No.

In the Supreme Court of the United States

PAUL S. MORRISSEY AND KELLY STEPHENSON,
PETITIONERS,

v.

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY, AND PETE BUTTIGIEG, SECRETARY OF TRANSPORATION

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Rules of Civil Procedure authorize district courts to dismiss a plaintiff's case in numerous circumstances for failure to comply with the Rules. When such a dismissal would be *with* prejudice—thereby ending the case forever—a heightened standard applies: The court may not dismiss unless it finds that the plaintiff's failure to comply was willful and that a lesser sanction would be inadequate.

In some cases, dismissal for failure to follow the Rules would nominally be *without* prejudice, but effectively *with* prejudice, because the statute of limitations or another barrier would preclude refiling the suit. The courts of appeals have divided over how to handle those cases. Four circuits apply the same heightened standard to all case-ending dismissals, no matter how they are labeled. Three circuits hold that without-prejudice dismissals are subject to a more lenient standard, even if the dismissal would end a case. In the decision below, a divided D.C. Circuit panel joined the minority view.

The question presented is:

Whether a discretionary dismissal without prejudice, which nevertheless functions as a dismissal *with* prejudice because it would end a case forever, is governed by a higher standard than a typical without-prejudice dismissal.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Morrissey v. *McAleenan*, No. 1:19-cv-01956 (Jan. 22, 2020)

Stephenson v. *Chao*, No. 1:19-cv-02256 (Jan. 10, 2020)

United States Court of Appeals (D.C. Cir.):

Morrissey v. *Mayorkas*, No. 20-5024 (Apr. 12, 2022)

Stephenson v. *Buttigieg*, No. 20-5042 (Apr. 12, 2022)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-64a) is published at 17 F.4th 1150. The court's order denying rehearing en banc (App. 93a-94a) is unreported.

The district court's order dismissing petitioner Morrissey's case (App. 77a-78a) is unreported. The order denying his motion to reinstate his complaint (App. 70a-76a) is published at 333 F.R.D. 1. The order denying his motion for reconsideration (App. 65a-69a) is available at 2020 WL 376512.

The district court's order dismissing petitioner Stephenson's complaint (App. 91a) is unreported. The court's order denying his motion for reconsideration (App. 80a-90a) is available at 2020 WL 122984.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2021. App. 1a. The court of appeals denied a timely petition for rehearing en banc on April 12, 2022. App. 93a-94a. On May 20, the Chief Justice extended the time to file a petition for a writ of certiorari to and including September 9. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 4 is reproduced at App. 95a-104a. Federal Rule of Civil Procedure 41 is reproduced at App. 105a-106a.

STATEMENT OF THE CASE

This case presents a square and acknowledged conflict over a question at the heart of the Federal Rules of Civil Procedure: Whether a district court that dismisses a case *without* prejudice for a Rules violation must apply the same heightened standard that applies to dismissals *with* prejudice when the court knows that the dismissal will end the case forever.

In the proceedings below, a divided D.C. Circuit panel held that so long as a dismissal is labeled "without prejudice," the district court should apply the same low standard applicable to garden-variety dismissals without prejudice—even if the court knows the plaintiff will be barred from refiling the case. The dissent (Judge Millett) would instead have applied, to all case-ending dismissals, the same heightened standard that applies to dismissals with prejudice.

This case satisfies the criteria for this Court's review. The conflict is acknowledged, entrenched, and widespread, with seven circuits having chosen sides. Four have held that the same strict standard applies to *all* case-ending dismissals, even if nominally without prejudice; three have held the opposite—including the court below by a sharply divided vote. Further percolation would be useless: The arguments have been thoroughly developed on each side, and there is no realistic prospect that either faction will yield. This issue was also dispositive in both proceedings below; it was raised and resolved by the D.C. Circuit; and there are no obstacles to resolving it in this Court.

The question presented raises an issue of fundamental importance, and its correct disposition is essential to the proper and uniform operation of the Federal Rules of Civil Procedure nationwide. Because this case presents an optimal vehicle for resolving this significant issue, the petition should be granted.

1.a. District courts have broad authority to issue appropriate orders to "achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.*, 370 U.S. 626, 629-32 (1962); see *Degen* v. *United States*, 517 U.S. 820, 827 (1996). That authority includes the power to order a case dismissed with prejudice or without prejudice for failure "to prosecute or to comply with these rules or a court order." Fed. R. Civ. P. 41(b) (App. 105a-106a).

The "spirit and inclination" of the Rules, however, "favor[s] decisions on the merits." *Schiavone* v. *Fortune*, 477 U.S. 21, 27 (1986). This Court has said the Rules are not intended to function as "a game of skill in which one misstep * * * may be decisive," but instead are intended to "facilitate a proper decision on the merits," *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 514 (2002) (citation omitted). Indeed, it is "entirely contrary to the spirit of the [Rules] * * * for decisions on the merits to be avoided on the basis of * * * mere technicalities." *Foman* v. *Davis*, 371 U.S. 178, 181 (1962).

