No. _____

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA AND STATE OF MICHIGAN *EX REL.* MOHAMAD SY AND DOSHAUN EDWARDS, PETITIONERS,

v.

OAKLAND PHYSICIANS MEDICAL CENTER, LLC, D/B/A PONTIAC GENERAL HOSPITAL, AND SANYAM SHARMA

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

PETITION FOR A WRIT OF CERTIORARI

SHEREEF H. AKEEL
Counsel of Record
ADAM S. AKEEL
HAYDEN E. PENDERGRASS
AKEEL & VALENTINE, PLC
888 W. Big Beaver Road
Suite 420
Troy, Michigan 48084
(248) 269-9595
shereef@akeelvalentine.com

Counsel for Petitioners

QUESTION PRESENTED

The False Claims Act ("FCA") provides that a *qui tam* complaint be placed under seal for a minimum of sixty days, which the Government may seek to extend upon good cause shown. 31 U.S.C. § 3730(b). After a *qui tam* complaint is unsealed, such a complaint is to be served pursuant to Federal Rule of Civil Procedure 4. *Ibid*. Under Rule 4, a district court must dismiss an action without prejudice if a defendant is not served within ninety days but may extend the time to effect service. Fed. R. Civ. P. 4(m).

In some cases, dismissals for failure to effect service would nominally be *without* prejudice, but are effectively *with* prejudice, because the statute of limitations 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: 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. Three circuits hold that without-prejudice dismissals are subject to a more lenient standard, even if the dismissal would end a case forever. In the decision below, the Sixth Circuit joined the minority view.

The question presented is:

Whether a district court may decline a discretionary extension of time to effect service and, in effect, dismiss *with* prejudice a relator's individual FCA retaliation claim due to the operation of the applicable statute of limitations, when it repeatedly granted the Government's requested extensions of time for the *qui tam* complaint to remain under seal.

PARTIES TO THE PROCEEDINGS

Petitioners Mohamad Sy and Doshaun Edwards were the plaintiff-relators before the district court and appellants before the court of appeals. Respondents Oakland Physicians Medical Center, LLC, d/b/a Pontiac General Hospital, and Sanyam Sharma were the defendants in the district court and appellees in the court of appeals.

RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

Sy v. Oakland Physician Med. Ctr., LLC, No. 18-10458 (Oct. 18, 2021)

United States Court of Appeals (6th Cir.):

United States v. Oakland Physicians Med. Ctr., LLC, No. 22-1011 (Aug. 12, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a–15a) is published at 44 F.4th 565. The court's order denying rehearing *en banc* (App. 29a–30a) is available at 2022 WL 10219981.

The district court's order dismissing Petitioners' case (App. 16a–21a) is available at 2021 WL 4847137. The order denying their motion for reconsideration (App. 24a–28a) is available at 2021 WL 6063646.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 12, 2022. App. 1a–15a. The court of appeals denied a timely petition for rehearing *en banc* on September 19, 2022. App. 29a–30a. This 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. 41a–51a. Section 3730 of the FCA, 31 U.S.C. §§ 3729–3733, is reproduced at App. 31a–40a.

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 failure to effect service must apply the same heightened standard that applies to a dismissal *with* prejudice when the operation of the statute of limitations would bar refiling. Moreover, this conflict is further compounded when the Government repeatedly extends the time for a *qui tam* complaint to remain under seal, thereby causing the statute of limitations on a relator's claims to expire. This raises a fundamental tension between the operation of the Federal Rules of Civil Procedure and the purposes of the FCA, as it puts the interests of relators and the Government at odds.

In the proceedings below, the Sixth Circuit 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 that the relator will be barred from refiling the case under the applicable statute of limitations due to the Government's repeated extension of the seal period.

This case satisfies the criteria for this Court's review. The conflict is acknowledged, entrenched, and pervasive, 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. Further development of this issue in the lower courts would be futile: The arguments have been thoroughly developed on each side of the circuit split, and there is no realistic

prospect that either side will yield. This issue was also dispositive in the proceedings below; it was raised and resolved by the Sixth 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 as well as to the function and purposes of the FCA. Because this case presents an optimal vehicle for resolving this significant issue, the petition should be granted.

