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

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

REPLY BRIEF FOR THE PETITIONER

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As Judge Millett explained in dissent below, these cases present a conflict on the important question whether a district court exceeds its discretion when—as in each of these cases—it issues a case-ending dismissal without finding any delay or contumacious conduct by the plaintiff and without considering whether a lesser sanction would better serve the interests of justice. The panel majority erred by holding that such dismissals are never subject to that higher standard so long as they are denominated "without prejudice" even if, in substance, they result in "the death of the party's case." App. 26a. This petition is an excellent vehicle for resolving this conflict on an important question of civil procedure. See Br. *Amici Curiae* Professors of Civil Procedure.

The brief in opposition attempts to kick up a cloud of dust. But despite respondents' best efforts, the case for

review remains clear. Respondents do not dispute the acknowledged circuit conflict. Instead, they assert that petitioners "overstate the degree of conflict in the courts of appeals." Opp. 10. But try as they might to narrow the conflict to Rule 4(m), they ultimately cannot explain away *any* of the many cases that have followed an approach "squarely at odds" with the approach below, much less all of them. App. 64a (Millett, J., dissenting). A petition that implicates a direct circuit split, involving "at least" six courts of appeals, *ibid.*, is more than enough to warrant certiorari. And *even if* these cases were just about Rule 4(m) dismissals—a view that even the majority below did not embrace, see App. 9a-10a & n.3—respondents do not contest that the Rule 4(m) issue arises frequently in courts nationwide; implicates a cross-cutting and fundamental precept of the Federal Rules; and has case-ending consequences for hundreds of cases each year.

Unable to evade the circuit conflict, respondents pivot, instead asserting that the issue lacks "practical significance." Opp. 10, 21. That is absurd. Any party that confronts a dismissal without prejudice that is effectively with prejudice will recognize the "practical significance" of the standard that governs the district court's exercise of discretion in that situation. There is a reason Judge Millett wrote a vigorous dissent below, almost twice as long as the majority opinion, warning that choosing the wrong rule would undermine "[t]he credibility of the judicial branch." App. 26a. There is a reason the Sixth Circuit jumped into the same debate just months after the decision below. This issue arises frequently, and the rule has enormous practical significance.

With no good argument on the circuit split or its importance, respondents are thus left to claim that the conflict is "not squarely implicated on the facts of these cases." Opp. 10, 22-23. If that objection had any merit, one might ask why it was not the basis for the decision by the

majority below—which instead expressly rejected the standard adopted by the other side of the circuit conflict. App. 10a & n.3. The majority's reason for addressing the issue is plain: These cases squarely implicate the circuit conflict, as both the majority (*ibid.*) and the dissent agreed (App. 46a n.3). Respondents cannot rewrite the record (and the decision below) to avoid review.

This petition presents the Court with an opportunity to dispel longstanding uncertainty on a question of great practical significance in the application of the Federal Rules and to provide much-needed guidance to parties and lower courts alike. The petition for a writ of certiorari should be granted.

I. The Decision Below Implicates A Conflict Among The Courts Of Appeals

Respondents do not dispute the existence of a conflict on the question presented. Instead, they merely contend that petitioners have "overstate[d] the degree of conflict in the courts of appeals." Opp. 10, 16. Respondents are wrong.

1. This is the rare case where a respondent readily admits that a direct conflict exists. In respondents' own words, "the Fifth Circuit has squarely adopted the approach to Rule 4(m) that petitioners favor." Opp. 16-17. Respondents even implicitly acknowledge that judges now have no choice but to pick sides. See *id.* at 21 ("The decision below * * * simply adhered to the majority approach" in "a conflict that has existed for decades").

Respondents instead claim the split is "shallow" and thus "does not warrant further review." Opp. 10, 16-17, 21. Respondents assert that the split concerns only the standard for discretionary dismissals that are effectively with prejudice under Rule 4(m), rather than the standard for all effectively-with-prejudice discretionary dismissals under the Federal Rules.