Because of the severe consequences of dismissals with prejudice, "[c]ourts are understandably cautious about imposing" such dismissals "as a penalty for want of prosecution or for failure to comply with a Federal Rule or court order." 9 Wright & Miller, Federal Practice & Procedure § 2369 (4th ed.). A dismissal with prejudice is a "death knell" that courts employ "only as a last resort." *English-Speaking Union* v. *Johnson*, 353 F.3d 1013, 1021 (D.C. Cir. 2004) (quotation marks and citation omitted); see *Rudder* v. *Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012) ("Dismissal with prejudice is the exception, not the rule, in federal practice."). As a consequence, "[i]n general, the federal courts have allowed a dismissal to be ordered with prejudice only on a showing of a 'clear record of delay or contumacious conduct by the plaintiff; mere negligence will not suffice and a lesser sanction

would not serve the interests of justice.'" 9 Wright & Miller, Federal Practice & Procedure § 2369 & nn.35-38 (4th ed.) (citation omitted).

b. Federal Rule of Civil Procedure 4(m) sets the timeframe for service in a federal case, instructing that a plaintiff should serve the defendant within 90 days of filing the complaint. Fed. R. Civ. P. 4(m) (App. 103a). If the plaintiff fails to do so, the district court, "on motion or on its own after notice to the plaintiff," either "must dismiss the action without prejudice against that defendant or order that service be made within a specified time." *Ibid.* If the plaintiff shows "good cause" for failing to serve the defendant, the court "must extend the time for service for an appropriate period." *Ibid.*

But district courts also have "discretion to enlarge the [service] period even if there is no good cause shown." *Henderson* v. *United States*, 517 U.S. 654, 662 (1996) (quotation marks and citation omitted). Thus, as with any other failure to comply with the Rules, district courts have discretion to decide whether to dismiss a case for failure to comply with Rule 4(m) or instead grant an extension and impose a lesser sanction.

2.a. Petitioners Paul S. Morrissey and Kelly Stephenson are former federal employees who each brought (initially unrelated) lawsuits alleging that they were victims of employment discrimination by their federal agencies. Morrissey served as a Secret Service agent for more than 33 years. See App. 32a-33a. He alleges that he was demoted on the basis of his age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1). See App. 32a-33a. Stephenson worked as an Air Traffic Control Specialist for the Department of Transportation for more than 18 years before being placed on disability retirement. See *id.* at 37a-38a. He alleges that after he re-applied for his former position, he was denied appropriate consideration

in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1), and the Americans with Disabilities Act, 42 U.S.C. § 12112. See App. 37a-38a.

Petitioners each spent years exhausting their claims administratively before receiving final decisions denying relief. At that point, each had 90 days to file a lawsuit in federal court or forfeit the right to sue. *Id.* at 33a, 38a; see *Colbert* v. *Potter*, 471 F.3d 158, 167 (D.C. Cir. 2006).

b. Petitioners both timely filed their lawsuits, but failed to effect service on respondents correctly within 90 days, as required by Rule 4(m). In Morrissey's case, he mailed the summons and complaint to the named agency defendant, but not to the Attorney General or the civil-process clerk at the local U.S. attorney's office. App. 33a-35a; see Fed. R. Civ. P. 4(i) (App. 100a-102a) ("Serving the United States and Its Agencies, Corporations, Officers, or Employees"). The district court dismissed his lawsuit on its own motion four days after the service deadline; the court refused Morrissey's pleas to reinstate it and to grant a short discretionary extension of time to permit him to remedy his service error. App. 35a-36a.

In Stephenson's case, the district court noted that no proof of service had been filed by the 90-day Rule 4(m) deadline, and the court granted a pro forma extension to permit counsel to effect service. *Id.* at 38a. Stephenson's counsel then attempted service but made the same error as Morrissey's counsel: He mailed the summons and complaint to the named agency defendant, but not to the Attorney General or the civil-process clerk. *Id.* at 38a-39a. The district court dismissed Stephenson's lawsuit on its own motion and refused his request to reinstate it and grant a short discretionary extension of time to permit him to remedy the service error. *Id.* at 39a-40a.

The dismissals in both cases were nominally "without prejudice." But due to the 90-day deadline to file suits following administrative exhaustion of a discrimination claim, petitioners were time-barred from refiling their suits. App. 36a, 40a. Thus, the dismissals were "effectively with prejudice." *Id.* at 3a, 30a.

In their motions to reinstate their cases and grant short extensions, petitioners alerted the district courts to the case-ending consequences of the dismissals. *Id.* at 34a-36a, 39a-40a. Petitioners argued that dismissal in these circumstances was manifestly unjust because their failures to effect service correctly were inadvertent, had caused no prejudice to the defendants, and easily could—and would—be remedied by short extensions of time. *Ibid.* Neither court accepted these arguments.

3. A divided panel of the D.C. Circuit affirmed the dismissals over a dissent by Judge Millett. App. 1a-64a.

a. Analyzing petitioners' claims under an abuse-of-discretion standard, the majority found no abuse of discretion. "Morrissey failed to exercise diligence in effectuating service on the United States," the panel asserted, and "he presented no good cause for his failure." *Id.* at 18a. "Reviewing the dismissal of Stephenson's complaint under the same standards," the panel similarly "f[ou]nd no abuse of discretion by the district court." *Ibid.*

The majority noted petitioners' argument that, because the district courts' dismissals effectively ended their suits, the courts should have applied the same heightened standard that the Fifth Circuit requires for such cases. *Id.* at 9a-10a & n.3 (citing *Pond* v. *Braniff Airways, Inc.*, 453 F.2d 347 (5th Cir. 1972)). Under that standard—which district courts in the Fifth Circuit apply to *all* case-ending dismissals—whenever the applicable statute of limitations would bar refiling, a district court's dismissal of claims under Rule 4(m) is

appropriate only where (1) there is "a clear record of delay or contumacious conduct" by the plaintiff; and (2) a "lesser sanction would not better serve the interests of justice." *Millan* v. *USAA Gen. Indem. Co.*, 546 F.3d 321, 326 (5th Cir. 2008) (quotation marks and citations omitted).

