No. 18-782

In the Supreme Court of the United States

WILLIAM C. BOND, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
BARBARA L. HERWIG
ANNE MURPHY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's pro se motion for leave to file an amended complaint, where the court explained that it was doing so for the reasons given in the court's prior opinion and order in the same case.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) 4
Ashe v. *Corley*, 992 F.2d 540 (5th Cir. 1993) 11
Birl v. *Estelle*, 660 F.2d 592 (5th Cir. 1981) 14
Bland v. *Johnson*, 637 Fed. Appx. 2 (D.C. Cir. 2016) 12
Bond, *In re*, 280 Fed. Appx. 246 (4th Cir. 2008) 3
Bond, *In re*, 547 Fed. Appx. 348 (4th Cir. 2013) 2
Bond, *In re*, 583 Fed. Appx. 170 (4th Cir. 2014) 2
Bond, *In re*, 621 Fed. Appx. 248 (4th Cir. 2015) 2
Bond, *In re*, 705 Fed. Appx. 174 (4th Cir. 2017) 2
Bond v. *Blum*, 317 F.3d 385 (4th Cir.), cert. denied, 540 U.S. 820 (2003) 3
Bond v. *Blum*, 294 Fed. Appx. 70 (4th Cir. 2008), cert. denied, 555 U.S. 1172 (2009) 3
Bond v. *Blum*, 604 Fed. Appx. 277 (4th Cir. 2015) 2
Bond v. *Hughes*, 671 Fed. Appx. 228 (4th Cir. 2016) 2
Bond v. *McDaniel, Bennett & Griffin*, 275 Fed. Appx. 243 (4th Cir. 2008) 3
Bond v. *United States Attorney*, 293 Fed. Appx. 222 (4th Cir. 2008), cert. denied, 555 U.S. 1154 (2009) 3
Byrd v. *United States*, 138 S. Ct. 1518 (2018) 13

Cases—Continued: Page

Clapper v. *Amnesty Int'l USA*, 568 U.S. 398 (2013) 10
Crawford-El v. *Britton*, 523 U.S. 574 (1998) 15
Duchon v. *Cajon Co.*, 791 F.2d 43 (6th Cir. 1986) 12
EEOC v. *Simbaki, Ltd.*, 767 F.3d 475 (5th Cir. 2014) 14
Eagle Eye Fishing Corp. v. *United States Dep't of Commerce*, 20 F.3d 503 (1st Cir. 1994) 14
Edwards v. *City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999) 10
Feldman v. *American Mem'l Life Ins. Co.*, 196 F.3d 783 (7th Cir. 1999) 11
Firestone v. *Firestone*, 76 F.3d 1205 (D.C. Cir. 1996) 12
Flynn v. *Department of Corr.*, 739 Fed. Appx. 132 (3d Cir. 2018) 12
Foman v. *Davis*, 371 U.S. 178 (1962) 6, 7, 9, 15
Garabed Melkonian Trust, *In re*, 235 Fed. Appx. 404 (9th Cir. 2007) 11
Higdon v. *Tusan*, 673 Fed. Appx. 933 (11th Cir. 2016) 13
Hurn v. *Retirement Fund Trust of Plumbing, Heating & Piping Indus.*, 648 F.2d 1252 (9th Cir. 1981) 11
Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 9
Laird v. *Tatum*, 408 U.S. 1 (1972) 10
Lake v. *Arnold*, 232 F.3d 360 (3d Cir. 2000) 11
Leatherman v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) 15
Mala v. *Crown Bay Marina, Inc.*, 704 F.3d 239 (3d Cir. 2013) 14
McDonald, *In re,* 489 U.S. 180 (1989) 5