A. Legal Background

1. District courts have broad authority to issue appropriate orders to "achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629–32 (1962); see also *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).

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 Fed. Prac. & Proc. Civ. § 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 also *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012) ("Dismissal with prejudice is the exception, not the rule, in federal practice."). Consequently, "[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 Fed. Prac. & Proc. Civ. § 2369 (citation omitted).

2. "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 . . . [which] is consistent with the modern conception of service of process as primarily a notice-giving device." 4A Fed. Prac. & Proc. Civ. § 1083 (4th ed.). "In addition, the avoidance of dismissals for improper service, especially when the defect is technical in nature, has the desirable objective of promoting the forward movement of the litigation and the disposition of cases on their merits, which are goals prescribed in Rule 1." *Ibid*.

Federal Rule of Civil Procedure 4(m) sets the timeframe for service in a federal case, instructing a plaintiff to serve the defendant within ninety days of

filing the complaint. Fed. R. Civ. P. 4(m) (App. 50a–51a). 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." *Id*. If the plaintiff shows "good cause" for failing to serve the defendant, the court "must extend the time for service for an appropriate period." *Id*.

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). The Advisory Committee Notes state that Rule 4(m) "authorizes the court to relieve a plaintiff of the consequences of an application of [Rule 4(m)] even if there is no good cause shown" and that "[r]elief may be justified, for example, *if the applicable statute of limitations would bar the refiled action*." Fed. R. Civ. P. 4 advisory committee's note (1993) (emphasis added). Of the factors "considered when determining whether to . . . grant an extension of time," "courts place the most emphasis on a statute of limitations bar" and "sometimes will apply a more stringent standard, often resembling or matching the standard used for dismissals *with prejudice*, when deciding whether or not to dismiss when the statute of limitations would bar refiling." 4B Fed. Prac. & Proc. Civ. § 1137 (4th ed.) (emphasis added).

Thus, 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, especially if the applicable statute of limitations would bar the refiled action.

3. The FCA provides that a *qui tam* complaint is required to be placed under seal for sixty days. 31 U.S.C. § 3730(b)(2) (App. 31a). The Government may, "for good cause shown," move to extend the sixty-day period. *Id.* § 3730(b)(3). There is no statutory limit on how many extensions the Government may request. After a *qui tam* complaint is unsealed and the district court orders service, such a complaint is to be served pursuant to Rule 4. *Id.* § 3730(b)(2), (3).

The FCA also prohibits retaliation against a relator for lawful acts in furtherance of a *qui tam* action under the FCA or other efforts to stop FCA violations. *Id.* § 3730(h). The statute of limitations for an FCA retaliation claim is three years. *Id.* § 3730(h)(3).

B. Facts & Procedural History

1. Petitioners Mohamad Sy worked as Director of Nursing and Doshaun Edwards worked as Nurse Educator at Respondent Pontiac General Hospital ("PGH") from 2016 until their termination in November 2017. See App. 3a–4a, 17a. During their employment, Petitioners cooperated with a Centers for Medicare & Medicaid Services audit of PGH, which directly led to their termination by PGH's CEO, Respondent Sanyam Sharma. *Ibid.*

2.a. On February 8, 2018, Petitioners filed their *qui tam* complaint as co-relators under seal, alleging that PGH rendered unnecessary patient procedures to unduly inflate its Medicare and Medicaid payments. See App. 3a, 17a. Petitioners raised several claims under the FCA, including FCA retaliation claims, as well as the Michigan Medicaid False Claims Act and Whistleblowers' Protection Act. See *id.* 3a–4a, 17a.

b. On October 23, 2020, after the district court repeatedly granted the Government's motions to extend the period for the complaint to remain under seal, the United States and the State of Michigan declined intervention. See App. 2a, 4a, 17a. Three days later, the district court ordered that the complaint be unsealed and served upon the defendants by the relators without a specific due date. *Ibid*. On December 24, 2020, the district court, with the consent of the United States and State of Michigan, dismissed without prejudice all claims, except Petitioners' FCA retaliation and Michigan Whistleblowers' Protection Act claims. See *id*. 17a–18a.