The panel rejected the Fifth Circuit's approach. "[E]ven in * * * circumstances" where "the running of the statute of limitations may prevent" refiling, the panel determined, "the district court has substantial discretion to grant or to deny an extension of time to perfect service." App. 24a. The panel concluded that a dismissal's effectively-with-prejudice status makes no difference to the district court's obligations when considering whether to grant a brief extension under Rule 4(m) instead. See *ibid.* Thus, the panel held, the district courts here were "well within [their] discretion in denying the extensions in these cases." *Ibid.*

b. Judge Millett dissented. *Id.* at 25a-64a. Judge Millett explained that the Federal Rules of Civil Procedure require courts, when exercising their discretion, to take into account the case-ending consequences of dismissal for failing to comply with the rules. *Id.* at 41a-43a. Accordingly, the Rules "require district courts that are aware of the prejudicial consequences of dismissal to make the same findings of repeated misconduct or dilatoriness that are required for a dismissal with prejudice for failure to serve under Rule 41(b)." *Id.* at 43a.

Judge Millett also explained that the standard was outcome-determinative in these proceedings. "Had the Fifth Circuit's standard been applied to Morrissey's and Stephenson's cases," she noted, the district courts would not have dismissed the suits:

> [T]he district courts' orders of dismissal would have been considered unequivocal abuses of discretion for

> failure to apply the correct legal standard. Neither district court in this case found a record of delay in the attorneys' first-failed efforts at service. Neither did they find anything remotely approaching contumacious or prejudicial conduct. No one disputes that proper service could have been effectuated in short order. And the dismissal orders show no sign of considering for a minute whether any lesser sanction might suffice. As a result, the only explanation for why Morrissey's and Stephenson's cases abruptly ended while those in the Fifth Circuit have continued is geography.

Id. at 46a.

Judge Millett further explained why the majority's rejection of the Fifth Circuit's heightened standard is inconsistent with the D.C. Circuit's own standard for dismissals with prejudice. Dismissals under Rule 41(b) for failure to prosecute—which presumptively operate *with* prejudice—are "ordinarily limited to cases involving egregious conduct by particularly dilatory plaintiffs, after 'less dire alternatives' have been tried without success." *Id.* at 57a (quoting *Peterson* v. *Archstone Cmtys. LLC*, 637 F.3d 416, 418 (D.C. Cir. 2011)). And that is true even where the failure to prosecute is based on the plaintiff's failure to serve within Rule 4(m)'s time limit. *Ibid.* There is "no principled reason," Judge Millett wrote, "why a district court's dismissal of claims * * * should be subjected to a lower standard of review merely because the district court characterizes the delay as a failure to timely or properly serve the defendant under Rule 4(m), as opposed to a failure to prosecute under Rule 41(b)." *Id.* at 58a (quotation marks and citation omitted).

Judge Millett identified a similar tension between the majority's holding and principles governing service of process on foreign governments. In that scenario, see,

e.g., *Barot* v. *Embassy of Zambia*, 785 F.3d 26 (D.C. Cir. 2015), a litigant avoids dismissal if he has acted in "good faith" and shows there is "a reasonable prospect that service [could] be obtained." App. 59a. That principle "maps directly onto the cases before us," Judge Millett concluded, and "[t]here is no sound reason for our circuit to subject like cases to so different a legal standard." *Ibid.*

c. The D.C. Circuit denied a timely petition for rehearing en banc. App. 91a-92a.

REASONS FOR GRANTING THE PETITION

The decision below deepens an intractable split over a crucial premise of the Federal Rules of Civil Procedure. As it stands, district courts in different circuits are applying starkly differing standards in determining whether to issue case-ending discretionary dismissals for minor breaches of the Rules. The positions on both sides are fully fleshed out; the question is cleanly presented; and this case offers the ideal vehicle for the Court to resolve it. The Court should grant the petition.

I. THE COURTS OF APPEALS ARE DIVIDED ON THE STANDARD FOR DISMISSALS THAT ARE NOMINALLY WITHOUT PREJUDICE BUT EFFECTIVELY WITH PREJUDICE

Four circuits have held that, before issuing a case-ending dismissal arising out of a failure to comply with the Rules—even if the dismissal is formally denominated "without prejudice"—a district court must apply a heightened standard: The court first must find a clear record of delay or contumacious conduct and determine that a lesser sanction would not better serve the interests of justice. Three other circuits—including now a divided D.C. Circuit panel—have held that as long as a dismissal is labeled "without prejudice," a district court only needs to consider the relevant factors, without any

thumb on the scale against dismissal. This split has been acknowledged by the courts of appeals themselves.

