of leave to amend, holding that such motions are "disfavored" and that the plaintiffs had delayed unreasonably by not seeking to amend before the district court ruled on the motion to dismiss.

As alleged in their original complaint, Ash and Jewsome work as "Territory Sales Leads" (a/k/a "Sales Merchandisers") for respondents. Compl. at 4. As merchandisers, Ash and Jewsome are responsible for product promotions, product placement and signage, sales floor presentation, and other point-of-sale techniques regarding consumer products at Wal-Mart

stores. *Id.* at 4. While working as merchandisers, Ash and Jewsome were non-exempt workers under the FLSA, *id.*, which requires the payment of overtime compensation (compensation at one-and-one-half times their regular rates of pay) for all hours worked in excess of forty in any workweek. 29 U.S.C. § 207. Ash and Jewsome were required to work more than forty hours per week without overtime compensation, among other violations of the FLSA. Compl. at 8-9.

On April 21, 2014, Ash and Jewsome filed this putative collective action against respondents under the FLSA. As the complaint alleged, "[d]efendants describe their services to their customers as connecting consumer brands to shoppers throughout the Wal-Mart stores through a broad array of point-to-point services that provide customized marketing and merchandising programs for their customers in order to maximize their customers' sales, increase efficiencies and reduce costs." *Id.* at 4. Knowing little about the relationship among the various respondent entities, the plaintiffs alleged that

> [d]uring all relevant times, defendants Anderson Merchandisers, LLC, a Delaware corporation, West AM, LLC, a Delaware corporation, Anderson Merchandisers, LLC, a Texas corporation, and ANConnect, LLC, a Texas corporation, were part of an integrated enterprise and, as such, were plaintiffs' employer. During all relevant times, and upon information and belief, all of these defendants shared interrelated operations, centralized control of labor relations, common management and common ownership and/or financial control.

Id. at 3. Petitioners also alleged that these entities were "employers" as defined under the FLSA. Federal

district courts in Missouri had previously held that FLSA complaints describing the nature of the employer at a comparable level of generality were sufficient to withstand a motion to dismiss. *See McClean v. Health Sys., Inc.*, 2011 WL 2650272, at *1-2 (W.D. Mo. July 6, 2011) (relying on *Arnold v. DirecTV, Inc.*, 2011 WL 839636, at *6 (E.D. Mo. Mar. 7, 2011)).

On May 23, 2014, respondents moved to dismiss on the ground that plaintiffs' allegations regarding the identity of their employer, their standing to proceed, the FLSA violations, and their entitlement to represent others similarly situated were insufficient to raise a viable claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Petitioners opposed the motion, arguing that under a proper reading of *Twombly* and *Iqbal*, as supported by numerous district court cases including the cases noted above, the complaint was adequately pleaded. Petitioners requested in the alternative that, if the court were to grant the motion to dismiss, it should permit plaintiffs leave to amend their complaint to cure any deficiencies identified by the court.

On July 2, 2014, the district court granted the motion to dismiss. Pet. App. 12a-13a. The court agreed with respondents that, with respect to the allegations regarding plaintiffs' employer and the FLSA violations, the complaint was "conclusory." *Id.* at 15a-18a. The court denied leave to amend because, although petitioners' opposition to the motion to dismiss requested the opportunity to amend if the motion were granted, petitioners "ha[d] not separately moved for leave to amend and ha[d] not filed a proposed amendment." *Id.* at 18a. On July 9, the court entered judgment in accordance with the opinion. *See id.* at 2a.