c. On January 14, 2021, Plaintiffs filed an amended complaint, realleging their FCA retaliation and state claims. See App. 4a, 18a. On January 22—eighty-eight days after the district court's order unsealing the original complaint—Petitioners attempted to serve the amended complaint via certified mail. *Ibid*. For several weeks, the U.S. Postal Service tracking website indicated a delivery status of "status not available." See *id*. 18a. At that point, Petitioners' counsel prepared to serve Defendants via personal service but discovered that a summons had not been issued when the complaint was unsealed. See *id*. 4a, 18a. On March 3, Petitioners requested a summons, which was issued the next day. *Ibid*. On March 15—fifty days after the ninety-day window provided under Rule 4(m)—Petitioners effectuated personal service. *Ibid*.

d. Defendants moved to dismiss without prejudice for untimely service, which the district court granted, without a hearing, in a four-page order. See App. 4a–

5a, 16a–21a. After finding good cause under Rule 4(m) did not exist, the district court applied a five-factor balancing test to determine whether a discretionary extension of time for service was warranted. See *id*. at 19a–20a. The district court found that the factors weighed in Defendants' favor and denied an extension, even though the fifty-day delay was "not a very long time period." *Ibid*. Despite noting that "refiling of the lawsuit may be time-barred," the district court ordered the Amended Complaint dismissed without prejudice and, in effect, dismissed the action with prejudice, as the statute of limitations had expired on Petitioners' individual FCA retaliation claims. *Id*. 21a.

3.a. The Sixth Circuit, without the benefit of oral argument, affirmed the district court's order in a published decision. See App. 1a–15a. The Sixth Circuit noted that it had not yet announced a test that district courts should employ when assessing whether to exercise their discretion to enlarge the service period. *Id*. at 7a. The Sixth Circuit set forth a novel seven-factor balancing test, which partially espoused the test applied by the district court. See *id*. 7a–9a. The Sixth Circuit held that, under this new test, the district court did not abuse its discretion in finding that an extension was not warranted, despite acknowledging Petitioners' argument that their "claims will be time-barred by the applicable statute of limitations" and that "the length of time that passed between the original incident . . . and the unsealing of the complaint was not due to any fault of the Plaintiffs." *Id*. at 9a–14a.

b. The Sixth Circuit denied a timely petition for rehearing *en banc*. See App. 29a–30a.

REASONS FOR GRANTING THE PETITION

The decision below deepens an intractable circuit split over a crucial premise of the Federal Rules of Civil Procedure. As it stands, district courts in different circuits are bound to apply starkly differing standards in determining whether to issue case-ending discretionary dismissals, even for minor breaches of the Rules, such as a fifty-day delay to perfect service after a previous attempt within the ninety-day service window. The positions on both sides of the split are fully fleshed out; the question is cleanly presented; and this case offers the ideal vehicle for the Court to resolve it. Moreover, this circuit split has profound implications for *qui tam* litigation in the circuits that apply the minority view, as the minority view, in application, only serves to undermine the purposes of the FCA and the relationship between relators and the Government. Accordingly, 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 ARE 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 the Sixth Circuit—have held that, if a dismissal is labeled "without prejudice," a district court only needs to consider the relevant

factors, without any particular emphasis on the operation of the statute of limitations that would bar refiling. 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 Even When Labelled as Dismissals without 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 Fed. Prac. & Proc. § 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.

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 plaintiff had improperly served the defendant insurance company because, unbeknownst to him, Louisiana 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 ordered the plaintiff to show cause for failure to properly serve the defendant. *Ibid.* Ultimately, plaintiff 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.

On appeal, 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. 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 therefore 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." *Ibid*.

The rule articulated in *Millan* has been the settled law of the Fifth Circuit for fifty years. See *Pond v. Braniff Airways, Inc.*, 453 F.2d 347, 348–49 (5th Cir. 1972)). And the Fifth Circuit applies this rule to all case-ending dismissals. See, *e.g., Thrasher v. City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013) ("To warrant dismissal, we must find a delay 'longer than just a few months; instead, the delay must be characterized by significant periods of total inactivity.'") (citation omitted); *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415, 418 (5th Cir. 2006) ("Another aggravating factor that is present here is that the delay could have only been intentional. . . . [W]e can only conclude that counsel intentionally failed to cause effectuation of service when the furnishing of information for service of process [was] a simple task[.]" (internal quotation marks and citation omitted)).

