No. 22-235

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 TRANSPORTATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* PROFESSORS OF CIVIL PROCEDURE IN SUPPORT OF PETITIONERS

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October 13, 2022

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS AND STATEMENT OF INTEREST[1]

Seven professors of civil procedure ("proposed *amici*") respectfully move under Supreme Court Rule 37.2(b) for leave to file a brief as *amici curiae* in support of Petitioners Paul S. Morrissey and Kelly Stephenson.

All parties were timely notified of proposed *amici*'s intent to file this *amicus* brief. Petitioners have consented to the filing of the brief. Respondents did not respond to proposed *amici*'s email communication notifying them of proposed *amici*'s intent to file this brief and seeking their consent. Proposed *amici* therefore file this motion requesting leave to file the *amicus* brief.

Amici curiae are professors of civil procedure. Together, *amici* have taught courses in procedure for decades, authored multiple books and scores of articles on civil procedure issues, and have addressed numerous groups of judges, lawyers, and academics about issues of procedural fairness. *Amici* are committed to the principles of fairness and efficiency set out in the procedures governing the federal courts. *Amici* believe

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici's* counsel made a monetary contribution to the preparation or submission of this brief. *Amici*'s affiliations are listed for identification purposes. *Amici*'s views are solely their own and do not represent the views of any public or private institution.

that the decision below, which interprets and applies Federal Rules of Civil Procedure 4(i) and 4(m), represents a troubling departure from an overarching goal of the Rules: that cases be decided on their merits, rather than on technicalities.

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*

STATEMENT OF INTEREST[1]

Amici curiae are professors of civil procedure. Together, *amici* have taught courses in procedure for decades, authored multiple books and scores of articles on civil procedure issues, and have addressed numerous groups of judges, lawyers, and academics about issues of procedural fairness. *Amici* are committed to the principles of fairness and efficiency set out in the procedures governing the federal courts. *Amici* believe that the decision below, which interprets and applies Federal Rules of Civil Procedure 4(i) and 4(m), represents a troubling departure from an overarching goal of the Rules: that cases be decided on their merits, rather than on technicalities.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici's counsel made a monetary contribution to the preparation or submission of this brief. Amici's affiliations are listed for identification purposes. Amici's views are solely their own and do not represent the views of any public or private institution. All parties were timely noticed of proposed amici's intent to file this amicus brief. Petitioners have consented to the filing of the brief. Respondents did not respond to proposed amici's email communication notifying them of proposed amici's intent to file this brief and seeking their consent.

SUMMARY OF ARGUMENT

Procedural fairness is a balancing act. Federal Rule of Civil Procedure 1 instructs that all the Rules should be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Balancing these competing goals of our judicial system is no simple task, but it is crucially important to remember that the Rules demand a "just" determination, and not just one that appears fast and cheap. When the court has an option that would both be fair to the parties and speedily move the case toward a resolution on the merits, dismissing the case instead is an abuse of discretion and contrary to the purpose of the Federal Rules.

Rule 4(i) is a particularly complex Rule that governs service of process on the United States. For that reason, it contains mandatory grounds for an extension. In addition, the provision must be read in conjunction with its neighboring subdivision Rule 4(m), which provides additional opportunities to cure service defects. Rule 4 permits extensions where the equities warrant it, with special aim to avoid the loss of claims as the consequence of a procedural default. The Advisory Committee's Notes to the Federal Rules explicitly identify the loss of claims due to a statute of limitations bar as a ground for an extension. Numerous courts around the country have granted extensions for failure to complete service under Rule 4(i), even where a claim could be refiled, and even more so where a claim would be time-barred. Those unusual cases that warrant dismissal—unlike this case—often are the

result of years-long delay and dilatory actions by the parties.

The court of appeals' decision to allow dismissal without granting a reasonable extension to cure a defect in service violates the text and objectives of the Federal Rules. Petitioner Paul Morrissey diligently pursued his claim against the Secret Service for four years, and was finally awarded a right to sue letter in 2019. Mr. Morrissey timely filed this action in the district court, and timely served the defendant, Kevin McAleenan, Acting United States Secretary of Homeland Security. Mr. Morrissey failed to serve the United States itself under Rule 4(i)(2). The district court, on its own motion, dismissed his case under Rule 4(m), without effective notice of the basis of dismissal and only four days after the deadline for service had passed. It dismissed the case despite no evidence of bad faith and despite a complete lack of prejudice to the defendant, who was timely served.