On July 11 — nine calendar days (six business days) after the court's decision and two days after entry of judgment — petitioners moved for reconsideration, asking the court to grant leave to amend the complaint and attaching a proposed amended complaint providing a dozen pages of new details about the respondent entities. These details included, among other items: how petitioners' business cards and uniforms identify their employer ("Anderson Merchandisers"); their current supervisor's title and responsibilities; the fact that respondents ANConnect and Anderson Merchandisers share a single parent corporation ("Anderson Media Corp."); which respondent entities have been listed on petitioners' paychecks and federal income tax forms during their employment (at various times, "West AM" or "Anderson Merchandisers"); which respondent entity sponsors the employer profit-sharing plan in which Jewsome participates ("ANConnect"); which entity provided workers' compensation coverage when Ash was injured at work ("Anderson Media Corp."); the fact that a call to petitioners' supervisor or to the Human Resources number petitioners have been given is answered with a recorded message thanking the listener for "calling ANConnect and Anderson Merchandisers"; and the fact that respondents Anderson Merchandisers and ANConnect share the same CEO and the same CFO, who are both officers and/or directors of respondent West AM. Ex. A to Mot. to Vacate Judgment at 3-16.

Petitioners argued, among other things, that Rule 15(a)(2) considerations favored amendment so that their claims could be tested on the merits and that amendment had been sought within a reasonable time. Respondents opposed the motion, arguing that petitioners had not met the Rule 59 or 60 standards for reconsideration and that

the proposed amended complaint would not survive a motion to dismiss in any event.

The district court denied petitioners' motion. Pet. App. 22a. "[T]he Court [found] no basis to disturb its prior Order or Judgment. The Plaintiffs' arguments are rejected for the reasons stated in the July 2, 2014 Order, and for the additional reasons stated by Defendants." *Id.* at 20a-21a. Among other authorities, the court relied on *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014), which "affirm[ed] denial of [a] post-dismissal motion for leave to amend in part because moving party knew 'of the possible need to amend its pleading.'" Pet. App. 21a (quoting *Ka-Nefer-Nefer*, 752 F.3d at 744).

Petitioners appealed both the dismissal and the denial of their motion for reconsideration to allow amendment, and the Eighth Circuit affirmed. Regarding the motion to dismiss, the court agreed with the district court that under *Iqbal*, petitioners' complaint did not contain sufficient information regarding the entities that employed them. *Id.* at 5a. The court explained:

> Ash and Jewsome could have alleged — and in their first amended complaint, did allege — such facts as the name on their business cards, the identity of their supervisors, the source of their work schedules, and the information they were given when they were hired. It is this type of factual allegation that could allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. (citations, internal quotation marks and source's alteration marks omitted). "However," the court continued, "without this type of factual allegation, the complaint is insufficient for failure to state a necessary

element of the claim." *Id.* Having affirmed the dismissal based on the insufficiency of the original allegations as to petitioners' employer, the court did not consider whether the district court correctly applied *Twombly* and *Iqbal* in also finding the FLSA allegations deficient. *Id.* at 6a-7a.

Turning to the motion to reconsider in order to amend the complaint, the court of appeals first noted that the reason petitioners sought reconsideration was to amend and accordingly the district court could not ignore considerations under Rule 15(a)(2) "that favor affording parties an opportunity to test their claims on the merits." *Id.* at 7a (citation and internal quotation marks omitted). The posture of the case, however, exerted a critical influence on the applicable standard: According to the court of appeals, the district court "has considerable discretion to deny a post judgment motion for leave to amend because such motions are disfavored." *Id.* (citations, internal quotation marks and source's alteration marks omitted). Accordingly, the court of appeals explained, "[w]hile plaintiffs 'remain free where dismissal orders do not grant leave to amend to seek vacation of the judgment under Rules 59 and 60[b] . . . district courts in this circuit [also] have considerable discretion to deny' such requests." *Id.* at 9a (quoting *Ka-Nefer-Nefer*, 752 F.3d at 742-43) (alterations in original).

Applying its Rule 59 "disfavored motion" standard, the court of appeals held that the district court acted within its discretion in denying the reconsideration motion on grounds of unreasonable delay:

> The defendants' motion to dismiss, filed 47 days before the district court dismissed the case, put Ash and Jewsome on notice of the possible deficiencies in their original complaint. They had the opportunity to request leave to amend at any

> time before the district court ruled on the motion to dismiss.