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)). The Eleventh Circuit concluded that such a dismissal "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.*

Applying this principle, the Eleventh Circuit in *Levy v. NCL (Bahamas), Ltd.*, 686 F. App'x 667 (11th Cir. 2017), reversed the district court's dismissal for failure of service that, while denominated without prejudice, was with effective prejudice due to the running of the statute of limitations. *Id.* at 669, 671. The Eleventh Circuit ruled that "even if a dismissal order expressly states that the dismissal is without prejudice, such a dismissal operates as one with prejudice if it has the effect of precluding the plaintiff from refiling her claim due to the running of a statute of limitations." *Id.* at 670. For that reason, the Eleventh Circuit remanded the case for the district court to apply Rule 41(b)'s heightened standard requiring "a finding of delay or willful misconduct and

a determination that lesser sanctions would be inadequate." *Id.* at 671.

Under its precedent, the Eleventh Circuit makes it "incumbent upon the district court" to "clearly consider" whether a dismissal would effectively "bar[] the plaintiffs from refiling their claims[.]" *Lepone-Dempsey v. Carroll Cnty. Comm'rs*, 476 F.3d 1277, 1282 (11th Cir. 2007); see also *Hong-Diep Vu v. Phong Ho*, 756 F. App'x 881, 883 (11th Cir. 2018) (holding that district court abused its discretion under Rule 4(m) by failing to address whether "dismissal without prejudice would act as a dismissal on the merits" due to the statute of limitations); *Reis v. Comm'r*, 710 F. App'x 828, 830 (11th Cir. 2017) (vacating dismissal because the district court did not "sufficient[ly] expla[in]" whether it considered "the possibility that Plaintiff would be barred from refiling by the pertinent statute of limitations" (internal quotation marks and citation omitted)).

3. The decision below also squarely conflicts with established law in the Tenth Circuit. In *Gocolay v. N.M. Fed. 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 1018–19. 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 for health reasons. *Id.* at 1019. After the plaintiff had returned to the Philippines, the defendant scheduled a date to complete the deposition, and when the plaintiff failed to appear on that date, the defendant

moved to dismiss the complaint for plaintiff's failure to cooperate in discovery. *Ibid.* The district court ordered another date for the deposition, which the plaintiff missed due to hospitalization, and the district court dismissed his complaint without prejudice for failing to complete the deposition. *Id.* at 1020.

On appeal, the Tenth Circuit agreed with the plaintiff 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 dismissals effectively with prejudice 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]

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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.) (concluding that district court's dismissal without prejudice was properly remanded in previous appeal, given that plaintiff's claims would otherwise be time-barred, 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."); *Florence v.*

In the Rule 4(m) context, the Tenth Circuit has required district courts to "consider the limitations period in deciding whether to exercise [their] discretion under Rule 4(m)." *Espinoza v. United States*, 52 F.3d 838, 842 (10th Cir. 1995).

4. The decision below 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 340 (emphasis added). Accordingly, the Third Circuit 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

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Decker, 153 F. App'x 478, 480 (10th Cir. 2005) ("[D]ismissal without prejudice . . . can be an extreme sanction if the statute of limitations bars refiling. This court has held that in such circumstances the district court 'must explain why it imposed the extreme sanction of dismissal.'" (quoting *Woodmore v. Git-N-Go*, 790 F.2d 1497, 1499 (10th Cir. 1986))).

> sanctions would better serve the interests of justice.