Petitioner Kelly Stephenson's claim against the Department of Transportation met a similar fate. He received a right to sue letter in 2019, following a years-long process of pursuing his claim in the EEOC. He timely filed a complaint in the district court and successfully served the defendant, United States Secretary of Transportation Elaine Chao. But Mr. Stephenson failed to serve the United States itself under Rule 4(i)(2). The district court dismissed his case sua sponte without finding bad faith on Mr. Stephenson's part or any prejudice to the defendant.

In both cases, the district court's decision was an abuse of discretion, and the court of appeals' affirmance of those dismissals should be reversed.

ARGUMENT

I. THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE INTERPRETED TO PROMOTE FAIRNESS.

Federal Rule of Civil Procedure 1 sets forth an overarching principle that guides the application of the Rules: that they should be interpreted "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. "There probably is no provision in the federal rules that is more important than this mandate." 4 Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 1029, Westlaw (4th ed., database updated Apr. 2022) ("Wright & Miller") (citing *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) (other citations omitted)).[2] If the Rules work as they are designed to, "they not only permit, but should *as nearly as possible guarantee* that bona fide complaints be carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp*., 383 U.S. 363, 373 (1966) (emphasis added). In other words, "[p]rocedure is the means; full, equal and exact enforcement of substantive law is the end." Roscoe

[2] *Amicus* Adam Steinman is a co-author of volumes 4 & 4B in the Wright & Miller *Federal Practice & Procedure*.

Pound, *The Etiquette of Justice*, 3 Proceedings Neb. St. Bar Ass'n 231 (1909).

History informs this approach. "The Federal Rules of Civil Procedure are the product of the progress of centuries from the medieval court-room contest . . . to modern litigation." *Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48, 62 (1952) (Frankfurter, J., dissenting). The "virtue of simplicity" in procedural Rules "was learned not only from common law procedure, but also from the misfortunes of the English Hilary Rules of 1834 and the New York Throop Code of 1876, both of which were intimately known to the generation of American lawyers who produced the Rules Enabling Act." Paul D. Carrington, "*Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281, 304–05 (1989) (footnotes omitted); *see* Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 Harv. J.L. & Pub. Pol'y 1107, 1114–16 (2010) (discussing the pitfalls of the Hilary Rules). "Procedural complexity, they knew, would be the master, not the servant, of substance." *Id.*

Because of Rule 1's mandate, this Court and every federal circuit court favors the resolution of cases on the merits rather than on technicalities. *See*, *e.g.*, *Foman v. Davis*, 371 U.S. 178, 181–82 (1962); *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 20 (1st Cir. 2004); *Sec. Ins. Co. of New Haven, Conn. v. U.S. for Use of Haydis*, 338 F.2d 444, 447 (9th Cir. 1964); *Cooper v. Am. Emp. Ins. Co.*, 296 F.2d 303, 306 (6th Cir. 1961); *Leedom v. Int'l Bhd. of Elec. Workers, Local Union No.*

108, 278 F.2d 237, 245 (D.C. Cir. 1960); *Nagler v. Admiral Corp.*, 248 F.2d 319, 322 (2d Cir. 1957); *Copeland Motor Co. v. Gen. Motors Corp.*, 199 F.2d 566, 567–68 (5th Cir. 1952); *Am. Fid. & Cas. Co. v. All Am. Bus Lines*, 190 F.2d 234, 236 (10th Cir. 1951); *cf. Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("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."), *abrogated in part by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

This extends to Rule 4. "The general attitude of the federal courts is that the provisions of Federal Rule 4 should be liberally construed in the interest of doing substantial justice . . . ." 4A Wright & Miller, § 1083. Because the Rule's primary purpose is actual notice to the defendant, courts are especially willing to forgive technical violations of Rule 4 in situations where the defendant nevertheless receives notice of the lawsuit. *See*, *e.g.*, *United Food & Com. Workers Union, Locs. 197, 373, 428, 588, 775, 839, 870, 1119, 1179 & 1532 v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984); *Karlsson v. Rabinowitz*, 318 F.2d 666, 668 (4th Cir. 1963); *Sidney v. Wilson*, 228 F.R.D. 517, 524 (S.D.N.Y. 2005); *Richardson v. Downing*, 209 F.R.D. 283, 284 (D. Mass. 2002); *Frasca v. Eubank*, 24 F.R.D. 268, 270 (E.D. Pa. 1959).