Id. at 10a.

Although the court of appeals characterized petitioners as having "offer[ed] nothing to explain why their litigation decisions did not amount to undue delay," *id.* at 11a, the court acknowledged and addressed in a footnote petitioners' argument that they should not be penalized for not amending the complaint during the pendency of the motion to dismiss that they opposed, *id.* at 10a n.3. The court was "unpersuaded": "[P]re-judgment requests for leave to amend are preferred," and "the decision whether to request leave to amend or stand on the complaint is an ordinary tactical decision that is commonly required of litigants." *Id.*

REASONS FOR GRANTING THE PETITION

The court of appeals erred in two ways, and both errors implicate direct disagreement among the circuits: First, the court treated petitioners' motion to reconsider and amend as a "disfavored" one subject to Rule 59 standards, thereby displacing the Rule 15 standard that this Court in *Foman v. Davis*, 371 U.S. 178 (1962), held applies to such a motion. Second, in applying its "disfavored motion" standard, the court counted the time when respondents' motion to dismiss the original complaint was pending as time during which petitioners "delayed" in seeking leave to amend. Each of these holdings implicates a deep split among the circuits, is erroneous, and has serious implications for pleading practice in the federal courts. This case presents an ideal vehicle to address these issues and ensure that the lower courts take a consistent approach that comports with Rule 15. Without such guidance, litigants in different circuits are left with two completely different standards

— one of which prevents some cases from ever being tested on their merits.

I. The Courts Of Appeals Are Divided Over The Standard Applicable To Post-Judgment Motions To Amend Complaints.

The Eighth Circuit's view that a post-judgment motion seeking leave to amend is a "disfavored" motion that the court has "considerable discretion to deny," Pet. App. 7a, follows from that court's earlier holding in *Ka-Nefer-Nefer* that, post-judgment, "Leave to amend will be granted if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief." 752 F.3d at 743. In turn, "Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *Holder v. United States*, 721 F.3d 979, 986 (8th Cir. 2013) (citation and internal quotation marks omitted); *cf. Clark v. United States*, 764 F.3d 653, 661 (6th Cir. 2014) (Rule 59(e) relief appropriate where new evidence is discovered, the law changes, the court clearly erred, or to correct manifest injustice); *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (same).[1]

Five circuits take the opposing view that the Rule 15 standard continues to govern a motion to amend a complaint when it is incorporated into a motion to reconsider; three circuits agree with the Eighth Circuit's approach; yet another circuit has expressed contradictory views on the question.

A. In direct conflict with the decision below, the Second, Fourth, Fifth, Seventh, and Eleventh Circuits hold that plaintiffs do not lose their entitlement to

[1] Rule 59(e) applies here because petitioners' motion was brought within 28 days of the judgment.

application of Rule 15's "freely give[n]" standard just because a district court has chosen to dismiss their complaint without, rather than with, leave to amend.

The Seventh Circuit's recent decision in *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510 (7th Cir. 2015), is illustrative. There, a hearing-impaired girl sued her local Girl Scout organization alleging violations of the Rehabilitation Act, and the district court dismissed the complaint without leave to amend for failure to allege sufficient factual detail. *Id.* at 516, 517. The plaintiff filed a Rule 59(e) motion for reconsideration seeking leave to amend, which the district court denied as to plaintiff's principal theory explaining why the Girl Scouts were covered under the Rehabilitation Act. *Id.* at 518-19.[2]

The Seventh Circuit reversed, holding that the district court's "unusual step" of dismissing without leave to amend did not defeat application of Rule 15's amendment standard even though the request to amend necessarily took the form of a post-judgment motion to reconsider under Rule 59. *Id.* at 520-22. Dismissal without leave to amend "cannot nullify the liberal right to amend under Rule 15(a)(2)," and so "[a]s with pre-judgment motions for leave to amend, the district court must still provide some reason — futility, undue delay, undue prejudice, or bad faith — for denying leave to amend, and we will review that decision under the same standard we would otherwise review decisions on Rule 15(a)(2) motions for leave to amend." *Id.* at 522.