Id. at 342. Under that standard, the Third Circuit held that the complaint should not have been dismissed because (1) plaintiff 's counsel "while dilatory, did not engage in contumacious conduct"; (2) "there was no allegation of any cognizable prejudice to any of the defendants"; (3) "the motion to reinstate the complaint was filed promptly"; and (4) "there is no indication that the district court considered the imposition of some lesser sanction." *Id*. at 343. The Third Circuit vacated the order of dismissal and remanded 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 has consistently followed the heightened *Donnelly* standard for dismissals that are effectively with prejudice. See, *e.g., Titus v. Mercedes Benz of N. Am.*, 695 F.2d 746, 749 (3d Cir. 1982) (*Donnelly* states "the governing principle in this Circuit"); *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"); *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 was nominally without prejudice but would have ended the case due to the applicable 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); *Berry v. Halliday*, 50 V.I. 610, 617, 2008 WL 3928918, at *4 (D. V.I. Aug. 15, 2008).

Moreover, the Third Circuit has reversed district courts for failing to perform the "significant and required" step of considering whether the running of the statute of limitations, along with other factors, warrants a discretionary extension. See, *e.g., Cain v. Abraxas*, 209 F. App'x 94, 97 (3d Cir. 2006); *Veal v. United States*, 84 F. App'x 253, 256 (3d Cir. 2004); *Walker v. Pa. Dep't of Transp.*, 812 F. App'x 93, 94–95 (3d Cir. 2020) (reversing dismissal as an abuse of discretion where the district court failed to provide notice of the potential dismissal and "there [was] no indication that it appreciated the running of the statute of limitations, or any other considerations potentially favorable to [the plaintiff]").

B. THREE CIRCUITS, INCLUDING NOW THE SIXTH CIRCUIT, APPLY A LOWER STANDARD TO SUCH DISMISSALS THAT ARE NOMINALLY WITHOUT PREJUDICE

In contrast with the majority rule, a minority of circuits—including now the Sixth 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 bar refiling is merely one of several factors to be considered in dismissing a case without prejudice.

1. In the decision below, 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." App. 7a. Surveying the approaches of other circuits, the Sixth Circuit adopted a seven-part balancing test, under which the running of the statute of limitations is just one "factor" that district courts "should consider . . . when deciding whether to grant a discretionary extension of time in the absence of a finding of good cause." *Id.* 8a–9a. 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 10a–14a.[2] Accordingly, the Sixth Circuit upheld the dismissal of the Petitioners' suit. See *id.* at 14a–15a.

The Sixth Circuit also rejected the Petitioners' contention that, because their claims would 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 10a (citing *Thrasher*, 709 F.3d at 512). The Sixth Circuit instead "agree[d]" with "[p]ersuasive authority from other circuits" that "the running of the statute of limitations does not require a court to grant a discretionary extension." *Ibid.*

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[2] Notably, neither the Sixth Circuit nor the district court below explicitly considered whether Petitioners' claims would, in fact, be time-barred under the applicable statute of limitations in reaching their decisions. See App. 10a (noting only that Petitioners argued that their claims would be time-barred); App. 21a (noting that "refiling of the lawsuit *may* be time-barred") (emphasis added)).

2. The Seventh Circuit, like the Sixth 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 the District of New Jersey. *Id.* at 748. After the plaintiff failed to serve the defendants within ninety days, the district 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 did not effect service. *Ibid.* The court granted the motion to change venue, and the case was transferred. *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 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 without prejudice, would "essentially end the case" because the statute of limitations had expired. *Ibid.* The district court, though it was "[a]ware that dismissal without prejudice would effectively end the suit," declined to grant an extension and dismissed the case.

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 declined, 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*. (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]

3. Like the Sixth and Seventh Circuits, the D.C. Circuit in *Morrissey v. Mayorkas*, 17 F.4th 1150 (D.C. Cir. 2021),[4] declined to follow the majority rule. In *Morrisey*, two former federal employees brought separate employment discrimination suits, after

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[3] But see *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 341 (7th Cir. 1996) (explaining that it is "incumbent upon the district court to fully consider" and give "close attention" to the fact that dismissal will result in a "suit [that] cannot be resolved on the merits").