II. DUE TO THEIR COMPLEXITY, RULES 4(i) AND 4(m) HAVE BEEN, AND SHOULD BE, INTERPRETED TO AVOID LOSS OF CLAIMS.

A. Extensions Under Rule 4(i) Are Intended to "Reduce the Hazard" of Commencing an Action Against Officers of the United States.

The process for serving officers of the United States is complex. In addition to serving the official in question, Rule 4(i) requires a party to serve the United States by delivering the summons and complaint *both* to the U.S. Attorney for the district in which the action is brought *and* to the Attorney General in Washington, D.C. This is required for both official capacity actions under Rule 4(i)(2) and suits against officers in their individual capacities under Rule 4(i)(3). However, service on the United States is only required under Rule 4(i)(3) if the officer is sued individually "for an act or omission occurring in connection with duties performed on the United States' behalf." Fed. R. Civ. P. 4(i)(3).

Because of this complexity, the Rule explicitly requires an opportunity to cure service defects in two circumstances in which partial service has been accomplished: first, if the plaintiff fails to serve *both* the U.S. Attorney and the Attorney General in an individual capacity action; and second if, when suing officers in their official capacity under Rule 4(i)(2), the plaintiff served either the U.S. Attorney *or* the Attorney General but failed to serve both. *See* Fed. R. Civ. P. 4(i)(4). These mandatory extensions reflect the Advisory

Committee's determination that commencing an action against the United States and its officers is "hazardous" and the Rules are designed, as a whole, to save "the plaintiff from the hazard of losing a substantive right because of a failure to comply with the complex requirements of multiple service under this subdivision." Fed. R. Civ. P. 4(i), advisory committee's note, 1993 amendments. In addition to the explicit extensions of time granted to cure failures to comply with the complexities of Rule 4(i), a court "must extend the time for service for an appropriate period" when the "plaintiff shows good cause for the failure," and may, even in the absence of good cause, "order that service be made within a specified time." Fed. R. Civ. P. 4(m).

Petitioners' request for an opportunity to effect service on additional officials relies on not only Rule 4(i), but also the discretion vested in the court under Rule 4(m). As the Advisory Committee's notes to the 1993 amendments to Rule 4 make clear, the amendments were intended to ensure that a "party failing to effect service on all the offices of the United States as required by the rule is assured adequate time to cure defects in service." Fed. R. Civ. P. 4, advisory committee's note, 1993 amendments. Further, the notes underscore that the requirement being fulfilled is actual notice: Rule 4 "should be read in connection with the provisions of subdivision (c) of Rule 15 to preclude the loss of substantive rights against the United States or its agencies, corporations, or officers resulting from a plaintiff's failure to correctly identify and serve all the

persons who should be named or served."[3] *Id.*; *see Canister Co. v. Leahy*, 182 F.2d 510, 514 (3d Cir. 1950) (stating that the Federal Rules "must be considered in relation to one another"). Service on the individual defendant provided that notice here.

Like all of the Rules, Rules 4(i) and 4(m) should be "applied as rational instruments for doing justice," *Johnson*, 344 U.S. at 55–56 (Frankfurter, J., dissenting), and construed to promote fair and efficient resolution of cases. *See Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016) (stating that Fed. R. Civ. P. 6(b)(1), which permits extensions of time for good cause, "should be liberally construed to advance the goal of trying each case on the merits"). Indeed, the 1993 amendment to Rule 4(m) gives district courts the discretion to grant an extension rather than dismissal "even if there is no good cause shown." 4B Wright & Miller, § 1137 (quoting Fed. R. Civ. P. 4(m), advisory committee's note, 1993 amendments); *see also Henderson v. United States*, 517 U.S. 654, 662–63 (1996) (citing advisory committee's note, 1993 amendments).