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[2] The court permitted amendment as to an alternative theory; the plaintiff then filed an amended complaint based on that theory, and the district court dismissed it. *Id.* On appeal, the plaintiff pursued only her principal theory and challenged the denial of leave to amend as to that theory. *Id.*

Runnion thus leaves no doubt that the Seventh Circuit would have applied the Rule 15 "freely give[n]" standard to the petitioners' request to amend their complaint here, in contrast to the Eighth Circuit's opinion that it was a "disfavored" motion that the district court had "considerable discretion to deny," under Rule 59. Pet. App. 7a; *see Ka-Nefer-Nefer*, 752 F.3d at 743.

The Second, Fourth, Fifth, and Eleventh Circuits agree with Seventh Circuit and would likewise have applied the Rule 15 standard. *See Williams v. Citigroup Inc.*, 659 F.3d 208, 210-14 (2d Cir. 2011) (per curiam) (reversing denial of post-judgment motion to amend and remanding for determination whether amendment would be futile); *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (en banc) ("[A] post-judgment motion to amend is evaluated under the same legal standard as a similar motion filed before judgment was entered — for prejudice, bad faith, or futility."); *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 367 (5th Cir. 2014) ("We . . . review the district court's denial of Spicer's motion [for reconsideration to allow amendment] for abuse of discretion, in light of the limited discretion afforded by Rule 15(a). The district court properly exercises its discretion under Rule 15(a)(2) when it denies leave to amend for a substantial reason, such as undue delay, repeated failures to cure deficiencies, undue prejudice, or futility." (citations omitted)); *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988) ("The same standards [under Rule 15(a)] apply when a plaintiff seeks to amend after a judgment of dismissal has been entered by asking the district court to vacate its order of dismissal pursuant to [Rule] 59(e).").

B. By contrast, the First, Sixth and Ninth Circuits hold, like the decision below, that Rule 15's mandate that

leave to amend be "freely give[n]" no longer applies when a plaintiff attempts to amend a complaint after a dismissal without leave to amend. Instead, the plaintiff must satisfy the more stringent standard applicable to a Rule 59 motion to alter or amend a judgment. *See In re Genzyme Corp. Sec. Litig.*, 754 F.3d 31, 46 (1st Cir. 2014) ("[O]nce judgment has been entered, the district court is without power to entertain any amendments unless the judgment is set aside. A motion to alter or amend a judgment may be granted under Rule 59 only if the movant demonstrates that an intervening change in controlling law, a clear legal error, or newly discovered evidence warrants modification of the judgment." (citations omitted)); *Clark*, 764 F.3d at 661 ("When a party seeks to amend a complaint after an adverse judgment, it thus must shoulder a heavier burden [than if the party sought to amend a complaint beforehand]. Instead of meeting only the modest requirements of Rule 15, the claimant must meet the requirements for reopening a case established by Rules 59 or 60." (citation and internal quotation marks omitted; alteration by the court)); *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001) ("Following dismissal of his complaint and entry of judgment against him, Weeks sought to reopen the judgment in order to amend his complaint. . . . [T]he judgment would have to be reopened, under Federal Rule of Civil Procedure 59(e), before the district court could entertain Weeks's motion to amend. . . . Judgment is not properly reopened absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." (citation and internal quotation marks omitted)).

C. The question what standard governs a post-judgment motion for leave to amend has produced intra-

as well as inter-circuit conflict, as different panels of the D.C. Circuit have taken opposing views on the question. *Compare Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1128 (D.C. Cir. 2015) ("[D]enial of the Rule 59(e) motion [to alter the judgment in order to amend the complaint] is an abuse of discretion if the dismissal of the complaint with prejudice was erroneous; that is, *the Rule 59(e) motion should be granted unless the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency*." (citation and internal quotation marks omitted; emphasis added)), *with Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam) ("Rule 15(a)'s liberal standard for granting leave to amend governs once the court has vacated the judgment. But to vacate the judgment, Appellants *must first satisfy Rule 59(e)'s more stringent standard*." (citation omitted and emphasis added)).