[4] A petition for writ of certiorari, seeking review of the *Morrisey* decision on substantially similar grounds as those raised in the instant petition, has been filed before this Court. See Pet. for Writ of Cert., *Morrissey v. Mayorkas*, No. 22-235 (U.S. filed Sept. 9, 2022).

exhausting their administrative remedies, but failed to correctly effect service on respondents within ninety days. *Id.* at 1154–56. In both cases, the district court dismissed his lawsuit on its own motion and refused their requests to reinstate their cases and to grant a short discretionary extension of time to remedy their service errors. *Ibid.* The dismissals in both cases were nominally without prejudice, but due to the length of administrative exhaustion, plaintiffs were time-barred from refiling their suits. *Ibid.*

In a consolidated appeal, a divided panel 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." *Id.* at 1157. 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." *Id.* at 1156. According to the panel majority, a district court's decision 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." *Id.* at 1157 (citation omitted). The panel majority recognized that the Fifth Circuit applies a contrary rule, but expressly "decline[d]" to adopt it. *Ibid.* 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. *Ibid.*

Judge Millett dissented, endorsing the majority rule. Under that rule, a dismissal that is 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 1170 (Millett, J., dissenting). Judge Millett 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 1173.

Further, Judge Millett noted that the panel majority's holding conflicted with rulings from the majority side of the circuit split: That case-ending dismissals must be subjected to a heightened standard. *Id*. at 1175–77 (discussing cases including *Mickles* and *Gocolay*). "Unlike the majority opinion," Judge Millett 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 1178.[5] Judge Millett noted that "[b]oth district courts' approaches . . . would have been rejected as abuses of discretion under the governing law in those other circuits." *Ibid*. In sum, Judge Millett concluded that

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[5] Judge Millett also observed that the majority's conclusion "that that the running of the statute of limitations does not require an extension of time"—a conclusion similarly made by the Sixth Circuit in the decision below, see App. —was "beside the point" as "[n]o one [was] arguing that an extension [was] automatically required." *Morrissey*, 17 F.4th at 1789 n.5. Instead, "the issue [was] what weight the effective prejudice of the dismissal should carry in the balancing of factors." *Id*.

the panel majority's decision put the D.C. Circuit "squarely at odds with the law of at least four other circuits." *Id*. at 1184.

C. Other Circuits Place Primary Importance on the Expiration of the Statute of Limitations in Considering a Discretionary Extension of Time to Perfect Service

While other circuits have not explicitly waded into the entrenched conflict between the circuits outlined above, they have placed primary importance on the operation of the statute of limitations in considering discretionary extensions of time to perfect service, in light of the case-ending ramifications. Specifically, the decisions of the Ninth, Eighth, and Second Circuits further counsel in favor of the majority rule.

1. The Ninth Circuit has described the situation in which plaintiffs "cannot re-file their action because the statute of limitations has run" as reflecting "the ultimate prejudice of being forever barred from pursuing their claims." *Lemoge v. United States*, 587 F.3d 1188, 1196 (9th Cir. 2009). In the Ninth Circuit, when a case is dismissed with effective prejudice under Rule 4(m), and there would be "no or only slight prejudice to the opposing party" if the case were reinstated, the district court must "consider, and give appropriate weight to," the "substantial prejudice" to the plaintiffs. *Id*. at 1195–96.

In *Lemoge*, the Ninth Circuit reversed an order of dismissal as an abuse of discretion because, although the district court "acknowledged" the plaintiffs' argument that they would be barred from refiling their action due to the statute of limitations, "the

district court neither considered prejudice to the [plaintiffs] in its analysis of prejudice, nor gave it any apparent weight." *Id*. at 1195. The Ninth Circuit held that, given the plaintiffs' inability to refile and their effort to comply with the court's orders, they were entitled to a discretionary extension. *Id*. at 1198; see also *United States v. 2,164 Watches, More or Less Bearing a Registered Trademark of Guess?, Inc.*, 366 F.3d 767, 773 (9th Cir. 2004) (observing that "prejudice might result" from a dismissal without prejudice for untimely service "if, for example, the statute of limitations had expired"); *Harper v. Wright*, 744 F. App'x 533, 534 (9th Cir. 2018) (holding that dismissal under Rule 4(m) was an abuse of discretion where, among other factors, the plaintiff's claims would be time-barred after dismissal); *Immerman v. U.S. Dep't of Agric. ex rel. Veneman*, 267 F. App'x 609, 610 (9th Cir. 2008) (concluding that the district court abused its discretion in dismissing the plaintiff's complaint when there had been "confusion regarding the service instructions" and "the statute of limitations had run").