Cases—Continued: Page

McNeil v. *United States*, 508 U.S. 106 (1993) 14
Moore v. *Baker*, 989 F.2d 1129 (11th Cir. 1993) 12
Mullin v. *Balicki*, 875 F.3d 140 (3d Cir. 2017) 15
Nolin v. *Douglas Cnty.*, 903 F.2d 1546 (11th Cir. 1990), overruled on other grounds by *McKinney* v. *Pate*, 20 F.3d 1550 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995) 12
Noll v. *Carlson*, 809 F.2d 1446 (9th Cir. 1987) 13
PEC Solutions, Inc. Sec. Litig., *In re,* 418 F.3d 379 (4th Cir. 2005) 10
Pallottino v. *City of Rio Rancho*, 31 F.3d 1023 (10th Cir. 1994) 11
Phillips v. *Illinois Dep't of Fin. & Prof'l Regulation*, 718 Fed. Appx. 433 (7th Cir. 2018) 13
Rhodes v. *Amarillo Hosp. Dist.*, 654 F.2d 1148 (5th Cir. 1981) 11
Sause v. *Bauer*, 138 S. Ct. 2561 (2018) 14
Swierkiewicz v. *Sorema N. A.,* 534 U.S. 506 (2002) 15
United States v. *Bond*, 561 Fed. Appx. 279 (4th Cir. 2014) 2
United States v. *Bromwell*, 377 Fed. Appx. 312 (4th Cir. 2010) 2
United States ex rel. Kelly v. *Novartis Pharms. Corp.*, 827 F.3d 5 (1st Cir. 2016) 10
Viernow v. *Euripides Dev. Corp.*, 157 F.3d 785 (10th Cir. 1998) 10
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 7

Constitution, statutes, and rules:

U.S. Const. Amend. I 2, 3, 8
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 4
28 U.S.C. 2675(a) 4

Statutes and rules—Continued: Page

28 U.S.C. 2679(d)(1) 4
28 U.S.C. 2401(b) 4
Fed. R. Civ. P.:
Rule 15 7
Rule 15(a)(1) 7
Rule 15(a)(2) 7
Rule 52(a)(3) 7
Rule 59(e) 7
Rule 60(b) 7
Sup. Ct. R. 14.1(a) 9

Miscellaneous:

3 James Wm. Moore, *Moore's Federal Practice* (3d ed. 2018) 7
6 Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2010) 7

In the Supreme Court of the United States

No. 18-782

WILLIAM C. BOND, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 742 Fed. Appx. 735. The opinion and order of the district court dismissing the complaint (Pet. App. 12a-37a) are not published in the Federal Supplement but are available at 2017 WL 1347884. The district court's order denying petitioner's first motion for leave to file an amended complaint (Pet. App. 10a-11a) is unreported. The district court's opinion and order denying petitioner's second such motion (Pet. App. 7a-9a) are unreported but are available at 2017 WL 4507499.

JURISDICTION

The court of appeals entered judgment on August 2, 2018. On October 22, 2018, the Chief Justice extended the time within which to file a petition for a writ of cer-

tiorari to and including December 17, 2018, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 2016, petitioner filed a pro se complaint asserting that the U.S. Marshals Service and the Federal Bureau of Investigation (FBI) had conspired to violate his First Amendment and due-process rights "at the direction of rogue Maryland Article III judges and the Maryland U.S. Attorney's Office." Compl. 3. The complaint named as defendants the U.S. Marshal for the District of Maryland, Johnny L. Hughes; the Special Agent in Charge of the Baltimore Field Office of the FBI, Kevin Perkins; the U.S. Attorney for the District of Maryland, Rod J. Rosenstein; and "Unknown Named Maryland U.S. Judges." Compl. 1, 3. The gravamen of the complaint was that federal officials had allegedly attempted to intimidate petitioner and retaliate against him for his protests about "provable corruption * * * in the Maryland U.S. courthouse." Compl. ¶ 23.

2. In April 2017, the district court dismissed petitioner's complaint in a thorough 28-page memorandum opinion and order. Pet. App. 12a-37a.

The district court began by observing that petitioner "is a frequent litigant" and admonishing him that "continuing to file frivolous and vexatious lawsuits" could result in sanctions. Pet. App. 13a.[1] After summarizing the

---

[1] See, *e.g.*, *In re Bond*, 705 Fed. Appx. 174 (4th Cir. 2017) (per curiam); *Bond* v. *Hughes*, 671 Fed. Appx. 228 (4th Cir. 2016) (per curiam); *In re Bond*, 621 Fed. Appx. 248 (4th Cir. 2015) (per curiam); *Bond* v. *Blum*, 604 Fed. Appx. 277 (4th Cir. 2015) (per curiam); *In re Bond*, 583 Fed. Appx. 170 (4th Cir. 2014) (per curiam); *United States* v. *Bond*, 561 Fed. Appx. 279 (4th Cir. 2014) (per curiam); *In re Bond*, 547 Fed. Appx. 348 (4th Cir. 2013) (per curiam); *United*