A. Four Circuits Apply a Heightened Standard to All Dismissals that Are Effectively with Prejudice

The majority of circuits to address the issue have taken the view that case-ending dismissals for failure to comply with the Rules cannot be issued unless the district court first determines that (1) the plaintiff's failure to comply was willful and (2) a lesser sanction would be inadequate. See 9 Wright & Miller, Federal Practice & Procedure § 2369 & n.34 (4th ed.) (noting cases that "scrutinize when the district court dismisses a case 'without prejudice' but it potentially has the effect of a dismissal with prejudice due to the operation of the applicable statute of limitations"). These courts reason that the Rules embody a principle that *all*-case ending dismissals should be treated the same way, no matter how they are labeled. As Judge Millett explained in her dissent below, if the D.C. Circuit had applied the standard used by the majority, these cases would not have been dismissed. App. 46a.

1. The decision below conflicts with settled law in the Fifth Circuit. In *Millan* v. *USAA Gen. Indem. Co.*, 546 F.3d 321 (5th Cir. 2008), the Fifth Circuit confronted a set of facts nearly identical to this case. The plaintiff had improperly served the defendant insurance company because, unbeknownst to him, Louisiana state law required him to use the Secretary of State as the agent for service of process for foreign insurers. *Id.* at 324. The district court issued an order requiring the plaintiff to show cause for failure to properly serve the defendant. *Ibid.* Plaintiff ultimately properly served the defendant, but did so four days after the Rule 4(m) deadline. *Ibid.* The court dismissed the complaint without prejudice, but the statute of limitations barred him from refiling. *Id.* at

325-26 & n.5. The plaintiff moved for reconsideration under Rule 59(e), which the court denied. *Id.* at 325.

The Fifth Circuit reversed. It reasoned that any "limit[ations]" applicable to "district courts' discretion to dismiss claims with prejudice" apply with equal force to dismissals that have the "*effect* of dismissal with prejudice." *Id.* at 326 (emphasis added). The Fifth Circuit could see no "principled reason" why the same "heightened standard of review" should not apply to the practical "'equivalent' of a Rule 41(b) dismissal." *Ibid.* It thus concluded that "where the applicable statute of limitations likely bars future litigation, a district court's dismissal of claims * * * should be reviewed under the same heightened standard used to review a dismissal with prejudice." *Id.* at 326.

As the D.C. Circuit majority acknowledged, the rule articulated in *Millan* has been the settled law of the Fifth Circuit for almost fifty years. See App. 10a n.3 (citing *Pond* v. *Braniff Airways, Inc.*, 453 F.2d 347, 348-49 (5th Cir. 1972)). It is also the rule that the Fifth Circuit applies to *all* case-ending dismissals. See, *e.g.*, *Thrasher* v. *City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013).

The Fifth Circuit first adopted the rule in *Pond*, which (like this case) involved claims of employment discrimination against a former employer. 435 F.2d at 348. The plaintiff there filed suit within the 30-day deadline after the Equal Employment Opportunity Commission issued a right-to-sue notice. *Id.* at 348-49. But nine months later—and on the eve of trial—her counsel inadvertently failed to comply with the district court's orders to file a pre-trial order, jury instructions, and proposed findings of fact and conclusions of law. *Id.* at 349. The court then dismissed her case *sua sponte* without prejudice for failure to prosecute. *Ibid.* Since her

30-day right-to-sue letter had expired months before, she was effectively barred from refiling her claim. *Ibid.*

On appeal, the Fifth Circuit acknowledged "the inherent power of federal courts to control their dockets," including a district court's power to dismiss without prejudice (as the district court there had done). *Ibid.* But "notwithstanding the recitation by the [district] court to the contrary," the Fifth Circuit emphasized that the dismissal was "fatally prejudicial" to the plaintiff, given that the statute of limitations on her claim had expired. *Ibid.* The Fifth Circuit explained that the "drastic" consequence for the "substantial rights of the litigant" of a dismissal with prejudice required it to be "used only in extreme situations." *Ibid.* For the same reasons, when a district court decides whether to issue a dismissal that is "fatally prejudicial notwithstanding" the "without prejudice" label, the district court must point to "extreme circumstances"—namely, reason to believe that no lesser sanction would serve the interest of justice, and a clear record of delay or contumacious conduct. *Ibid.* Where these factors are lacking, the Fifth Circuit concluded, "such a dismissal [is not] within the sound discretion of the court." *Ibid.*

As Judge Millett noted, the Fifth Circuit "plainly would have reversed the orders of dismissal in [petitioners'] cases." App. 44a.

2. The decision below also squarely conflicts with established law in the Eleventh Circuit. In *Mickles* v. *Country Club, Inc.*, 887 F.3d 1270 (11th Cir. 2018), the district court issued an order that "effectively barred further litigation under the relevant statute of limitations." *Id.* at 1280. In vacating and remanding that order, the Eleventh Circuit agreed with the Fifth Circuit: "Where a dismissal without prejudice has the effect of precluding a plaintiff from refiling his claim due to the running of the statute of limitations, the dismissal is

'tantamount to a dismissal with prejudice, a drastic remedy to be used only in those situations where a lesser sanction would not better serve the interests of justice.'" *Ibid.* (quoting *Burden* v. *Yates*, 644 F.2d 503, 505 (5th Cir. 1981)). Such a dismissal thus "is only proper if the district court finds both (1) a clear record of delay or willful conduct, and (2) a finding that lesser sanctions are inadequate." *Ibid.*