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[3] Rule 15(c) provides that, for the purpose of adding the United States or a United States officer to an amended pleading after the statute of limitations has run, notice requirements are satisfied if the plaintiff serves the U.S. Attorney, the Attorney General, *or* the officer or agency. Fed. R. Civ. P. 15(c)(2).

B. Whether the Statute of Limitations Would Bar Refiling the Action Is a Key Consideration Under Rule 4(m).

As Judge Millet explained in her dissenting opinion below, the Federal Rules' preference for resolving cases on the merits is "particularly strong" where dismissing the claims would "conclusively end the litigation." *Morrissey v. Mayorkas*, 17 F.4th 1150, 1165 (D.C. Cir. 2021) (Millett, J., dissenting) (citation omitted). Consistent with this principle, the Advisory Committee's note on Rule 4(m) specifically states that an extension may be justified where "the applicable statute of limitations would bar the refiled action." Fed. R. Civ. P. 4(m), advisory committee's note, 1993 amendments. Some courts consider the expiration of the statute of limitations as a component of good cause, while others consider it a "salient factor" when considering a discretionary extension. *Compare Wright v. Potter*, 350 F. App'x 898 (5th Cir. 2009) ("Even without a showing of good cause, we have held that a plaintiff should be allowed additional time to perfect service under Rule 4(m) where the claims would be otherwise time-barred and there is no clear record of delay or evidence of contumacious conduct."), *with Rhodan v. Schofield*, No. 1:04-CV-2158-TWT, 2007 WL 1810147, at *5 (N.D. Ga. June 19, 2007) ("harsh result" of expiration of statute of limitations "is good cause" to enlarge the time period for service).

Under either formulation, whether the applicable statute of limitations would bar the refiling of the action is a key consideration under Rule 4(m). *See Kurka*

v. Iowa Cty., 628 F.3d 953, 959 (8th Cir. 2010) (district court must consider the effect of the statute of limitations bar on the party requesting the extension); *Cano v. Brennan*, No. 19-CV-239-CAB-BGS, 2019 WL 3718670, at *2 (S.D. Cal. Aug. 7, 2019) (running of a statute of limitations is a strong factor among many); *Varghese v. Shinseki*, No. 2:10-cv-03258, 2011 WL 3035418, at *2 (D.N.J. July 25, 2011) (expiration of statute of limitations is a "salient" factor when dismissal without prejudice would bar refiling).

C. Numerous Courts Have Granted Extensions in Cases Similar to Mr. Morrissey's and Mr. Stephenson's.

Courts around the country have granted discretionary extensions in cases where the plaintiff failed to serve both the U.S. Attorney and the Attorney General, even when there was no indication that the statute of limitations would bar a refiled claim. This is to be expected, because of the overwhelming preference that the Rules be construed to favor an extension for failure to effectuate service under Rule 4(i) unless there is prejudice to the defendant. *See*, *e.g.*, *Mlinarchik v. Brennan*, No. CV 3:16-257, 2018 WL 351945, at *2–6 (W.D. Pa. Jan. 9, 2018) (further extension granted after 280-day failure to effectuate service on either the U.S. Attorney or Attorney General); *Wright v. Colvin*, No. 8:12-cv-00425-WKU, 2014 WL 325647, at *2–3 (D. Neb. Jan. 29, 2014) (extension granted even though plaintiff failed to serve either the U.S. Attorney or the Attorney General for over a year); *Ulmer v. U.S. Postal Serv.*, No.

4:09-cv-00704, 2009 U.S. Dist. LEXIS 104010, at *1–3 (S.D. Tex. Nov. 4, 2009) (granting an additional 16-day extension after six-month delay in service); *Shore v. Henderson*, 168 F. Supp. 2d 428, 431–32 (E.D. Pa. 2001) (granting 20-day extension).