applicable legal standards, see *id.* at 15a-22a, the district court explained to petitioner that his claims against the U.S. Marshal, the FBI Special Agent in Charge, and the U.S. Attorney would be dismissed because the complaint failed to allege, except in conclusory fashion, that any of those three officials personally "did anything to violate [petitioner's] constitutional rights," *id.* at 24a. The complaint also failed to allege any basis for overcoming the named defendants' qualified immunity. *Id.* at 34a-35a. The court further explained that although the First Amendment protects individuals against retaliation in some circumstances, petitioner's complaint did not contain any plausible allegations of "a chilling effect on his speech" and in fact indicated that petitioner continued to protest even after the alleged intimidation. *Id.* at 26a. And the complaint contained no allegations that any of the named officials personally "did anything at all to restrict [petitioner's] First Amendment rights." *Ibid.*

The district court also reviewed petitioner's six claims for relief and explained why each one failed to state a due-process claim. Pet. App. 27a-34a. For example, petitioner alleged in Count I that unnamed federal agents questioned him about whether "any federal judges or government officials [were] in any danger from [petitioner]," Compl. ¶ 40, in what petitioner alleged was an effort to intimidate him and prevent his

---

States v. *Bromwell*, 377 Fed. Appx. 312 (4th Cir. 2010) (per curiam); *Bond* v. *Blum*, 294 Fed. Appx. 70 (4th Cir. 2008) (per curiam), cert. denied, 555 U.S. 1172 (2009); *Bond* v. *United States Attorney*, 293 Fed. Appx. 222 (4th Cir. 2008) (per curiam), cert. denied, 555 U.S. 1154 (2009); *In re Bond*, 280 Fed. Appx. 246 (4th Cir. 2008) (per curiam); *Bond* v. *McDaniel, Bennett & Griffin*, 275 Fed. Appx. 243 (4th Cir. 2008) (per curiam); *Bond* v. *Blum*, 317 F.3d 385 (4th Cir.), cert. denied, 540 U.S. 820 (2003).

protests, Compl. ¶¶ 48-49. The court explained that the complaint identified no "specific legal violation"; "glosse[d] over th[e] legitimate possibility" that the agents' questioning was justified by judicial safety concerns; and contained only "'conclusory'" allegations of misconduct or bad-faith intent. Pet. App. 29a-30a (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 681 (2009)).

Finally, the district court noted that the complaint could be construed to allege tort claims subject to the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* Pet. App. 34a n.3. The court therefore granted the government's motion to substitute the United States as a defendant, see 28 U.S.C. 2679(d)(1), and dismissed the complaint for the additional reason that petitioner had failed to exhaust administrative remedies, Pet. App. 34a n.3 (citing 28 U.S.C. 2401(b), 2675(a)).

3. After the dismissal of his complaint, petitioner twice moved to reopen the case and file an amended complaint. D. Ct. Doc. 24 (May 9, 2017); D. Ct. Doc. 26 (June 20, 2017). In his motions, petitioner demonstrated that he was aware of the legal standard he was required to meet under circuit law for filing an amended complaint after dismissal with prejudice—namely, that "a party may amend its complaint" after final judgment "only if doing so avoids 'prejudice, bad faith, and futility.'" D. Ct. Doc. 24-1, at 3 (brackets and citation omitted); accord D. Ct. Doc. 26-1, at 4.

The district court denied both motions. Pet. App. 7a-9a, 10a-11a. Each time, the court explained to petitioner that the court was denying his motion for the reasons set forth in the court's earlier opinion. See *id.* at 10a (denying first motion "[f]or reasons expressed in the Memorandum Opinion and Order"); *id.* at 7a (deny-

ing second motion "[f]or reasons expressed in the Memorandum Opinion and Order"). In denying the second motion, the court again admonished petitioner about his "vexatious and frivolous complaints." *Id.* at 8a (citation omitted). The court also observed that "every paper filed with the Clerk of this court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the court's stewardship responsibility is to see that these resources are allocated in a way that promotes the interests of justice." *Ibid.* (quoting *In re McDonald*, 489 U.S. 180, 184 (1989) (per curiam)) (brackets omitted). In denying the second motion, the court ordered the Clerk of the court "not to accept any further motions" from petitioner to reopen the action. *Ibid.*