2. The Eighth Circuit, too, has ruled that a district court must actually weigh the case-ending effect of a dismissal against other considerations before shutting the plaintiff out of court. Noting the "lethal effect" of a statute-of-limitations bar and the "judicial preference for adjudication on the merits, which goes to the fundamental fairness of the adjudicatory process," the Eighth Circuit has said that "the district court must weigh the effect on the party requesting the extension against the prejudice to the defendant." *Kurka v. Iowa Cnty.*, 628 F.3d 953, 956, 958–59 (8th Cir. 2010) (affirming dismissal given the "highly unusual" facts

of the case in which the plaintiff waited almost five months to effect service and had "lied to the court" about the defendant's notice of the suit); see also *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 887–88 (8th Cir. 1996) (affirming effective dismissal with prejudice only after the district court "carefully considered plaintiffs' arguments on the service issues," "gave plaintiffs repeated opportunities to correct their service insufficiencies[,]" and the record suggested that the delay was a "conscious strategic or tactical decision").

3. In the Second Circuit, when "dismissal without prejudice in combination with the statute of limitations would result in a dismissal *with* prejudice," the district court abuses its discretion in a case under Rule 4(m) if it fails to "weigh[] the impact that a dismissal or extension would have on the parties." *Zapata v. City of New York*, 502 F.3d 192, 197 (2d Cir. 2007) (emphasis in original); *id.* at 199 (affirming effective dismissal with prejudice because plaintiff "made no effort to effect service" within the service period and misrepresented that he did not know defendant's badge number and work location). In other words, the district court "must carefully consider the impact that the dismissal would have on the parties[,]" including the "serious consequences" of a statute-of-limitations bar on refiling. *Harper v. City of New York*, 424 F. App'x 36, 40 (2d Cir. 2011) (internal quotation marks and citation omitted) (affirming effective dismissal with prejudice, when plaintiff's counsel exhibited "a troubling pattern of carelessness," and referring counsel to grievance panel).

II. THE MINORITY VIEW UNDERMINES THE PURPOSES OF THE FCA AND THE RELATIONSHIP BETWEEN RELATORS AND THE GOVERNMENT

When applied to *qui tam* litigation, the case-ending consequences of the minority view adopted by the Sixth Circuit in the decision below are compounded. The Government often exercises it ability to extend the period under which an FCA complaint remains under seal, often resulting in multi-year extensions, as happened in this case. Under the minority view, a minor breach of the Rules—such as untimely service of process after the statute of limitations has expired—can jeopardize a relator's individual FCA retaliation claim. This puts the interests of such a relator, seeking to preserve a retaliation claim, at odds with that of the Government, seeking to extend the period to investigate the underlying fraud. Accordingly, the minority view only serves to undermine the purposes of the FCA and strains the relationship between relators and the Government.

1. According to Congress in its 1986 amendments to the FCA, the purpose of the FCA is to successfully combat "sophisticated and widespread fraud" that threatens the federal treasury and national security through "a coordinated effort of both the Government and the citizenry." S. Rep. No. 99-345, at 2–3 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5267–68. Congress's overall intent was "to encourage more private enforcement suits." *Id*. at 23–24. Additionally, Congress's inclusion of an anti-retaliation provision was designed to incentivize exposing fraud by "assur[ing] those who may be considering exposing

fraud that they are legally protected from retaliatory acts." *Id*. at 35.