Where the statute of limitations would prevent the plaintiff from refiling, courts are especially willing to grant extensions, even absent good cause, and after already significant delays. *See Cano*, 2019 WL 3718670, at *3 (granting an extension when claim would be time-barred, even after the plaintiff failed to comply with an order to show cause); *Toland v. Potter*, No. 05-2409-JWL, 2006 WL 1300998, at *1 (D. Kan. May 9, 2006) (denying a motion to dismiss based on ineffective service where the plaintiff did not attempt to serve the United States Attorney or the Attorney General); *Myers v. Sec'y of the Dep't of the Treasury*, 173 F.R.D. 44, 49 (E.D.N.Y. 1997) (granting 30-day extension); *cf. Mehus v. Emporia State Univ.*, 295 F. Supp. 2d 1258, 1272–74 (D. Kan. 2004) (plaintiff given leave to serve the State of Kansas outside the 90-day window for service under Rule 4(j)(2) because the employee had timely attempted service on the wrong party and had corrected the error once it was pointed out, the state was not prejudiced by delay in proper service, and dismissal might render her claims time-barred).

The District Court for the District of Columbia recently did so. After the decision below here issued, the court denied a motion to dismiss based on the untimely service of the United States under Rule 4(i) in an employment discrimination suit against the Acting

Secretary of Homeland Security. *Murphy v. Wolf*, No. 19-CV-1954 (TSC), 2022 WL 4379037, at *1 (D.D.C. Sept. 22, 2022). There, the plaintiff timely served the defendant but completed service on the United States 57 days after the deadline. *Id.* Noting that the statute of limitations would bar the plaintiff from refiling her lawsuit—and relying on Judge Millet's dissent in the decision below here—the court refused to impose the "death knell" of a de facto dismissal with prejudice on the plaintiff "for what amounts to her lawyer's first-time, procedural error that did not prejudice this court or Defendant." *Id.* at *2 (citation omitted); *see also Lemus on behalf of O.C.L. v. D.C. Int'l Charter Sch.*, No. 20-CV-3839 (RCL), 2022 WL 407151, at *10 (D.D.C. Feb. 10, 2022).

Two other employment discrimination cases are particularly instructive. In *Mlinarchik v. Brennan*, the plaintiff failed even to serve the agency official within the 90-day deadline, and had neglected to attempt service on the U.S. Attorney and the Attorney General. 2018 WL 351945, at *2–4. Similarly to Mr. Morrissey's counsel, plaintiff's counsel had misunderstood what Rule 4(i) required. *Id*. at *2. Despite the delay, and because there was no indication of prejudice to the defendant, the court would not "harshly penalize Plaintiff with a wholesale dismissal of her case due to her counsel's misinterpretation of the nuanced and somewhat technical service requirements of Rule 4(i)(1) and Rule 4(i)(2)." *Id*. at *5 n.8. This was an appropriate outcome even though the plaintiff in *Mlinarchik* had not served *any* party—the U.S. Attorney, Attorney General,

or the official—within the 90-day time limit. In contrast, Mr. Morrissey timely served the individual defendant (and Mr. Stephenson did so within the time limit extended by the district court), providing the kind of actual notice that wards off concerns about prejudice to the defendant. *Cf.* Fed. R. Civ. P. 4, advisory committee's notes, 1993 amendments (citing Fed. R. Civ. P. 15(c)(2)).

In *Myers v. Secretary of the Department of the Treasury*, the plaintiff had pursued an employment discrimination claim against the Secretary of the Treasury through a final administrative decision so the plaintiff could sue in federal court. 173 F.R.D. at 45. However, the plaintiff failed to properly serve the Secretary of the Treasury, the United States Attorney, *or* the Attorney General—he instead served the office of the IRS counsel who had defended the administrative action. *Id*. Noting that "his attorney's failure to read the Federal Rules of Civil Procedure carefully" did not constitute good cause, the court did not grant a mandatory extension. *Id.* at 46–47. Nevertheless, the court extended the time for service because Rule 4(m) "authorizes the court to relieve a plaintiff of the consequences of the application of this subsection even if there is no good cause shown," the equities "tip heavily in favor of [the] plaintiff," and the "plaintiff would be barred from refiling this action because the statute of limitations has expired." *Id*. at 47 (cleaned up). The court also noted that the plaintiff had "satisfied the core function of service"—to put the agency on notice, even though he had not correctly served the Secretary.