In the face of a 5-4 circuit split (with an additional circuit divided against itself) on a basic question of pleading procedure, this Court should grant the petition and provide guidance as to the correct standard.

II. The Courts Of Appeals Are Divided Over How To Calculate The Length Of Time A Plaintiff Has Taken To Amend.

Applying its strict standard for post-judgment motions to amend under Rule 59(e), the court of appeals here affirmed the district court's conclusion that petitioners unduly delayed in requesting leave to amend, because "[t]he defendants' motion to dismiss, filed 47 days before the district court dismissed the case, put Ash and Jewsome on notice of the possible deficiencies in their original complaint." Pet. App. 10a. Thus, the court of appeals calculated the "delay" in seeking to amend from the filing of the motion to dismiss, rather than from

the dismissal of the complaint. Three circuits reject this approach; two others agree with it.

The Second, Sixth, and Seventh Circuits do not count days prior to the dismissal of the complaint in considering whether a plaintiff has unduly delayed in moving for leave to amend the complaint. In *Williams*, a district court had denied a plaintiff's post-judgment motion for leave to amend and explained that the plaintiff should have sought leave to amend "in the first instance." 659 F.3d at 214. The Second Circuit reversed: Whether the district court meant by "in the first instance" that the plaintiff was obliged to seek leave to replead "immediately upon answering the motion to dismiss the complaint (without yet knowing whether the court will grant the motion, or, if so, on what ground)" or immediately upon dismissal and prior to the entry of judgment, the appeals court found it "unmistakably clear there is no such rule." *Id.*

The plaintiffs in *Morse v. McWhorter*, 290 F.3d 795 (6th Cir. 2002), faced an analogous situation: The district court denied a post-judgment motion for leave to amend based on plaintiffs' failure to seek amendment during the two-year period between when the magistrate judge recommended that the complaint be dismissed and when the district court overruled plaintiffs' objections to that recommendation and dismissed the case. *Id.* at 798. The Sixth Circuit noted a preference for earlier amendment, but nonetheless reversed, holding that plaintiffs were under no obligation to amend the complaint until the district court ruled on the motion to dismiss. *Id.* at 800.

In *Runnion*, the Seventh Circuit, after concluding (as described above) that the Rule 15 standard applies to a post-judgment motion seeking leave to amend, went on

to hold that the plaintiff should not be penalized for waiting until dismissal to seek amendment:

> [A] plaintiff who receives a Rule 12(b)(6) motion and who has good reason to think the complaint is sufficient may . . . choose to stand on the complaint and insist on a decision without losing the benefit of the well-established liberal standard for amendment with leave of court under Rule 15(a)(2).

786 F.3d at 523. Accordingly, a district court may not "remove the liberal amendment standard by . . . requiring plaintiffs to propose amendments before the court rules on a Rule 12(b)(6) motion on pain of forfeiture of the right to amend." *Id.* at 523 n.3.

In contrast to these decisions, the First and Third Circuits agree with the Eighth Circuit that a plaintiff's failure to move for leave to amend the complaint upon the filing of a motion to dismiss may constitute undue delay. In *ACA Financial Guaranty Corp. v. Advest, Inc.*, 512 F.3d 46 (1st Cir. 2008), the court upheld the district court's denial of the plaintiffs' post-judgment motion for leave to amend their complaint, rejecting the plaintiffs' argument that "they were entitled to wait and see if their amended complaint was rejected by the district court before being put to the costs of filing a second amended complaint." *Id.* at 57. Similarly, *Jang v. Boston Scientific Scimed, Inc.*, 729 F.3d 357 (3d Cir. 2013), held that the district court had not abused its discretion when it denied the plaintiff post-judgment leave to amend. The court faulted the plaintiff for adopting a "wait-and-see approach" and for failing to amend the complaint "at any time before the District Court granted the dismissal." *Id.* at 368.