3. The D.C. Circuit's decision also squarely conflicts with established law in the Tenth Circuit. In *Gocolay* v. *New Mexico Federal Sav. & Loan Ass'n*, 968 F.2d 1017 (10th Cir. 1992), a Philippines-based plaintiff with deteriorating health sued to recover allegedly converted certificates of deposit. *Id.* at 1018. The U.S.-based defendant scheduled, but then cancelled, the plaintiff's deposition at least four times. *Id.* at 1018-1019. When the plaintiff traveled to the United States to receive medical treatment, the defendant deposed him for three days, until a cardiologist stopped the deposition due to his severe chest pains. *Id.* at 1019. Months later, despite the fact that the plaintiff had returned to the Philippines, the defendant scheduled a date to complete the deposition; when the plaintiff failed to appear on that date, the defendant noted the plaintiff's non-appearance and moved to dismiss the complaint, arguing that the plaintiff had failed to cooperate in the discovery process. *Ibid.* The district court ordered yet another date for the deposition, but the plaintiff had to miss it due to hospitalization, and the court dismissed his complaint without prejudice for failing to complete the deposition. *Id.* at 1020. On the day he filed a notice of appeal, the plaintiff died. *Ibid.* His wife, as administrator of his estate, served as substitute plaintiff. *Id.* at 1020 n.5.

On appeal, the Tenth Circuit agreed with the plaintiff's wife that, although the dismissal was nominally without prejudice, "because the statute of

limitations had expired on all [of the plaintiff's] claims" "the dismissal was, for all practical purposes, a dismissal with prejudice." *Id.* at 1021. The Tenth Circuit reasoned that all discretionary dismissals made "under circumstances that defeat altogether a litigant's right to redress grievances" should be treated in the same manner under the Federal Rules of Civil Procedure. *Ibid.* The law "favors the resolution of legal claims on the merits," and effectively-with-prejudice dismissals should only be used "as a weapon of last * * * resort," "applicable only" in "extreme circumstances," and "only where a lesser sanction would not serve the interest of justice." *Ibid.* (quotation marks omitted).[1]

4. The D.C. Circuit's decision also squarely conflicts with established law in the Third Circuit. In *Donnelly* v. *Johns-Manville Sales Corp.*, 677 F.2d 339 (3d Cir. 1982), the district court dismissed a case without prejudice for failure to comply with court orders and rules. *Ibid.* The plaintiff, who had initially failed to procure local counsel, ignored an order to show cause; and although counsel sought to enter an appearance on the afternoon of the show-cause order deadline, the court issued the dismissal order the next day. *Ibid.*

On appeal, because the statute of limitations had run by the time of the dismissal, the Third Circuit stated "that in reality the order had the inevitable effect of a dismissal with prejudice, and *we will so treat it*." *Id.* at

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[1] The Tenth Circuit continues to apply this rule. See *Rodriguez* v. *Colorado*, 531 Fed. App'x 921, 921 (10th Cir. 2013) (Gorsuch, J.) (district court's dismissal without prejudice was properly vacated, given that plaintiff's claims would otherwise be time-barred, in order to consider factors applying to dismissal with prejudice); *AdvantEdge Bus. Grp.* v. *Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009) ("This court has recognized that a dismissal without prejudice can have the practical effect of a dismissal with prejudice if the statute of limitations has expired.").

340 (emphasis added). The court accordingly reviewed the dismissal using a heightened standard:

> Dismissal is a drastic sanction and should be reserved for those cases where there is a clear record of delay or contumacious conduct by the plaintiff. Furthermore, it is necessary for the district court to consider whether lesser sanctions would better serve the interests of justice.

Id. at 342.

Applying that standard, the Third Circuit concluded that the complaint should not have been dismissed. Among other things, plaintiff's counsel "while dilatory, did not engage in contumacious conduct"; "there was no allegation of any cognizable prejudice to any of the defendants"; "the motion to reinstate the complaint was filed promptly"; and "there is no indication that the district court considered the imposition of some lesser sanction." *Id.* at 343. The Third Circuit "vacate[d] the order of dismissal and remand[ed]" the case back to the district court "with directions to permit reinstatement of the complaint and to consider whether any sanction, short of dismissal, should be imposed." *Id.* at 344.

The Third Circuit's endorsement in *Donnelly* of a heightened standard for dismissals that are effectively with prejudice has been followed consistently within the circuit. See *Titus* v. *Mercedes Benz of N. Am.*, 695 F.2d 746, 749 (3d Cir. 1982) (*Donnelly* states "the governing principle in this Circuit"). And later Third Circuit cases have further elaborated the factors that a district court must consider in such a situation. See *Poulis* v. *State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984) (considering, *inter alia*, "whether the conduct of the party or the attorney was willful or in bad faith" and "the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions"); see, *e.g.*, *Knoll* v. *City of Allentown*, 707 F.3d 406, 409 (3d Cir.