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 2a-6a. Petitioner, now represented by counsel, contended on appeal that "[t]he district court abused its discretion when it denied, without explanation, [petitioner's] second motion to amend his complaint." Pet. C.A. Br. 32. The court of appeals "reject[ed] this contention as without merit." Pet. App. 4a. The court acknowledged that the district court's order denying petitioner's second motion "does not explicitly state whether [petitioner's] second motion to amend was being denied for prejudice, bad faith, or futility." *Ibid.* The court of appeals determined, however, that the district court's rationale—"futility"—was apparent from the record, given the district court's express reliance on the reasoning of its previous opinion dismissing the complaint for failure to state a claim. *Ibid.* The court of appeals concluded that the district court's decision not to spell out its reasoning again in detail "does not amount to an abuse of discretion." *Ibid.*

The court of appeals also "review[ed] the record" and confirmed that petitioner's proposed second amended complaint was futile. Pet. App. 5a. The court explained that petitioner's "bare assertions in the proposed second amended complaint that he curtailed or diluted his First Amendment activity do not amount to sufficient allegations that he suffered an objective harm to his rights under that Amendment." *Ibid.*

ARGUMENT

Petitioner contends (Pet. ii) that the courts of appeals are divided on the question whether a district court "must provide a reason" when denying a pro se plaintiff's motion for leave to amend the complaint, even if the district court's reasons for denying the motion are "apparent from an analysis of the record." That contention lacks merit. No court of appeals has adopted the rule petitioner advocates. The circuit courts have instead uniformly concluded, consistent with this Court's decision in *Foman* v. *Davis*, 371 U.S. 178 (1962), that a district court's decision not to articulate its reasons for denying leave to amend is not an abuse of discretion if the court's reasons "appear[] from the record," *id.* at 182. And petitioner is wrong to suggest (Pet. 4) that the question presented is outcome-determinative in this or any case; even if a district court's reasons are not apparent from the record, the court of appeals may still affirm the judgment—for example, because any error was harmless. In any event, here the district court *did* provide a reason for denying leave to amend, when it explained that it was acting for the reasons set forth in its prior opinion. Petitioner fails to explain why anything more was required even under his own novel proposed rule. Accordingly, the petition for a writ of certiorari should be denied.

1. The decision below is correct. The district court did not abuse its discretion in denying petitioner's repeated post-judgment motions to amend the complaint.

a. A party "may amend its pleading once as a matter of course" in certain circumstances at the outset of a case. Fed. R. Civ. P. 15(a)(1). "In all other cases," a party seeking to amend a pleading may do so "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). A party seeking leave to amend a complaint that already has been dismissed with prejudice must also demonstrate some basis for altering or setting aside the judgment. See Fed. R. Civ. P. 59(e), 60(b); 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.13[2] (3d ed. 2018); 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1489 (3d ed. 2010). And when a court denies a motion for leave to amend, the Federal Rules do not require the court to issue any written findings or conclusions. See Fed. R. Civ. P. 52(a)(3) ("The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, *on any other motion*.") (emphasis added).

In *Foman*, this Court confirmed that "the grant or denial of an opportunity to amend" the complaint under Rule 15 "is within the discretion of the District Court." 371 U.S. at 182. The Court also determined that a district court "abuse[s] * * * that discretion" if it denies leave to amend "[i]n the absence of any apparent or declared reason" for the denial, or "without any justifying reason appearing for the denial." *Ibid.* The Court further observed that "undue delay," "bad faith," and "futility of amendment" were all among the reasons that would justify denying leave to amend. *Ibid.*; cf. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321,

332 (1971) (affirming the district court's denial of leave to amend, although the court's specific reasoning was "unexpressed").

b. The courts below correctly applied those principles to petitioner's second motion to set aside the judgment and amend his complaint. In dismissing petitioner's complaint, the district court noted that the complaint failed to state a First Amendment claim because it failed to allege any plausible injury in fact. Pet. App. 25a. Petitioner alleged that the defendants had attempted to intimidate him and discourage him from protesting "provable corruption" outside the Maryland federal courthouse, see pp. 2-4, *supra*, but the complaint contained no plausible allegations of "a chilling effect on his speech," Pet. App. 26a. Petitioner's second proposed amended complaint did not remedy that pleading defect. See Gov't C.A. Br. 10-14. The district court was therefore well within its discretion to deny petitioner's second motion to amend the complaint. In doing so, the court explained that it was denying the motion "[f]or reasons expressed in the [court's earlier] Memorandum Opinion and Order." Pet. App. 7a.