These decisions reflect a fundamental disagreement among the circuits on the question of how to calculate delay in seeking leave to amend. Here, the Second, Sixth, and Seventh Circuits would have permitted petitioners to defend their original complaint against respondents' motion to dismiss without the risk of losing their opportunity to amend because of the "delay" while that disputed motion was pending. The Court should grant the petition to resolve the conflict among the circuits.

III. The Decision Below Is Wrong And Cannot Be Reconciled With Rule 15 Or This Court's Decision In *Foman*.

Even after the plaintiff is no longer able to amend as of right, leave to amend a complaint shall be "freely give[n]." Fed. R. Civ. P. 15(a)(2). This Court held in *Foman v. Davis*, 371 U.S. 178 (1962), that the "freely give[n]" standard applies whether leave to amend is sought before or after judgment.

Foman was a contract case in which the original complaint relied on an oral promise; the district court dismissed under the statute of frauds and on the same day entered judgment against the plaintiff. *Id.* at 179. The next day, the plaintiff sought reconsideration in order to amend the complaint to plead an alternative theory, quantum meruit. *Id.* The district court denied the motion to amend, and the court of appeals affirmed. *Id.* at 179-80. Accepting the appellate court's treatment of the post-judgment motion as one under Rule 59, *id.* at 181, this Court nonetheless reversed, explaining that Rule 15's mandate — "that leave to amend 'shall be freely given when justice so requires'" — "is to be heeded." *Id.* at 182. What that mandate requires, the Court elaborated, is that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper

subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.*; *see also id.* at 181-82 (explaining that "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." (citation and internal quotation marks omitted)). Accordingly, even after judgment, leave to amend must be "freely given" absent reasons such as undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, and futility. *Id.* at 182.

Foman demonstrates that the court of appeals here erred in holding that the "freely given" standard does not apply to post-judgment requests to amend: Ash and Jewsome should have been "freely give[n]" a chance to amend, Fed. R. Civ. P. 15(a)(2), even though (as in *Foman*) they sought that chance after dismissal. Indeed, the Eighth Circuit's implication that the amended complaint would have been sufficient to state a claim, *see* Pet. App. 5a (acknowledging that petitioners "in their first amended complaint, did allege" facts "that could allow the court to draw the reasonable inference that the defendant is liable" (citations and internal quotation marks omitted)), underscores that the court's treatment of amendments is antithetical to the goal of testing cases on their merits. Further, under the Eighth Circuit's approach, a district court's unexplained decision whether to grant leave to amend in its initial dismissal — a decision made prior to reviewing a proposed amendment — makes a dispositive difference in the standard for a subsequent motion for leave to amend. Accordingly, in the Eighth Circuit, plaintiffs' chance to have their claims tested on the merits will vary based on whether

individual district judges prefer dismissals with or without leave.

Although *Foman* did not address the second question presented here, its logic suggests that the court of appeals also erred in counting as "delay" in seeking leave to amend the time during which the opposed motion to dismiss was pending. The Rules allow plaintiffs to oppose a motion to dismiss, but the court of appeals, without questioning petitioners' good faith in opposing the motion, penalized them for doing so by holding that they had unduly delayed seeking leave to amend by not making a formal request until nine days (six business days) after the case was dismissed. Counting the time during the pendency of the motion as "delay" forces a plaintiff to behave as if a motion to dismiss has been granted — that is, to seek amendment — before the court has ruled on the defendant's motion. This better-safe-than-sorry strategy is not costless, because the plaintiff's counsel will have to redraft, perhaps do additional legal research, and undertake additional investigation necessary to plead in more detail, although the original pleading may in fact be sufficient. *See Ka-Nefer-Nefer*, 752 F.3d at 742 (explaining that party seeking amendment must submit a proposed amended complaint); *see also ACA Financial*, 512 F.3d at 57 (acknowledging the "costs of filing a[n] . . . amended complaint"). A litigant should not be forced to behave as if she has lost a motion to dismiss that she opposes and that remains pending.