As an initial matter, even if the conflict were limited to a dispute over the standard specifically for Rule 4(m), that would be more than enough to warrant this Court's review: That issue is outcome-determinative every time it arises; it occurs frequently; and it will continue generating conflicts and uncertainty until this Court provides a definitive answer. See *United States* v. *Oakland Physicians Med. Ctr., LLC*, 44 F.4th 565, 570 (6th Cir. 2022). And this Court routinely grants certiorari in comparable cases implicating even narrower conflicts where, as here, the practical stakes are substantial. See, *e.g.*, *Bittner* v. *United States*, No. 21-1195 (U.S. argued Nov. 2, 2022) (1-1 split); *PPL Corp.* v. *Comm'r of Internal Revenue*, 569 U.S. 329, 331, 334 (2013) (1-1 split); *Boeing Co.* v. *United States*, 537 U.S. 437, 440, 445-446 (2003) (1-1 split); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 86-88 (2001) (1-1 split); *United Dominion Indus., Inc.* v. *United States*, 532 U.S. 822, 824, 828-829 (2001) (1-1 split). Indeed, under respondents' own (overly narrow) formulation of the divide, they calculate a 6-1 split. Opp. 20. Such a split would still merit the Court's review.

But, as the petition established, these cases implicate a broader conflict over the abuse-of-discretion standard applicable to effectively-with-prejudice discretionary dismissals. Both the majority and dissent below agreed that the majority's decision implicated that broader question. The majority did not reject an abuse-of-discretion standard specific to Rule 4(m); it rejected "the Fifth Circuit's rule that dismissals without prejudice when the statute of limitations has run must be treated as dismissals with prejudice." App. 10a n.3; see App. 9a-10a & n.3. In so ruling, the majority expressly disagreed with *Pond* v. *Braniff Airways, Inc.*, 453 F.2d 347, 348–349 (5th Cir. 1972), see App. 10a n.3, a case that respondents concede *is not a Rule 4(m) case*. See Opp. 17 (explaining that, in reliance on *Pond*, the Fifth Circuit "has

subsequently applied the same logic" to dismissals "under Rule 4(m)"). The panel majority resolved these cases on grounds that apply to *all* dismissals, not just Rule 4(m) dismissals.

Judge Millett's dissent read the majority's decision the same way. Judge Millett explained that the majority's holding places the D.C. Circuit "squarely at odds" with the Fifth Circuit and "at least four other circuits" that "require district courts to, at a minimum, give focused consideration and appropriate weight to the death-knell consequences of dismissal before terminating a lawsuit." App. 25a; see also *id.* 64a. As support, Judge Millett cited *Gocolay* v. *New Mexico Fed. Sav. & Loan Ass'n*, 968 F.2d 1017, 1021 (10th Cir. 1992), and *Mickles* v. *Country Club Inc.*, 887 F.3d 1270, 1280 (11th Cir. 2018), neither of which involved Rule 4(m). App. 47a-49a; contra Opp. 18-19. The majority did not disagree or claim that Judge Millett was overstating the breadth of the conflict. See App. 9a-10a & n.3, 16a n.7.

2. Respondents nonetheless contend—for the first time in these cases—that petitioners, the majority, and the dissent are all wrong about what is at stake here, because these cases only concern the abuse-of-discretion standard that applies to dismissals under Rule 4(m). See Opp. 13-18. As a consequence, respondents argue, "[a] court of appeals that has treated dismissals without prejudice in other contexts as being effectively with prejudice, based on the running of the limitations period, could nonetheless appropriately reach a different result under Rule 4(m)." Opp. 19. It is on that logic, and that logic alone, that respondents assert the circuit split raised by this petition is "shallow." Opp. 21.

Respondents' argument turns on a premise that is both wrong and inconsistent with the majority and dissenting opinions below. Rule 41 is the mechanism by which dismissals for rules violations are effectuated. Fed.