The court of appeals, in turn, concluded that the district court's reference to the earlier opinion provided petitioner with the "relevant justification" that petitioner claimed was lacking. Pet. App. 4a. Because the district court's order denying leave to amend "relie[d] on the rationales articulated in the [earlier] opinion," the court of appeals had no difficulty discerning that the "relevant basis for [the district court's] decision was a determination that the proposed second amended complaint was futile." *Ibid.* Petitioner himself recognized as much, in arguing (unsuccessfully) in both the district

court and the court of appeals that his proposed amendment was *not* futile. See Pet. C.A. Br. 44; D. Ct. Doc. 26-1, at 11. This is therefore not a case in which the district court acted "[i]n the absence of any apparent or declared reason." *Foman*, 371 U.S. at 182. Rather, the district court denied leave to amend because of the "futility of amendment," *ibid.*, and the court of appeals agreed. And, in any event, the court of appeals conducted its own "review of the record and the parties' briefs" and reached the same conclusion—namely, that petitioner's "bare assertions in the proposed second amended complaint that he curtailed or diluted his First Amendment activity do not amount to sufficient allegations that he suffered an objective harm to his rights under that Amendment." Pet. App. 5a.

c. Petitioner contends (Pet. 22-24) that his proposed second amended complaint was not futile because it adequately alleged that he censored his protest activities in response to actions by federal agents. That fact-bound contention does not merit review. First, whether the proposed amendment was futile is not within the scope of the question presented in the petition (Pet. ii), which addresses only the extent to which a district court must state its reasons for denying leave to amend—not whether the district court's particular reasons here were sound. See Sup. Ct. R. 14.1(a); see, *e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993) (per curiam) (declining to review an issue not "fairly included" within the questions set forth in the petition) (citation omitted). Second, certiorari is not warranted to address the case-specific question whether petitioner's proposed amended complaint was futile. Third, the courts below correctly

concluded that the proposed amendment was indeed futile. Petitioner's threadbare allegation that he "dilut[ed] [his] demonstration planning" does not suffice to allege an injury in fact. Pet. 24 (quoting the proposed amended complaint); see *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) ("[A]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]") (quoting *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972)).

2. Petitioner asserts (Pet. 11) that the courts of appeals are divided on the question whether a district court's reasons for denying a pro se litigant's motion for leave to amend "must be set forth in the district court's denial order," even if they are otherwise "apparent in the record." That assertion is incorrect and does not warrant review. No court of appeals has adopted the rule petitioner advocates here.

a. Petitioner recognizes (Pet. 11) that the First, Fourth, Fifth, and Tenth Circuits do not require a district court to explain specifically its reasons for denying leave to amend in the order denying such leave. See, *e.g.*, *United States ex rel. Kelly* v. *Novartis Pharms. Corp.*, 827 F.3d 5, 10 (1st Cir. 2016) ("The court's basis for decision need not be declared if its reasons are apparent from the record."); *In re PEC Solutions, Inc. Sec. Litig.*, 418 F.3d 379, 391 (4th Cir. 2005) ("As long as a district court's reasons for denying leave to amend are apparent, its failure to articulate those reasons does not amount to an abuse of discretion.") (quoting *Edwards* v. *City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999)); *Viernow* v. *Euripides Dev. Corp.*, 157 F.3d 785, 800 (10th Cir. 1998) ("[A]lthough the district court did not give reasons for refusing to grant leave to amend,

the 'grounds for refusal are clear from the record.'") (quoting *Pallottino* v. *City of Rio Rancho*, 31 F.3d 1023, 1027 (10th Cir. 1994)); *Ashe* v. *Corley*, 992 F.2d 540, 542-543 (5th Cir. 1993) ("Where reasons for denying leave to amend are 'ample and obvious,' the district court's failure to articulate specific reasons does not indicate an abuse of discretion.") (quoting *Rhodes* v. *Amarillo Hosp. Dist.*, 654 F.2d 1148, 1154 (5th Cir. 1981)); cf. Pet. App. 2a-4a.