Moreover, forcing plaintiffs to seek amendment simultaneously with opposing a motion to dismiss in order to ensure that their claims are heard on the merits effectively requires plaintiffs to plead to a higher standard than Rule 8 requires: Plaintiffs cannot rest on

allegations that "state a claim to relief that is plausible on its face," *Iqbal*, 556 U.S. at 678 (citation and internal quotation marks omitted); rather, they have to plead something like an *indisputably* plausible claim. Any less specific pleading places plaintiffs at risk of a dismissal that would prevent them from curing any deficiencies — in spite of Rule 15's "freely give[n]" standard, Rule 8(a)'s requirement of a "short and plain statement of the claim showing that the pleader is entitled to relief," and the mandate of *Foman*.

Finally, under the Eighth Circuit's approach, plaintiffs who elect to oppose motions to dismiss without simultaneously seeking amendment will be subject to differential treatment not only based on whether the presiding judge is inclined to include leave to amend in the dismissal order, but also based on how quickly the motion is decided: A fast dismissal might enable a plaintiff to seek amendment soon enough to avoid "undue delay," whereas a plaintiff will have not have that opportunity if a court takes two years to issue a decision (as in *Morse*). Given the different caseloads that different judges face and the varying complexity of different cases, the Eighth Circuit's rule for calculating the days of delay makes the opportunity to amend turn on arbitrary factors unrelated to the goal of enabling claims to be tested on the merits.

IV. This Case Presents Two Recurring Questions Of Significant Importance And Provides An Ideal Vehicle For Resolving Them.

The frequency with which the questions at issue arise is reflected in the fact that nearly every circuit has ruled on one or both of the questions at issue. As the Seventh Circuit noted, these questions are particularly salient at this time of lingering confusion in the lower courts about

the proper application of *Twombly* and *Iqbal*. *See Runnion*, 786 F.3d at 520.

Because these questions are important for basic pleading practice, circuit disarray on these questions is problematic. In circuits that take the Seventh Circuit's approach, plaintiffs may defend their complaint without the risk that, if unsuccessful, they will be held to have "delayed" seeking to amend when they later file a "disfavored" post-judgment motion to do so. By contrast, under the decision below and in circuits that agree with it, prudent plaintiffs will find it necessary to couple their opposition to a motion to dismiss with a conditional motion to amend and proposed amended complaint. Although this step may be time-consuming and costly, plaintiffs who do not take it run the risk of being held to a "one-and-done" pleading standard if (as occurred here) the district court finds the complaint insufficient, dismisses without leave to amend, and denies reconsideration and amendment because the time while the motion to dismiss was pending is deemed "delay."

Continuing confusion as to the standard will increase uncertainty not only circuit-to-circuit but even district-to-district and judge-to-judge. In circuits applying the Eighth Circuit's rule, individual judges — not the Federal Rules — will determine which standard applies to proposed amendments, because the standard will vary depending on whether the judge has allowed leave to amend in the dismissal order, a decision that amounts to an effectively unreviewable exercise of discretion. Such disuniformity on such a basic procedural threshold question — when may a plaintiff amend to cure deficiencies in the complaint? — should not be allowed to persist.

This case provides an ideal vehicle for resolving the two conflicts. Both issues were squarely raised and ruled on below. No procedural obstacles or ancillary questions would obstruct this Court's direct consideration of the questions presented. Finally, the fact that the court of appeals implied that the plaintiffs' proposed amended complaint would have cured the problem that caused the court to affirm the dismissal, *see* Pet. App. 5a, makes clear that in circuits applying less stringent amendment rules, plaintiffs' proposed amendment would have been permitted and (as *Foman* requires) tested on its merits.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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