R. Civ. P. 41(b); see Opp. 13. Thus, if a plaintiff violates Rule 37, his case may be dismissed under Rule 41. If a plaintiff violates Rule 11, his case may be dismissed under Rule 41. And if a plaintiff violates Rule 4, his case may be dismissed under Rule 41

The abuse-of-discretion standard applicable to dismissals for Rule 4(m) violations therefore must be the same abuse-of-discretion standard that governs all other dismissals for violations under the Federal Rules. App. 42a-46a. Respondents' contrary claim that the drafters of the Federal Rules hid an unstated but distinct abuse-of-discretion standard in Rule 4(m), see Opp. 13, is incorrect. On respondents' logic, the Federal Rules would make it easier to dismiss a case forever for missing the initial 90-day service-of-process deadline than to dismiss for failure to prosecute the case at all—or for failure to meet a discovery deadline, or for failure to comply with a court order, or for any of the countless other rule violations of far greater significance than making a technical misstep in serving process. See Opp. 13-16, 19. Respondents' claim is also at war with the rationale of the decision below, which cited several non-Rule 4(m) cases for the abuse-of-discretion standard. See App. 9a. The majority thus agrees that the same standard governs *any* discretionary case-ending dismissal.[1]

In sum, there is every reason to conclude, as Judge Millett explained below, that the standard governing effectively-with-prejudice dismissals for failure to serve

[1] Respondents assert that applying the heightened standard used in the Fifth Circuit would be unadministrable, see Opp. 15-16, but that assertion is belied by the experience of that Circuit. Over the past fifty years, district courts in the Fifth Circuit have handled *hundreds* of cases under its heightened standard, see, *e.g.*, *Thrasher* v. *City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013), and Respondents have not identified a *single decision* in which the standard proved difficult to apply.

under Rule 4(m) is the same standard that governs equivalent Rule 41 dismissals. App. 46a-52a. The circuit conflict is accordingly as broad and significant as the petition explained—with the Third, Fifth, Tenth, and Eleventh Circuits arrayed on one side, and the Sixth, Seventh, and D.C. Circuits on the other. See Pet. 10-15.

Respondents further claim that the Third and Tenth Circuits are in fact on the opposite side of the split, because they would apply a lower standard to case-ending Rule 4(m) dismissals than to other case-ending dismissals. Opp. 20-21 (citing *Petrucelli* v. *Bohringer & Ratzinger, GmbH*, 46 F.3d 1298 (3d Cir. 1995), and *Espinoza* v. *United States*, 52 F.3d 838, 842 (10th Cir. 1995)). Even if true, that would not change the number of circuits that have waded into the split, only their precise alignment.

In any event, respondents misread those cases. Both merely acknowledged that district courts have discretion to dismiss cases under Rule 4(m) even where the statute of limitations has run. See Opp. 20-21 (quoting cases). As Judge Millett already explained in discussing *Petrucelli*, that is "beside the point." App. 53a n.5. "No one is arguing that an extension is automatically required" just because the statute of limitations has run. *Ibid.* Rather, "[t]he issue * * * is what weight the effective prejudice of the dismissal should carry in the balancing of factors." *Ibid.* Indeed, as the experience of the Fifth Circuit shows, cases are still dismissed under the heightened standard when the standard is met. See, *e.g., Flores* v. *City of San Benito, Texas*, No. 1:20-cv-169, 2021 WL 4928393, at *2 (S.D. Tex. Oct. 20, 2021); *Randolph* v. *Amos*, No. 2:17-cv-355, 2021 WL 3602042, at *3 (W.D. La. Aug. 12, 2021).

Respondents also contend that five circuits agree with the D.C. Circuit and decline to apply a heightened standard to Rule 4(m) dismissals, instead "treat[ing] the limitations period as one factor for a district court to consider under Rule 4(m)." Opp. 20-21 (citing cases from

the Second, Sixth, Seventh, Eighth, and Ninth Circuits).[2] Two of those decisions were already identified in the petition as part of the split. See Pet. 18-20 (discussing Sixth and Seventh Circuit cases). As for the other three decisions: If respondents believe the circuit conflict is in fact deeper than the petition claimed, that is merely a point further *in favor of* certiorari, not against it.