Petitioner asserts (Pet. 13-15) that five other circuits follow a contrary rule, but that is incorrect. The Third, Seventh, and Ninth Circuits have all affirmed a district court's denial of leave to amend on the basis of reasons apparent from the record, even if those reasons were not set forth specifically in the district court's order denying leave. See, *e.g.*, *In re Garabed Melkonian Trust*, 235 Fed. Appx. 404, 406 (9th Cir. 2007) ("A denial without explanation is only an abuse of discretion if the reasons are not 'readily apparent.'") (quoting *Hurn* v. *Retirement Fund Trust of Plumbing, Heating & Piping Indus.*, 648 F.2d 1252, 1254 (9th Cir. 1981)); *Lake* v. *Arnold*, 232 F.3d 360, 373-374 (3d Cir. 2000) ("Not providing a justification for a denial of leave to amend * * * does not automatically constitute an abuse of discretion as long as the court's rationale is readily apparent from the record on appeal."); *Feldman* v. *American Mem'l Life Ins. Co.*, 196 F.3d 783, 793 (7th Cir. 1999) ("[D]enial of a motion to amend pleadings without explanation does not constitute abuse of discretion if the delay and prejudice that would result from such amendment was apparent.").

The remaining two circuits identified by petitioner—the Eleventh and D.C. Circuits—have likewise indicated that a district court's reasons for denying leave to

amend need only be apparent or obvious in the record, not necessarily spelled out in the order denying leave. See *Bland* v. *Johnson*, 637 Fed. Appx. 2, 3 (D.C. Cir. 2016) (per curiam) (reversing denial of leave to amend in the absence of a "sufficiently obvious indication" of the district court's reasoning); *Firestone* v. *Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (per curiam) (reversing denial of leave to amend where "the record in this case reveals none of the legitimate reasons * * * that may justify denial of leave to amend"); *Moore* v. *Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993) (noting that "a justifying reason must be apparent for denial of a motion to amend"); *Nolin* v. *Douglas Cnty.*, 903 F.2d 1546, 1550 (11th Cir. 1990) (observing that "a justifying reason must be apparent" and proceeding to "review the record to determine whether a justifying reason exists"), overruled on other grounds by *McKinney* v. *Pate*, 20 F.3d 1550, 1558-1560 (11th Cir. 1994) (en banc).[2]

Petitioner does not point to any court of appeals that has held that a district court's denial of leave to amend is always an abuse of discretion if the court does not articulate its reasoning in the order denying leave. The other decisions cited by petitioner (Pet. 13-15) did not establish any such per se rule, but merely concluded that, on the particular facts presented, the district court's denial of leave to amend lacked sufficient justification. See *Flynn* v. *Department of Corr.*, 739 Fed.

---

[2] The Sixth Circuit, which the petition does not address, has also looked to the record as a whole to evaluate whether a district court properly exercised its discretion in denying leave to amend. See *Duchon* v. *Cajon Co.*, 791 F.2d 43, 48 (1986) (per curiam) ("Although Duchon's motion [to amend] was summarily denied with no stated explanation, the district court's reason was apparent by virtue of its memorandum and opinion of the previous week.").

Appx. 132, 136 (3d Cir. 2018) (per curiam) (concluding that the district court's failure to explain its reasoning for denying leave to amend was "near-harmless," except as to one proposed amendment); *Phillips* v. *Illinois Dep't of Fin. & Prof'l Regulation*, 718 Fed. Appx. 433, 436 (7th Cir. 2018) (remanding for opportunity to amend complaint where pro se plaintiff's complaint was ambiguous about whether he was suing the defendants in their individual or official capacities); *Higdon* v. *Tusan*, 673 Fed. Appx. 933, 937 (11th Cir. 2016) (per curiam) (stating that "meaningful appellate review" requires "sufficient explanation[]" of the district court's reasoning; concluding that the district court's two-sentence explanation for denying leave to amend the "274-page, 76-claim complaint" was inadequate); *Noll* v. *Carlson*, 809 F.2d 1446, 1449 (9th Cir. 1987) (remanding because it was "not absolutely clear" from the record that amendment would be futile).

Thus, petitioner's contention that the courts of appeals are divided is mistaken. All courts of appeals, consistent with *Foman*, require that a district court's exercise of its discretion to deny leave to amend be supported by sufficient reasons. But no court of appeals requires that a district court's reasons always appear in the particular order denying leave to amend, if the district court's reasoning is apparent from the record.

b. The decisions discussed above and this Court's decision in *Foman* did not turn on any distinction between pro se and counseled litigants, yet petitioner urges (Pet. ii, 2-3, 11-15) this Court to grant review of a question framed specifically around that distinction. Petitioner offers no compelling reason for the Court to address that distinction in the first instance. This Court is one of review, not of first view. See, *e.g.*, *Byrd* v.