Id. at 48. Because Myers had been pursuing his claim against the agency, it would be "unconscionable on the part of the Government to seek to dismiss this action on such a technicality" when the government was on full notice of his claims, and had in fact been litigating against them administratively for at least five years. *Id*. (citation omitted).

Petitioners are even more deserving of an extension than the plaintiffs in *Mlinarchik* and *Myers*. Mr. Morrissey has been litigating his claim against the Secret Service since 2014; Mr. Stephenson has maintained his claim against the Department of Transportation since 2013 or 2014. Petitioners made timely service on the proper defendant (in Mr. Stephenson's case, within the time limit extended by the district court), unlike the plaintiffs in either *Myers* or *Mlinarchik*. Thus, the defendant in each case had both actual and constructive notice of the lawsuit. Finally, dismissal will bar Petitioners from refiling, because they are now outside the 90-day window provided in their right to sue letters. There is no indication the defendants would be prejudiced by the delay. The district court assumed that a dismissal would bar Mr. Morrissey from refiling his action and yet dismissed his case nonetheless.

Petitioners' lawsuits, and the cases to which they are analogous, are meaningfully different from the cases in which courts deem dismissal proper. For example, dismissal may be warranted when a plaintiff has been granted numerous extensions already and has still not effectuated service. *See Kinzie v. U.S. Dep't*

of Labor Emp. Benefits Sec. Admin., No. 1:14-CV-1191 (GLS/CFH), 2016 WL 3660547, at *2 (N.D.N.Y. June 6, 2016) (report and recommendation) (multiple extensions granted over the course of two years), *adopted*, 2016 WL 3661400 (N.D.N.Y. July 5, 2016); *see also Arndt v. Napolitano*, 495 F. App'x 178, 180–81 (2d Cir. 2012) (affirming dismissal after two years had elapsed between filing the action and the motion to dismiss, where the plaintiff had been warned multiple times, and still failed to serve the United States).

The Rules require that the judge consider whether lesser sanctions will suffice before dismissing a case "with prejudice" as a sanction. While the dismissals of Petitioners' cases were not labeled "with prejudice," they had the same practical effect of barring them from refiling their complaints. Under these circumstances, the district court should have considered less harsh alternatives before dismissing the cases outright. The court in *Kinzie* concluded that, since multiple extensions, warnings, and reminders had already been granted, "a sanction lesser than dismissal would not be effective." 2016 WL 3660547, at *2. This is not analogous to Petitioners' cases here. The district court dismissed each case with no prior indication that lesser sanctions would not be effective. Furthermore, the district court failed to even consider whether a lesser sanction would have been appropriate. *See Trakas v. Quality Brands, Inc.*, 759 F.2d 185, 188 (D.C. Cir. 1985) (reversing dismissal where the trial judge did not "even consider other alternative sanctions that would also be less drastic than complete dismissal.").

III. IT WAS AN ABUSE OF DISCRETION TO DISMISS PETITIONERS' CLAIMS, WHERE THERE WAS NO PREJUDICE TO DEFENDANTS AND DISMISSAL WILL BAR REFILING OF PETITIONERS' CLAIMS.

Some courts have applied a "heightened standard" when the practical effect of dismissal under Rule 4(m) keeps the litigant from having their day in court. *See Thrasher v. City of Amarillo*, 709 F.3d. 509, 512–13 (5th Cir. 2013) (applying the "heightened standard" for dismissals with prejudice to a dismissal without prejudice when the statute of limitations would nevertheless bar future litigation). For similar reasons, the D.C. Circuit applies a heightened standard for dismissing a case under Rule 41 for failure to prosecute, especially when other lesser sanctions are available. As the court explained in *Trakas v. Quality Brands, Inc.*:

> The law of this circuit partakes of the general view that dismissal is an extremely harsh sanction and may be reversed when discretion is abused. Since our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success.