2013) (similar); *Briscoe* v. *Klaus*, 538 F.3d 252, 262 (3d Cir. 2008) (similar); *Mindek* v. *Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992) (similar). That includes cases in which the dismissal is nominally without prejudice, but would end the case due to a statute of limitations. See, *e.g.*, *Hernandez* v. *Palakovich*, 293 Fed. App'x 890, 894 n.8 (3d Cir. 2008); *Bjorgung* v. *Whitetail Resort*, 197 F. App'x 124, 125 (3d Cir. 2006) (unpublished); *Berry* v. *Halliday*, 50 V.I. 610, 617, 2008 WL 3928918, at *4 (D. V.I. Aug. 15, 2008).

B. Three Circuits, Including Now the D.C. Circuit, Apply a Lower Standard to All Dismissals that Are Nominally without Prejudice

In contrast with the majority rule, a minority of circuits—including now the D.C. Circuit—hold that the decision to issue a dismissal without prejudice is left entirely to the discretion of the district court. That remains so even when the court knows that dismissal would effectively end the case forever. In these circuits, the fact that the dismissal would end the case is merely one of several factors that a court *may* consider in deciding whether to dismiss a case without prejudice.

1. In the decision below, a divided panel of the D.C. Circuit held that, in light of a district court's "broad discretion to manage its docket," the court is *not* required to apply "a heightened standard before dismissing * * * claims" without prejudice, even when the "dismissal[] would in essence be with prejudice." App. 9a. That permissive standard gives the district court a broad "range of choice," and "its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Ibid.* (citation omitted). In fact, according to the panel majority, a district court's decision in a case like this one is entitled to *additional* deference, since the court is "simply exercising its judgment about whether to relieve a party from an unexcused (*i.e.*, no

good cause) failure to comply with the [R]ules." *Ibid* (citation omitted).

The panel majority recognized that the Fifth Circuit applies a contrary rule, but expressly "decline[d]" to adopt it. *Id.* at 9a-10a. The panel majority reasoned that "[n]either the text of the Federal Rules of Civil Procedure nor our precedents suggest a reason to deviate from the ordinary standard" for dismissals without prejudice. *Id.* at 10a.

Judge Millett dissented, endorsing the majority rule. Under that rule, a dismissal that is nominally without prejudice, but effectively with prejudice, is allowed only where (1) there is "a clear record of delay" or "contumacious conduct" by the plaintiff; and (2) a "lesser sanction would not better serve the interests of justice." *Id.* at 44a. She rejected "the majority opinion's view that no weightier showing is required for a case-ending dismissal with *de facto* prejudice—one of the harshest sanctions in the district court's arsenal—than for a dismissal without any prejudice at all." *Id.* at 42a.

Judge Millett further noted that the panel majority's holding conflicted with rulings from other circuits on the long side of the split: That case-ending dismissals must be subjected to a heightened standard. See *id.* at 46a-55a (citing and discussing cases, including *Mickles* and *Gocolay*). "Unlike the majority opinion," she explained, "these circuits hew to the Federal Rules' strong preference for not shutting parties out of court for an initial technical mistake or negligent misstep by their attorneys, and they harmonize their treatment of dismissals with effective prejudice" with other case-ending dismissals. *Id.* at 52a. And she noted that "[b]oth district courts' approaches [in this case] would have been rejected as abuses of discretion under the governing law in those other circuits." *Id.* at 53a. She thus concluded that the panel majority's decision put the D.C. Circuit

"squarely at odds with the law of at least four other circuits." *Id.* at 64a.

2. The Seventh Circuit, like the D.C. Circuit, has also openly rejected the majority approach. In *Jones* v. *Ramos*, 12 F.4th 745 (7th Cir. 2021), the plaintiff sued the defendants in New Jersey district court for injuries sustained in a car accident. *Id.* at 748. After the plaintiff failed to serve the defendants within 90 days, as required, the court issued a warning that the case would be dismissed unless proof of service was filed within one month. *Ibid.* One month later, the plaintiff filed a motion to change venue to the Northern District of Indiana, but he did not effect service. *Ibid.* The court granted the motion to change venue and the case was transferred to district court in Indiana. *Ibid.* The plaintiff did not serve the defendants until more than three months after the transfer, after he found new counsel, and the defendants moved to dismiss for failure to timely serve under Rule 4(m). *Ibid.*

The plaintiff asked the district court to deny the motion and grant an extension, arguing that all of the defendants were aware of the lawsuit; none had been prejudiced; and the plaintiff had been diligent in attempting to find new counsel who, once found, effected service quickly. *Ibid.* The plaintiff explained that dismissal of his suit—even dismissal without prejudice—would "essentially end the case," because the statute of limitations had passed. *Ibid.* The court, though it was "[a]ware that dismissal without prejudice would effectively end the suit," declined to grant an extension and dismissed the case. *Id.* at 748-49.

On appeal, the plaintiff asked the Seventh Circuit to adopt the "rule that the Fifth Circuit employs when dismissal effectively ends the litigation because of the running of the limitations period." *Id.* at 750. He argued that dismissal was "warranted only where a clear record

of delay or contumacious conduct by the plaintiff exists and a lesser sanction would not better serve the interests of justice." *Ibid.*

The Seventh Circuit disagreed, holding that "our circuit requires only that the district court consider whether dismissal without prejudice will effectively end the litigation as one factor to be weighed with others." *Ibid.* In reaching that conclusion, the Seventh Circuit acknowledged the majority position that district courts must meet a heightened standard where dismissal "likely bars future litigation," because such a dismissal is a "severe sanction that deprives a litigant of the opportunity to pursue his claim." *Ibid.*; see *ibid.* (acknowledging that a service "slip-up can be fatal"). Nonetheless, the Seventh Circuit rejected the plaintiff's request to adopt that heightened standard: "We have required no heightened standard," the court stated, and "[w]e see no reason to revisit the existing standards in our circuit." *Id.* at 750-51.