United States, 138 S. Ct. 1518, 1527 (2018). Additionally, no sound basis exists to impose such a rigid rule in cases involving pro se litigants. To be sure, courts must construe a pro se litigant's complaint liberally. See, *e.g.*, *Sause* v. *Bauer*, 138 S. Ct. 2561, 2563 (2018) (per curiam). But pro se litigants are not excused from complying with ordinary rules of procedure. See, *e.g.*, *McNeil* v. *United States*, 508 U.S. 106, 113 (1993).[3] If a pro se plaintiff's motion to amend is futile even when liberally construed, a district court should not be required to treat that plaintiff any differently than other litigants when denying the motion.

c. In addition to the absence of any demonstrated division within the courts of appeals, petitioner's proposed rule also makes little sense as a matter of first principles.

First, the Federal Rules of Civil Procedure do not require a district court to state its findings or conclusions when denying a motion for leave to amend. See

---

[3] See also *EEOC* v. *Simbaki, Ltd.*, 767 F.3d 475, 484 (5th Cir. 2014) ("Despite our general willingness to construe pro se filings liberally, we still require pro se parties to fundamentally 'abide by the rules that govern the federal courts.'") (citation omitted); *Mala* v. *Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) ("At the end of the day, [pro se litigants] cannot flout procedural rules—they must abide by the same rules that apply to all other litigants."); *Eagle Eye Fishing Corp.* v. *United States Dep't of Commerce*, 20 F.3d 503, 506 (1st Cir. 1994) ("While courts have historically loosened the reins for pro se parties, * * * the right of self-representation is not a license not to comply with relevant rules of procedural and substantive law.") (citation and internal quotation marks omitted); *Birl* v. *Estelle*, 660 F.2d 592, 593 (5th Cir. 1981) (per curiam) (observing that a pro se litigant "acquiesces in and subjects himself to the established rules of practice and procedure").

p. 7, *supra*. *Foman* also did not impose such a requirement. See 371 U.S. at 182 (indicating that a district court's reasons may be "apparent" rather than "declared"). Petitioner's policy arguments for a different rule for pro se litigants (Pet. 17-20) are better addressed to the rulemaking process. See *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 515 (2002); *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). In general, "questions regarding pleading * * * are most frequently and most effectively resolved either by the rulemaking process or the legislative process." *Crawford-El* v. *Britton*, 523 U.S. 574, 595 (1998).

Second, petitioner's proposed rule would not be outcome-determinative in this or any case, as he suggests (Pet. 4). Settled principles of appellate review, such as harmless error or affirmance on alternative grounds, would permit a court of appeals to affirm the judgment of a district court denying leave to amend even if the district court did not comply with petitioner's proposed rule. And a court of appeals considering whether an error was harmless, or whether to affirm on alternative grounds, may look beyond the district court's specific ruling to the broader record. See, *e.g.*, *Mullin* v. *Balicki*, 875 F.3d 140, 150 (3d Cir. 2017) ("If we find an error in the District Court's reasoning, we exercise our own discretion in determining whether we will nevertheless affirm 'if . . . the District Court's remaining findings would support denial of leave to amend.'") (brackets and citation omitted).

Third, petitioner's proposed rule would not solve the problem he purports to address. Petitioner argues (Pet. 2) that a district court "must identify the reason for denying a pro se litigant leave to amend in the denial

order" itself so that the litigant will be able to "identify how to successfully amend [his] complaint[]." But the district court will have *already* denied the pro se plaintiff leave to amend in those circumstances.

3. In any event, the petition would be an unsuitable vehicle to address the question presented because the district court here *did* provide reasons for denying petitioner's second motion to amend the complaint. As the court of appeals recognized, the district court explained its reasoning for denying leave to amend by referring to its earlier opinion dismissing petitioner's complaint. Pet. App. 4a, 7a; pp. 4-5, *supra*. The district court's 28-page memorandum opinion and order provided petitioner with ample notice of the pleading defects of his complaint, and the court's subsequent orders put petitioner on notice that his proposed amendments failed to cure those pleading defects. Petitioner does not explain why anything more was required even under the rule he proposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
BARBARA L. HERWIG
ANNE MURPHY
Attorneys

MARCH 2019