Moreover, the FCA provides that the Government may, "for good cause shown," move to extend the sixty-day period when the complaint remains under seal. 31 U.S.C. § 3730(b)(2)–(3). Congress intended the sixty-day period "to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine" whether to dismiss or intervene. S. Rep. No. 99-345, at 24. As to the good cause requirement, Congress intended "that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene" and that "[t]he Government should not, in any way, be allowed to unnecessarily delay lifting of the seal[.]" *Id*. at 24–25. Nevertheless, federal courts give the Government wide latitude in granting extensions of the seal period. See, *e.g., United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006) (seal extended for eight years); *In re Pharm. Indus. Average Wholesale Price Litig.*, 498 F. Supp. 2d 389, 392 (D. Mass. 2007) (case under seal for nine years); *United States ex rel. Yannacopolous v. Gen. Dynamics*, 457 F. Supp. 2d 854, 857 (N.D. Ill. 2006) (seal extended for seven years); *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 349 F. Supp. 2d 170, 172 (D. Mass. 2004) (eight-year seal period); *United States ex rel. Sarmont v. Target Corp.*, No. 02 C 0815, 2003 WL 22389119, at *2 (N.D. Ill. Oct. 20, 2003) (case under seal for seven years while Government claimed to be pursuing criminal investigation).

2. The minority view only serves to undermine the purposes of the FCA because it creates a rift in the

"coordinated effort" between relators and the Government and thereby discourages "private enforcement suits." S. Rep. No. 99-345, at 2–3, 23–24. The minority view creates conflicting interests between relators, who wish to pursue individual FCA retaliation claims but face an elapsing statute of limitations, and the Government, who wishes to extend the sixty-day seal period to fully investigate the fraud. See *id*. at 24. For example, in the instant case, the Government's repeated extension of the seal period upon showing of good cause resulted in Petitioners case being time-barred due to a not "very long" delay in service. See App. 11a–12a, 20a. Had Petitioners known that the Government's nearly three-year extension of the seal period would jeopardize their retaliation claims, they likely would not have filed *qui tam* claims on behalf of the Government or, even worse, possibly would have opposed the extension of the seal period.

III. 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, the Sixth Circuit. The standard for determining the consequence of minor breaches of the Federal Rules of Civil Procedure—such as minor delays in service of process–should be uniform, especially when application of that standard has case-ending consequences due to the operation of the applicable statute of limitations. Litigants in federal court 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 so fundamental to the

procedure of the federal courts to the happenstance of where an action is brought. The sheer number of cases where this issue recurs confirms its importance. Dismissals for failure to meet the ninety-day service deadline under Rule 4(m) occur almost daily in the federal courts. Even if only a fraction of those cases implicates a statute-of-limitations bar, the issue occurs frequently. In 2021, district courts in the Fifth Circuit alone applied that Circuit's heightened standard for dismissals that were effectively with prejudice over a dozen times in Rule 4(m) cases.[6]

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[6] *Flores v. City of San Benito*, 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. Miss. 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 Cnty.*, 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*

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.

This issue was dispositive in the case below. There is no alternative route to reinstating Petitioners' case. The Sixth Circuit rejected the majority standard in its published decision, which now binds every district court within the Circuit and every subsequent Sixth Circuit panel. See *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) ("A published prior panel decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision." (internal quotation marks and citation omitted)). And its decision was outcome-determinative: Petitioners' case would not have been dismissed under the majority rule. Had a heightened standard been applied, the district court's order of dismissal would have constituted a clear abuse of discretion. Neither the Sixth Circuit nor the district court found any contumacious or prejudicial conduct on Petitioners' behalf. No one disputes that proper service could have been perfected in short order. And neither the dismissal order nor the Sixth Circuit opinion considered whether a lesser sanction might suffice. Had this case arisen in a majority circuit, it would have been heard on the merits.

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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).

The decision below also thoroughly considered the question presented. The Sixth Circuit surveyed the approaches employed by the other circuits, including those circuits on either side of the split. See App. 7a–9a. The Sixth Circuit expressed the view that the running of the statute of limitations is just one factor that district courts should consider when deciding whether to grant a discretionary extension of time in the absence of a finding of good cause and rejected the majority standard as espoused by the Fifth Circuit. *Id.* at 8a–10a.

Further deliberation in the lower courts will not aid this Court's consideration of these important questions regarding the correct application of the Federal Rules of Civil Procedure and the implications of Rule 4(m) on FCA litigation. 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,

SHEREEF H. AKEEL
Counsel of Record
ADAM S. AKEEL
HAYDEN E. PENDERGRASS
AKEEL & VALENTINE, PLC
888 W. Big Beaver Road
Suite 420
Troy, Michigan 48084
(248) 269-9595
shereef@akeelvalentine.com

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