759 F.2d at 186–87 (citations omitted). Importantly, "a single act of misconduct seldom if ever can justify dismissal." *Id.* at 188 (citation omitted). "[D]ismissal is in order only when lesser sanctions would not serve the interest of justice." *Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990). Considerations

relevant to whether a Rule 41 dismissal is warranted include "the effect of a plaintiff's dilatory or contumacious conduct on the court's docket, whether the plaintiff's behavior has prejudiced the defendant, and whether deterrence is necessary to protect the integrity of the judicial system." *Id*. A dismissal with prejudice under Rule 41 will "be affirmed only on a showing of a clear record of delay or contumacious conduct by the plaintiff and where lesser sanctions would not serve the best interests of justice." *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415, 417 (5th Cir. 2006) (cleaned up).

Because their right to sue letters bar Petitioners from refiling, the district court's dismissals were in effect dismissals with prejudice. *Id*. (treating dismissal without prejudice as a dismissal with prejudice as to Appellant's claims that would be barred by the limitations period); *see also Cardenas v. City of Chicago*, 646 F.3d 1001, 1007–08 (7th Cir. 2011). When the dismissal is effectively with prejudice because the statute of limitations bars refiling, courts have "held that in such circumstances the district court must explain why it imposed the extreme sanction of dismissal." *Florence v. Decker*, 153 F. App'x 478, 480 (10th Cir. 2005) (cleaned up); *see Novak v. World Bank*, 703 F.2d 1305, 1310 (D.C. Cir. 1983) ("[D]ismissal is not appropriate when there exists a reasonable prospect that service can be obtained.").

Applying those factors here demonstrates why this higher standard is appropriate and that the district court abused its discretion in dismissing

Petitioners' cases. Mr. Morrissey's failure to serve the United States within the 90-day window can hardly be said to have had a "dilatory" effect on the court's docket, since the case was dismissed only four days after the deadline expired. And the court dismissed Mr. Stephenson's case the day after its extended deadline to serve the United States elapsed. In both cases, there was no indication of prejudice to the defendant, a factor the district court did not even consider. The district court also failed to consider whether lesser sanctions would be appropriate, nor did the district court adequately explain why it imposed "the extreme sanction of dismissal," other than the fact that it has discretionary authority to do so. Finally, there were indications that service could be readily obtained. *Cf. Novak*, 703 F.2d at 1310. Dismissal under such circumstances is a clear abuse of the district court's discretion.

IV. AFFIRMANCE OF THE COURT OF APPEALS' DECISION COULD LEAD TO WIDESPREAD INJUSTICE.

The court of appeals' decision affirming dismissal of these cases sets a troubling precedent. Not only is the result substantially unfair to Mr. Morrissey and Mr. Stephenson, but if not corrected, will lead to unfair results for others like them who fail to correctly serve the United States under the "nuanced and somewhat technical service requirements of Rule 4(i)(1) and Rule 4(i)(2)." *Mlinarchik*, 2018 WL 351945, at *4 n.8. The district court's decisions provide a playbook for other courts seeking to clear their dockets on the basis of

technical errors. And the court of appeals' decision blesses that procedure in the circuit that likely sees more cases implicating Rule 4(i) than any other.

Given the complexity of the service Rules, it is entirely predictable that others will fail to properly serve the individual government agency or employee *and* the Attorney General *and* the U.S. Attorney for the district where the action is brought. It is also entirely predictable that the service defects could be easily cured if pointed out clearly. Quick dismissals may reduce a court's docket numbers, but they do nothing either for efficiency or for justice. If a case dismissed without prejudice can be refiled, the process has taken more time for the court and the plaintiff with nothing to show for it. If the dismissal is effectively with prejudice, then potentially meritorious cases die on a technicality.

"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Denying review in this case would entrench circuit-level precedent allowing dismissal in the absence of meaningful delay or prejudice, even when the dismissal prevents the refiling of the case. It would allow dismissal even when the purpose of Rule 4—assuring adequate notice to the defendant—has been fulfilled. It would allow dismissal even without attempting any other means of prompting compliance. In short, allowing the court of appeals' action to stand will affect far more than Petitioners' own claims—it could encourage such dismissals throughout the federal system. *Amici*, as civil

procedure professors, urge the Court to grant certiorari and reject the court of appeals' misinterpretation of Rule 4 and disregard for the principles of fairness that underlie the Federal Rules of Civil Procedure.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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