II. The Question Presented Warrants Review In These Cases

Petitioners have already explained why the question presented is exceptionally important and warrants review in these cases. Pet. 21-24. Respondents' efforts to undercut the petition as a suitable vehicle fall short.

1. Respondents claim that petitioners "overstate * * * the practical significance of their disagreement with the D.C. Circuit," on the theory that extensions for "good cause" can ameliorate any concern with prejudicial dismissals. Opp. 21. But discretionary extensions are supposed to be available precisely when "a plaintiff fails to complete timely service and lacks good cause for the failure." App. 41a. That is the whole point.

After all, the good cause standard is difficult to meet. As the majority below held, it is not available in the most common case in which a service failure happens. As the majority held, mere "confusion or failure to read or understand" the service rules "does not constitute good cause" for failure to make timely service. App. 14a. That is what happened in both cases below, where counsel for petitioners missed the service deadline because they

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[2] According to respondents, these cases show that these circuits have all adopted a special standard just for Rule 4(m) dismissals. Opp. 20-21. But in three of the cases (from the Second, Eighth, and Ninth Circuits), the plaintiff never argued that a heightened standard should have applied. The other two (the Sixth and Seventh Circuits) did not say they were adopting a special rule only for Rule 4(m) dismissals. Pet. 18-20. That is merely respondents' surmise.

misread the complicated rules for serving federal officials. Pet. 5. The facts of the cases at bar—involving "one-off and easily remedied technical missteps in the initial processing of a case"—show that the good cause exception is not enough to protect the "strong presumption in favor of adjudications on the merits." App. 26a-27a.

Respondents carefully avoid any mention of the number of cases affected by the standard applicable to Rule 4(m) dismissals. See Opp. 21-22. And with good reason: Hundreds of cases are dismissed annually under Rule 4(m); and among that number, a large percentage are dismissed effectively with prejudice. As the petition explained, district courts in the Fifth Circuit apply a heightened standard for effectively-with-prejudice dismissals at least a dozen times each year. Pet. 21 n.2.[3] As respondents do not dispute, moreover, the issue is of particular importance in the civil rights context: The 90-day deadline for serving process in employment discrimination suits under Rule 4(m) means that the 45,000 people each year who receive a 90-day right to sue letter have one—and only one—chance to correctly effect service, or else they will lose their claims forever. Pet. 22. Respondents' effort to characterize the "practical significance" of these cases as somehow "overstated," Opp. 21-22, withers upon scrutiny.

2. As a last resort, respondents claim that these cases would be "unsuitable vehicles" for considering the question presented, on the theory that reversal would not alter the result below. Opp. 22. That is wishful thinking. As Judge Millett explained, "[h]ad the Fifth Circuit's standard been applied to Morrissey's and Stephenson's cases, the district courts' orders of dismissal would have

[3] This number is based on published decisions, so it likely understates by a considerable margin the frequency with which the issue arises.

been considered unequivocal abuses of discretion for failure to apply the correct legal standard." App. 46a. And the panel majority did not disagree. App. 9a-10a. Indeed, it expressly "decline[d] to apply a heightened standard or cabin the district court's broad discretion to manage its docket." App. 9a-10a. If the standard were immaterial, as respondents now suggest, then rejecting petitioners' proposed standard—and disagreeing with the Fifth Circuit, see App. 10a n.3—would not have been necessary.

Nonetheless, respondents claim that these cases are bad vehicles because petitioners' claims were inadequately pressed *in the district courts*. Opp. 23. That claim is bizarre. First, it is wrong. App. 46a n.3. Petitioners "raised their arguments for a heightened standard at their first practical opportunity." *Ibid.* But it is also irrelevant: The D.C. Circuit ruled on the merits in these cases. A petition raising an argument that was vigorously pressed and passed upon in the court of appeals—as the standard-of-review argument was here—is plainly suitable for this Court's review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

In short, these cases cleanly and squarely present the question whether a heightened standard should apply to effectively-with-prejudice dismissals under the Federal Rules. This issue recurs regularly and is exceptionally important. And this Court's guidance is badly needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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