3. The Sixth Circuit has also rejected the majority rule. In *United States ex rel. Sy* v. *Oakland Physicians Medical Center, LLC*, No. 22-1011, 2022 WL 3335658 (6th Cir. Aug. 12, 2022), the plaintiffs brought a qui tam action against their former employer and its CEO. *Id.* at *1. After a two-and-a-half year delay, during which the United States considered whether to intervene in the case, the district court unsealed the complaint and ordered the plaintiffs to serve the defendants, triggering Rule 4(m)'s 90-day service of process deadline. *Ibid.* But the plaintiffs did not serve the defendants until approximately 50 days after the time to effect service had expired. *Ibid.* The court granted the defendants' motion to dismiss the complaint, holding that the plaintiffs had failed to establish good cause for their delay, and it declined to grant a discretionary extension of time to effect service. *Ibid.*

On appeal, the Sixth Circuit explained that "[t]his court has not yet announced a test that district courts should employ when assessing whether to exercise their discretion to enlarge the service-of-process period." *Id.* at *3. Surveying the approaches of other circuits—including the decision below—the Sixth Circuit panel adopted a seven-part balancing test, under which the running of the statute of limitations is just one "factor" district courts "should consider * * * when deciding whether to grant a discretionary extension of time in the absence of a finding of good cause." *Ibid.* Reviewing the district court's application of those factors, the Sixth Circuit held that the district court did not make "a clear error of judgment in its overall balancing of the factors." *Id.* at *4. The Sixth Circuit accordingly upheld the dismissal of the plaintiffs' complaint.

The Sixth Circuit also rejected the plaintiffs' contention that "because their claims will be time-barred by the applicable statute of limitations," the district court should have applied the heightened standard applicable to dismissals with prejudice. *Id.* at *4 (citing *Thrasher* v. *City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013)). The Sixth Circuit instead "agree[d]" with "[p]ersuasive authority from other circuits"—citing the D.C. Circuit's decision in this case—that "the running of the statute of limitations does not *require* a court to grant a discretionary extension." *Ibid.* The Sixth Circuit thus adopted the position that "whether the applicable statute of limitations has run is only one of several factors that a court must consider in deciding whether to grant a discretionary extension of time." *Ibid.*

4. In addition to the conflict between the courts of appeals, district courts outside these jurisdictions have likewise split over which approach to follow. Compare, *e.g.*, *Broome* v. *Iron Tiger Logistics, Inc.*, No. 7:17-cv-444, 2018 WL 3978998, at *3-4 (W.D. Va. Aug. 20, 2018)

(applying majority rule); *Harris* v. *S. Charlotte Pre-Owned Auto Warehouse, LLC*, No. 3:14-cv-307, 2015 WL 1893839, at *5 (W.D.N.C. Apr. 27, 2015) (same); *Jean-Louis* v. *J.P. Morgan Chase Bank, N.A.*, No. 14-cv-199, 2014 WL 12709944, at *2 (C.D. Cal. Oct. 14, 2014) (same); *Noise* v. *Ass'n of Flight Attendants-CWA*, No. 10-cv-62, 2010 WL 3767300, at *4 (D. Haw. Sept. 20, 2010) (same); *De Malherbe* v. *Int'l Union of Elevator Constructors*, 438 F. Supp. 1121, 1127 (N.D. Cal. 1977) (same), with *Bray* v. *Idaho Dep't of Juv. Corr.*, No. 4:21-cv-458, 2022 WL 3227638, at *5-6 (D. Idaho Aug. 9, 2022) (considering the statute of limitations as only one factor in a balancing test); *Ndemenoh* v. *Boudreau*, No. 20-cv-4492, 2022 WL 2870859, at *2 (S.D.N.Y. July 21, 2022) (same); *Williams* v. *Vaccaro*, No. 1:19-cv-3548, 2022 WL 2179726, at *5 (S.D.N.Y. June 1, 2022), *report and recommendation adopted*, 2022 WL 2181647 (June 16, 2022) (same).

II. This Case Is an Ideal Vehicle for Reviewing This Important Question

1. The question presented is of exceptional legal and practical importance. The conflict has reached seven circuits—including, in the decision below, a divided panel of the D.C. Circuit. The standard for determining the consequence of minor breaches of the Federal Rules of Civil Procedure should be uniform; that is *doubly so* when application of that standard has case-ending consequences. Litigants need to know whether a minor misstep, as occurred in this case, can result in a case-ending dismissal. There is no basis for leaving an issue with such broad sweep and overarching significance to the happenstance of where a suit is brought.

The sheer number of cases where this issue recurs confirms its importance. Dismissals for failure to meet the 90-day service deadline under Rule 4(m), for instance, occur almost daily in the federal courts. Even if only a fraction of those cases implicate a statute-of-

limitations bar, the issue occurs frequently: In 2021, district courts just in the Fifth Circuit applied that Circuit's heightened standard for effectively-with-prejudice dismissals more than a dozen times in Rule 4(m) cases.[2]

This issue also has special significance, and recurs repeatedly, in the application of Rule 4(m) in civil rights cases involving right-to-sue letters. The plaintiff in such cases has only 90 days to file suit following receipt of the letter. See *Colbert* v. *Potter*, 471 F.3d 158, 167 (D.C. Cir. 2006). Thus, failure to effect service within Rule 4(m)'s 90-day deadline *always* deals a fatal blow to the

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[2] *Flores* v. *City of San Benito, Texas*, No. 1:20-cv-169, 2021 WL 4928393 (S.D. Tex. Oct. 20, 2021); *Kilcrease* v. *City of Tupelo*, No. 1:20-cv-131, 2021 WL 3742391 (N.D. Miss. Aug. 24, 2021); *Randolph* v. *Amos*, No. 2:17-cv-355, 2021 WL 3602042 (W.D. La. Aug. 12, 2021); *Pearl HPW Ltd.* v. *Tadlock*, No. 2:20-cv-1429, 2021 WL 3057046 (W.D. La. July 20, 2021); *Jones* v. *McClean*, No. 3:20-cv-142, 2021 WL 2905421 (S.D. Tex. June 24, 2021), *report and recommendation adopted*, 2021 WL 2899874 (July 9, 2021); *Stacey* v. *Daily*, No. 6:20-cv-610, 2021 WL 3118422 (E.D. Tex. June 23, 2021), *report and recommendation adopted*, 2021 WL 3115185 (July 22, 2021); *Towns* v. *Mississippi Dep't of Corr.*, No. 4:19-cv-70, 2021 WL 2933114 (N.D. Miss. May 24, 2021), *report and recommendation adopted*, 2021 WL 2933172 (July 12, 2021); *Pace* v. *Madison Cty., Mississippi*, No. 3:20-cv-487, 2021 WL 1535887 (S.D. Miss. Apr. 19, 2021); *Culley* v. *McWilliams*, No. 3:20-cv-739, 2021 WL 1799431 (N.D. Tex. Apr. 14, 2021), *report and recommendation adopted*, 2021 WL 1789161 (May 4, 2021); *Coleman* v. *Carrington Mortg. Servs., LLC*, No. 4:19-cv-234, 2021 WL 1725523 (E.D. Tex. Apr. 12, 2021), *report and recommendation adopted*, 2021 WL 1721706 (Apr. 30, 2021); *Aples* v. *Adm'rs of Tulane Educ. Tr.*, No. 20-cv-2451, 2021 WL 1123560 (E.D. La. Mar. 24, 2021); *Zellmar* v. *Ricks*, No. 6:17-cv-386, 2021 WL 805154 (E.D. Tex. Feb. 2, 2021), *report and recommendation adopted*, 2021 WL 796133 (Mar. 2, 2021); *Kidd* v. *Monroe Transit Sys.*, No. 3:19-cv-1596, 2021 WL 537100 (W.D. La. Jan. 28, 2021), *report and recommendation adopted*, 2021 WL 536136 (Feb. 12, 2021).

litigation—even to otherwise-diligent plaintiffs who have spent years administratively exhausting their claims. Indeed, that happened to both Morrisey and Stephenson here. Given the tens of thousands of plaintiffs who fall into this category, see U.S. Equal Employment Opportunity Commission, *Data Visualizations: All Charge Data* (2022), https://bit.ly/3KMWfKx (EEOC issues over 45,000 right-to-sue letters each year), this issue is undeniably important.

2. This case is an ideal vehicle for deciding this significant question.

The dispute turns on a pure question of law: The proper standard for reviewing a discretionary dismissal where the district court was aware of the case-ending ramifications of its decision. Two cases bearing materially similar fact patterns and raising the same question arose at the same time, and the D.C. Circuit saw fit to resolve the question in a consolidated case below.

This issue is also dispositive in these cases. There is no alternative route to reinstating petitioners' cases. The D.C. Circuit rejected the majority standard, and its decision is outcome-determinative: These petitioners' cases would not have been dismissed under the majority rule. See App. 46a. Had a heightened standard been applied, the district courts' orders of dismissal would have constituted clear abuses of discretion. Neither court found a record of delay in petitioners' failed efforts at service. Neither court found any contumacious or prejudicial conduct. No one disputes that proper service could have been effectuated in short order. And the dismissal orders did not consider whether a lesser sanction might suffice. Had these cases arisen in a majority circuit, they would have been heard on their merits. See *ibid.*

The decision below also thoroughly ventilates the question presented. Both the panel majority and dissenting opinions explored every aspect of the debate. The majority expressed the view that a district court's broad discretion to manage its docket—including determining when and under what circumstances to issue a dismissal without prejudice—is not limited by the potential downstream consequences of its decision. *Id.* at 9a-10a. In contrast, the dissent explained that the background assumption of the Rules is that judges must account for the actual severity of the sanctions they impose; they accordingly must impose punishments that are proportional to the infraction, and must apply a strong presumption in favor of permitting cases to be heard on their merits notwithstanding minor breaches of the Rules. *Id.* at 25a-64a.

Further percolation will not aid the Court's consideration of these important questions regarding the correct application of the Federal Rules of Civil Procedure. This case cleanly presents the issue and provides an ideal vehicle for resolving the circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES