No. 22-235

In the Supreme Court of the United States

PAUL S. MORRISSEY, ET AL., PETITIONERS

v.

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the district courts in these two consolidated cases acted within the scope of their discretion when they dismissed petitioners' respective complaints, without prejudice, for failure to effect service on the United States within the time limit prescribed by Rule 4 of the Federal Rules of Civil Procedure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) in these consolidated cases is reported at 17 F.4th 1150.

In *Morrissey* v. *Mayorkas*, the order of the district court dismissing the action (Pet. App. 77a-78a) is unreported. The court's later orders denying a motion to reinstate the case (Pet. App. 70a-76a) and denying reconsideration (Pet. App. 65a-69a) are reported at 333 F.R.D. 1 and available at 2020 WL 376512, respectively.

In *Stephenson* v. *Buttigieg*, the order of the district court dismissing the action (Pet. App. 91a) is unreported. The court's later order denying reconsideration (Pet. App. 80a-90a) is not published in the Federal Supplement but is available at 2020 WL 122984.

JURISDICTION

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

STATEMENT

1. "Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). Service of a summons to answer the complaint is "the procedure by which a court . . . asserts jurisdiction over the person of the party served." *Ibid.* (quoting *Mississippi Publ'g Corp.* v. *Murphree*, 326 U.S. 438, 444-445 (1946)). Accordingly, "[i]n the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant." *Ibid.*

"Today, service of process in a federal action is covered generally by Rule 4 of the Federal Rules of Civil Procedure." *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). Rule 4 provides for the issuance of a summons by the clerk of court, upon application of the plaintiff, identifying the court and the parties and notifying the defendant of the time "within which the defendant must appear and defend" or risk default. Fed. R. Civ. P. 4(a)(1)(D); see Fed. R. Civ. P. 4(a) and (b). The "plaintiff is responsible for having the summons" and a copy of the complaint served on the

named defendants "within the time allowed by Rule 4(m)." Fed. R. Civ. P. 4(c)(1).

Rule 4(m) generally requires service "within 90 days after the complaint is filed." Fed. R. Civ. P. 4(m). If service on a particular named defendant is not effected within that period, "the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." *Ibid.* If the plaintiff "shows good cause for the failure" to effect service within the 90-day time limit, Rule 4(m) states that the court "must extend the time for service for an appropriate period." *Ibid.*

Rule 4(i) provides special rules for "serving the United States and its agencies, corporations, officers, or employees." Fed. R. Civ. P. 4(i) (capitalization altered). As relevant here, when a plaintiff sues a federal officer in the officer's official capacity, the plaintiff "must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the * * * officer." Fed. R. Civ. P. 4(i)(2). And to serve the United States, Rule 4(i) requires the plaintiff to send a copy of the summons and complaint both to the U.S. Attorney's Office "for the district where the action is brought" and to the "Attorney General of the United States at Washington, D.C." Fed. R. Civ. P. 4(i)(1)(A)(i) and (B). The plaintiff is thus responsible for sending the summons and complaint to three distinct recipients: the federal officer, the local U.S. Attorney's Office, and the Attorney General. If the plaintiff fails to serve all the required persons but has at least served "either the United States attorney or the Attorney General," the court "must allow [the plaintiff] a reasonable time to cure its failure." Fed. R. Civ. P. 4(i)(4)(A).

2. These two consolidated cases arise from proceedings before different judges of the United States District Court for the District of Columbia. Petitioners each sued a federal officer in the officer's official capacity. Both actions were dismissed without prejudice under Rule 4(m) for failure to effect timely service.

a. Petitioner Paul Morrissey is a former employee of the Department of Homeland Security (DHS). Pet. App. 4a. On June 28, 2019, he filed a complaint naming the Acting Secretary of Homeland Security, in his official capacity, as the sole defendant. 19-cv-1956 Compl. ¶ 5. The complaint alleged that Morrissey had been constructively discharged from his employment with DHS in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* See 19-cv-1956 Compl. ¶¶ 38-40. The complaint further alleged that Morrissey had filed an age-discrimination complaint with the Equal Employment Opportunity Commission (EEOC) and that he had received a final agency decision on April 1, 2019, "providing for a ninety (90) day right to sue deadline for civil actions in federal court." *Id.* ¶ 7; see 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. 1614.407(a).

Under Rule 4(m), Morrissey was required to perfect service by September 26, 2019. On September 12, the district court issued an order noting that, as of that date, "the public docket reflect[ed] that [Morrissey] ha[d] yet to file proof of service." Pet. App. 79a. The court "direct[ed]" Morrissey's attention to Rule 4(m) and ordered him to "either cause process to be served upon the Defendant and file proof of service" by September 26, or "establish good cause for the failure to do so." *Ibid.* The court warned Morrissey that "[f]ailure to make such filings will result in dismissal of this case." *Ibid.* On September 30, after Morrissey failed to file

either proof of service or anything else, the court dismissed the case under Rule 4(m). *Id.* at 77a.

Later that day, Morrissey filed a motion seeking to "reinstate his Complaint." Pet. App. 70a. Morrissey contended that he had "serve[d] the Defendant before September 26" but that counsel had been hindered from filing proof of service for medical reasons. *Id.* at 71a. Morrissey attached to his motion "an affidavit and a printout from the U.S. Postal Service's tracking portal indicating that [DHS] was served on September 16." *Id.* at 4a-5a. Morrissey did not request additional time for service and did not claim to have good cause for failing to effect service within the 90-day deadline.

The district court denied the motion. Pet. App. 70a-78a. The court explained that, in an official-capacity suit, Rule 4(i) requires the plaintiff to serve both the named official and the United States itself, and that "[t]here is no proof Morrissey served either the U.S. Attorney or the Attorney General." *Id.* at 72a. Accordingly, the court found "that Morrissey [had] failed to" serve the United States "within the 90-day time limit." *Ibid.* The court determined that Morrissey was not entitled to additional time for service under Rule 4(m) because he had "not shown good cause for his failure to effect timely service." *Ibid.* The court also determined that Morrissey was not entitled to an extension under Rule 4(i)(4)(A) because that provision applies in official-capacity suits only if the plaintiff "has served either the United States attorney or the Attorney General," *ibid.* (citation and emphasis omitted), which Morrissey had failed to do. Finally, the court recognized that it had the authority to grant a "discretionary extension of time to complete service" but declined to do so. *Id.* at 73a. The court observed that, based on the allegations in the

complaint, the limitations period had "long since expired" and Morrissey might therefore be time-barred "from refiling his action" after dismissal. *Id.* at 74a. But the court found that other considerations weighed against any further extension, including that Morrissey was represented by counsel and that he had been specifically warned about his Rule 4 obligations two weeks before the deadline. *Ibid.*

Morrissey filed a motion for reconsideration, which the district court denied. Pet. App. 65a-69a.

b. Petitioner Kelley Stephenson is a former employee of the U.S. Department of Transportation (DOT). Pet. App. 6a. On July 29, 2019, Stephenson filed an official-capacity suit against the Secretary of Transportation alleging various forms of employment discrimination. *Ibid.* The complaint alleged that Stephenson had filed an administrative charge with the EEOC and that "this action has been commenced within ninety (90) days of Mr. Stephenson's receipt of the EEOC's decision." 19-cv-2256 Compl. ¶ 11; see *id.* ¶¶ 8-11.

Under Rule 4(m), Stephenson was required to perfect service by October 28, 2019.[1] On November 20, the district court issued a minute order stating that Rule 4 "requires service of both the summons and complaint to the agency, the U.S. Attorney's Office, and the Attorney General of the United States," and that the court had "received proof of service for the agency" but not the Attorney General or the U.S. Attorney's Office. Pet. App. 92a. The court directed Stephenson to serve the required officials and file proof of service "by no later

[1] The lower courts referred to the deadline for service as October 27, 2019, see Pet. App. 6a, 92a, but October 27 was a Sunday. The deadline was therefore automatically extended to the following Monday, October 28. See Fed. R. Civ. P. 6(a)(1)(C).

than December 4," and warned him that "[i]f service is not perfected by that time, the [c]ourt may dismiss the action without prejudice." *Ibid.*

On December 3, 2019, Stephenson "filed an affidavit affirming that service had been made on [DOT] via certified mail." Pet. App. 82a. Stephenson did not, however, "represent that he so much as tried to serve the United States Attorney or the Attorney General." *Ibid.* On December 5, the district court dismissed the complaint without prejudice. *Id.* at 91a. The court observed that Stephenson had "failed to properly effect service by October 27," had failed to "show[] good cause for this failure," and had "failed to comply" with the court's earlier order "specifically requiring him to file proof of service on the Attorney General * * * and the U.S. Attorney's Office." *Ibid.*

Stephenson filed a motion for reconsideration, which the district court denied. Pet. App. 80a-90a. Stephenson alleged that he had been unable to effect service on the Attorney General or the U.S. Attorney's Office because the "signature card," which the court understood to be a reference to a return-mail receipt, had been inadvertently misplaced. *Id.* at 86a. That explanation "ma[de] no sense" to the court. *Ibid.* The court observed that a return receipt "would only be relevant to filing proof of service," and the loss of such a receipt would not "prevent a plaintiff from effectuating service" and then filing an alternative method of proof, such as an affidavit. *Id.* at 87a. Stephenson also argued that the court should grant him additional time as a matter of discretion "because otherwise his claims will be time barred." *Id.* at 89a. In the court's view, however, "the time for that argument ha[d] passed," because Stephen-

son could have sought additional time on that basis before his case was dismissed. *Ibid.*

3. Petitioners appealed. The court of appeals consolidated the two cases for argument, see 20-5024 C.A. Order 1 (Nov. 19, 2020), and affirmed in a single opinion over a dissent by Judge Millett. Pet. App. 1a-64a.[2]

As relevant here, petitioners contended that the district courts had "effectively" dismissed their complaints "with prejudice" because petitioners were time-barred from refiling the same claims, and that each dismissal constituted an abuse of discretion because dismissal with prejudice was not warranted under the circumstances. Pet. App. 3a. The court of appeals rejected those contentions. *Ibid.* The court explained that, under its precedent, a dismissal without prejudice under Rule 4(m) is reviewed "for abuse of discretion." *Id.* at 9a (citing *Mann* v. *Castiel*, 681 F.3d 368, 375 (D.C. Cir. 2012)). Adhering to that precedent, the court "decline[d] to apply a heightened standard or cabin the district court's broad discretion," even when a Rule 4(m) dismissal results in the plaintiff being time-barred from refiling the same claims. *Id.* at 9a; see *id.* at 9a-10a.

The court of appeals also found no abuse of discretion on the particular facts of these cases, emphasizing that petitioners had violated specific orders bringing Rule 4 to their attention and had not demonstrated good cause. Pet. App. 11a-23a. The court explained that "whether the statute of limitations would bar the plaintiff from refiling his complaint" is one of the factors a

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[2] The government had not appeared or otherwise participated in the district-court proceedings. After receiving petitioners' opening briefs, the court of appeals ordered the government to enter an appearance in each appeal and to file a party brief. See 20-5024 C.A. Order 1 (July 8, 2020); 20-5042 C.A Order 1 (July 29, 2020).

district court may consider in determining whether to grant a discretionary extension of the deadline for service under Rule 4(m). *Id.* at 15a. But the court of appeals emphasized that any such extension remains discretionary, and the district court may take into account other countervailing factors, such as "whether the plaintiff had 'been diligent in correcting the service deficiencies.'" *Ibid.* (quoting *Mann*, 681 F.3d at 376-377). And here, in the court of appeals' view, the district courts "reasonably determined that * * * the other factors tipped the balance against an extension." *Id.* at 16a; see *id.* at 19a.

Judge Millett would have reversed. Pet. App. 25a-64a. She would have held that, when a district court is aware that a dismissal without prejudice under Rule 4(m) would result in the suit being time-barred, the court cannot dismiss the case without first "mak[ing] the same findings of repeated misconduct or dilatoriness that are required for a dismissal with prejudice" under Rule 41(b). *Id.* at 43a; see Fed. R. Civ. P. 41(b) (authorizing the district court to dismiss a case "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order").

Petitioners sought rehearing en banc, which the court of appeals denied without noted dissent. Pet. App. 93a-94a.

ARGUMENT

The court of appeals correctly determined that the district courts did not abuse their discretion by dismissing petitioners' complaints without prejudice for failing to effect timely service on the United States. Petitioners contend (Pet. 2) that a dismissal without prejudice under Rule 4(m) must satisfy the "the same heightened standard that applies to dismissals *with* prejudice when

the court knows that the dismissal will end the case forever," and that the D.C. Circuit's refusal to adopt such a heightened standard conflicts with the approach of other circuits. See Pet. 9-21. Those contentions do not warrant further review.

The text and structure of Rule 4 make clear that, outside of limited circumstances not present here, the decision whether to grant an extension of the service deadline is committed to the sound discretion of the district court. Although the court may take into account the expiration of the limitations period, the court is not obligated to grant an extension under Rule 4(m), nor is the court required to consider the standards applicable to a dismissal with prejudice under Rule 41(b). Petitioners also overstate the degree of conflict in the courts of appeals. The Fifth Circuit has adopted the approach to Rule 4(m) that petitioners advocate, but no other circuit has done so. That shallow conflict lacks practical significance and is not squarely implicated on the facts of these cases. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the district courts did not abuse their discretion in dismissing petitioners' complaints.

a. As petitioners do not dispute, the district courts correctly determined that each of them failed to effect service on the United States within the 90-day period prescribed by Rule 4. Pet. App. 77a, 91a. Under Rule 4(i), petitioners were required to send a summons and a copy of the complaint to the official-capacity defendant named in each case, to the Attorney General, and to the local U.S. Attorney's Office. See Fed. R. Civ. P. 4(i)(1) and (2). Petitioners failed to do so. Morrissey mailed a summons and a copy of his complaint to DHS, but he

never complied with Rule 4(i)'s separate requirements regarding the Attorney General and the U.S. Attorney's Office. Pet. App. 4a-5a. Stephenson likewise mailed a summons and a copy of his complaint to the relevant agency (DOT), but not the Attorney General or the U.S. Attorney's Office. *Id.* at 82a.

When a plaintiff fails to serve a defendant within the time allotted, the command of Rule 4(m) is clear. The district court "must dismiss the action without prejudice" or "order that service be made within a specified time." Fed. R. Civ. P. 4(m). In Morrissey's case, the court chose the first option. The court had previously issued an order directing Morrissey's attention to Rule 4(m), advising him of the impending deadline for filing proof of service, and inviting him to request an extension for good cause if needed. Pet. App. 79a. After the deadline passed with Morrisey filing nothing, the court dismissed the case without prejudice. *Id.* at 77a-78a. In Stephenson's case, the court granted an extension to perfect service and, in the same order, specifically advised Stephenson of the need to send the summons and complaint to the agency, the U.S. Attorney's Office, and the Attorney General. *Id.* at 92a. Stephenson failed to perfect service by the extended deadline, and the court dismissed the case. *Id.* at 91a.

The court of appeals correctly determined that those dismissals were "within the broad discretion of the district court[s]." Pet. App. 3a. The text of Rule 4 makes clear that any further extension was discretionary, not mandatory. Rule 4 specifies limited circumstances—not present here—in which the district court "must" afford a plaintiff more time for service. Fed. R. Civ. P. 4(i)(4) and (m). In particular, Rule 4(m) requires the district court to extend the deadline for service on a par-

ticular defendant if the plaintiff shows that his failure to serve that defendant was due to "good cause." Fed. R. Civ. P. 4(m). And in official-capacity suits against federal officers, Rule 4(i) requires the court to "allow [a plaintiff] a reasonable time to cure" a failure to serve any of the persons required to be served in such a suit, but only if the plaintiff has served at least "the United States attorney or the Attorney General." Fed. R. Civ. P. 4(i)(4)(A). By specifying the circumstances in which a district court must afford a plaintiff more time to perfect service, Rule 4 forecloses recognizing any other circumstances in which an extension is mandatory. See *Leatherman* v. *Tarrant Cnty. Naroctics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*.") (interpreting Fed. R. Civ. P. 9(b)).[3]

Petitioners were not entitled to an extension under any of the mandatory-extension provisions. Petitioners never asked for a good-cause extension, let alone made the requisite showing, and petitioners served neither the Attorney General nor the U.S. Attorney's Office (despite having Rule 4 specifically brought to their attention before dismissal). Accordingly, the district court in each case had discretion to dismiss without prejudice or to grant an extension—the two options expressly prescribed by Rule 4(m) when a plaintiff misses the service deadline without good cause. The court of

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[3] Rule 4(i) also provides for a mandatory extension when a plaintiff sues a federal officer in the officer's individual capacity and properly serves the officer, but fails to serve the United States. See Fed. R. Civ. P. 4(i)(4)(B). That provision is not directly implicated in these official-capacity suits, but it provides further support for the textual inference that any other extensions are necessarily committed to the discretion of the district court.

appeals, in turn, properly reviewed the district courts' discretionary judgment calls for abuse of discretion and found no such abuse on the particular facts of these cases. See Pet. App. 11a-23a.

b. Petitioners contend (Pet. 21-24) that a district court lacks discretion to dismiss a case under Rule 4(m) when the court knows that the statute of limitations has expired, unless the court first makes the findings that would be required for a dismissal with prejudice under Rule 41(b). Petitioners contend that a dismissal under those circumstances is "effectively with prejudice," Pet. 6 (citations omitted), and therefore may occur only under Rule 41(b) rather than Rule 4(m).

The court of appeals correctly rejected petitioners' request "to apply a heightened standard" for Rule 4(m) dismissals under those circumstances. Pet. App. 9a. Petitioners' request is at odds with the structure of the Federal Rules. Rule 4(m) provides the district court with express authority to "dismiss the action without prejudice" for failure to effect timely service. Fed. R. Civ. P. 4(m). Nothing in that provision suggests that the court must first consider whether the claims in the complaint would be timely if refiled after dismissal. Nor does Rule 4(m) cross-reference or otherwise incorporate the separate standards applicable to a dismissal with prejudice under Rule 41(b). Rule 41(b) is a more general font of authority to dismiss a case, with or without prejudice, at any stage of the proceedings for "fail[ure] to prosecute or to comply with the[] rules or a court order." Fed. R. Civ. P. 41(b). Under the interpretive principle that the "specific governs the general," *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted), a court's specific authority to dismiss under Rule 4(m) should not be

read to be constrained by the more general standards of Rule 41.

In rejecting petitioners' approach, the court of appeals adhered to its precedent under which the limitations period is one factor for the district court to consider in exercising its discretion under Rule 4(m). See Pet. App. 15a (discussing *Mann* v. *Castiel*, 681 F.3d 368, 376-377 (D.C. Cir. 2012)). A district court may also properly consider other factors, including whether the plaintiff is represented by counsel, whether the court warned the plaintiff about Rule 4(m), and whether the plaintiff diligently worked to correct any errors. See *Mann*, 681 F.3d at 376. A district court thus will take into account the limitations period in an appropriate case, but the court is not required to apply a heightened standard whenever the limitations period appears to have run.

Treating the limitations period as a relevant consideration, but not one that fundamentally alters the scope of the district court's discretion, is consistent with the historical development of Rule 4. Subdivision (m) was added to the rule in 1993. See Fed. R. Civ. P. 4 advisory committee's note (1993 Amendments). Before those amendments, Rule 4 did not "explicitly" require that an extension be granted upon a showing of good cause. *Ibid.*[4] The 1993 amendments reworded the provision to its current form, in which Rule 4(m) obligates a district court to grant an extension if the plaintiff shows good cause for failure to serve a defendant within the 90-day

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[4] The prior version of Rule 4 stated that the case would be dismissed if the plaintiff failed to effect timely service without good cause, but it did not expressly require the district court to grant an extension if the plaintiff demonstrated good cause. See Fed. R. Civ. P. 4(j) (1988).

period. The drafters of the amendments were well aware that a dismissal without prejudice under Rule 4(m) might result in the plaintiff's claims being time-barred. Indeed, the advisory committee notes to the 1993 amendment discuss that precise scenario and state that the limitations period "may" justify relief from a party's failure to meet the service deadline, "even if there is no good cause shown." *Ibid.* But the drafters declined to require an extension in those circumstances, or to condition the district court's authority on first making the findings that would be required for dismissal with prejudice under Rule 41(b).

Petitioners' approach is also unsound as a matter of first principles. Petitioners would constrain a district court's discretion to dismiss without prejudice under Rule 4(m) only when the court "knows that the dismissal will end the case forever." Pet. 2; see, *e.g.*, Pet. 7, 16, 23. But petitioners identify no persuasive reason that the scope of the court's discretion should turn on the court's awareness of the limitations period. Petitioners' rule would operate arbitrarily, turning in some cases on the happenstance of whether the court identifies a limitations problem that the plaintiff has failed to bring to the court's attention. Petitioners' rule would also be an unwarranted imposition on a district court's "power * * * to control the disposition of the causes on its docket with economy of time and effort." *Landis* v. *North Am. Co.*, 299 U.S. 248, 254 (1936). For example, determining whether a statute of limitations would bar refiling the same claims after dismissal could be a complex undertaking, particularly where the limitations period only begins to run upon accrual of the claim. Those complexities would only increase in suits involving multiple claims with distinct limitations periods.

Requiring district courts to make additional findings before dismissing without prejudice under Rule 4(m) in an arbitrary and potentially difficult-to-identify subset of cases involving an expired limitations period would not "serve the interests of justice." Pet. 9. To the contrary, a dismissal without prejudice for failure to effect service merely places the plaintiff "in the same position as if the action had never been filed," *Mann*, 681 F.3d at 376 (citation omitted), and placing the plaintiff in that position does not work any injustice. A plaintiff who files a complaint but fails to effect service has failed to take a step necessary for the court to exercise jurisdiction over the named defendant; in that sense, the litigation was never properly commenced. See p. 2, *supra*. Treating the plaintiff as though the unserved complaint had never been filed is also consistent with the purpose of a limitations period, which is "designed to encourage plaintiffs 'to pursue diligent prosecution of known claims.'" *California Pub. Emps.' Retirement Sys.* v. *ANZ Secs., Inc.*, 137 S. Ct. 2042, 2049 (2017) (citation omitted). If the plaintiff has good cause for failing to serve the complaint within the time allotted, the district court is required to grant an extension. Fed. R. Civ. P. 4(m). But if the plaintiff fails to comply with the rule, fails to show good cause, and fails to persuade the court that a discretionary extension is warranted, the plaintiff has no legitimate claim to being entitled to more time as a matter of fairness or equity.

2. Petitioners contend that the decision below implicates a circuit conflict on the standard for granting "case-ending" dismissals without prejudice. Pet. 9; see Pet. 9-21. But petitioners overstate the degree of any conflict. As the D.C. Circuit recognized below, only the Fifth Circuit has squarely adopted the approach to Rule

4(m) that petitioners favor. Pet. App. 10a n.3. That shallow conflict does not warrant further review.

a. In *Pond* v. *Braniff Airways, Inc.*, 453 F.2d 347 (1972), the Fifth Circuit held that a district court abused its discretion in dismissing a case without prejudice for failure to prosecute, after the plaintiff's counsel inadvertently failed to satisfy several pre-trial deadlines but nonetheless appeared on the scheduled trial date. *Id.* at 348-349. The plaintiff urged that the "sanction imposed was too severe," in part because she was time-barred from refiling the same claim. *Id.* at 349. The court of appeals agreed, reasoning that the dismissal was "fatally prejudicial" to the plaintiff's claims, notwithstanding that the dismissal was denominated as being without prejudice. *Ibid.* The court also found that the circumstances of the case did not warrant the "drastic sanction" of "dismissal with prejudice." *Ibid.* The court has subsequently applied the same logic in the context of other dismissals, including under Rule 4(m). See *Boazman* v. *Economic Lab., Inc.*, 537 F.2d 210, 213 (5th Cir. 1976) ("[W]here the dismissal is without prejudice, but the applicable statute of limitations probably bars further litigation, the standard of review of the District Court's dismissal should be the same as is used when reviewing a dismissal with prejudice."); see also *Millan* v. *USAA Gen. Indem. Co.*, 546 F.3d 321, 326 (5th Cir. 2008) (citing additional cases).

b. No other court of appeals has adopted a similar approach in the context of Rule 4(m). The decisions invoked by petitioner (Pet. 12-16) from the Third, Tenth, and Eleventh Circuits did not address Rule 4(m) and therefore do not establish any conflict with the decision below. For example, in *Donnelly* v. *Johns-Manville Sales Corp.*, 677 F.2d 339 (1982), the Third Circuit re-

versed the district court's dismissal without prejudice under Rule 41(b). The complaint was first filed in a district court in Texas before being transferred to one in New Jersey. *Id.* at 340-341. After the plaintiff's new local counsel missed a court-ordered deadline to appear, the transferee court dismissed the case without prejudice. *Id.* at 340. The statute of limitations would have barred refiling. *Ibid.* In reviewing the dismissal, the Third Circuit applied the standard typically used for Rule 41(b) dismissals with prejudice. *Id.* at 342. And because the plaintiff's counsel, "while dilatory, did not engage in contumacious conduct," the court vacated the order of dismissal and remanded. *Id.* at 343.

In *Gocolay* v. *New Mexico Federal Savings & Loan Ass'n*, 968 F.2d 1017 (1992), the Tenth Circuit reversed a dismissal under Rule 37 for failure to obey a discovery order. *Id.* at 1020. The plaintiff in that case suffered from chronic heart disease and repeatedly rescheduled his deposition because of his health needs. *Id.* at 1019. After two years of other discovery, the district court dismissed the case without prejudice. *Id.* at 1020. Recognizing that the statute of limitations would bar refiling, the Tenth Circuit applied a heightened standard allowing dismissal "only when a party has willfully or in bad faith disobeyed a discovery order." *Ibid.* (citations omitted). And the court concluded on the facts of that case that dismissal as a sanction "for debilitating health problems beyond [the plaintiff's] control was a clear abuse of discretion." *Id.* at 1022.

In *Mickles* v. *Country Club Inc.*, 887 F.3d 1270 (2018), the Eleventh Circuit reviewed the dismissal of claims by several plaintiffs whom the district court had determined "were never properly added as party plaintiffs to the collective action," even though they had par-

ticipated in the case for nearly two years. *Id.* at 1275. The Eleventh Circuit described the dismissal as being "tantamount to a dismissal with prejudice" because the statute of limitations would have barred refiling the same claims. *Id.* at 1280 (citation omitted). The court also stated that it would affirm such a dismissal only under the standards applicable to dismissals with prejudice under Rule 41(b), *i.e.*, only "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.* Because neither condition was present, the Eleventh Circuit vacated the dismissal. *Id.* at 1280-1281.

Those three decisions did not address Rule 4(m) and do not commit the Third, Tenth, or Eleventh Circuits to adopting a similar approach to Rule 4(m). 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). As explained above, the text, structure, and history of Rule 4(m)—considerations not at issue in *Donnelly*, *Gocolay*, and *Mickles*—counsel against limiting a district court's discretion to dismiss without prejudice in cases involving claims that would otherwise be time-barred. See pp. 10-16, *supra*. And a plaintiff who fails to effect service within 90 days of filing the complaint and fails to establish good cause is in a materially different position than a plaintiff who has spent years diligently pursuing litigation only to have the case dismissed because of, *e.g.*, personal health problems. Cf. *Gocolay*, 968 F.2d at 1019-1020.

Petitioners' reliance on decisions from the Third and Tenth Circuits is also misplaced because those courts have elsewhere indicated that—like the D.C. Circuit—

they would treat the limitations period as merely one factor for the district court to consider in exercising its discretion under Rule 4(m). Shortly after the 1993 amendments to Rule 4, both circuits addressed the scope of a district court's discretion to grant an extension of the service deadline absent a showing of good cause. In *Petrucelli* v. *Bohringer & Ratzinger, GmbH*, 46 F.3d 1298 (1995), the Third Circuit remanded a case for the district court to determine whether to grant a discretionary extension under the then-new Rule 4(m), taking into account the expiration of the limitations period. In so ruling, the court "emphasize[d] that the running of the statute of limitations does not require the district court to extend time for service of process." *Id.* at 1306. The court explained that "a district court may in its discretion still dismiss the case, even after considering that the statute of limitations has run and the refiling of an action is barred." *Ibid.* The Tenth Circuit similarly directed district courts to consider the limitations period as one relevant factor "in deciding whether to exercise [their] discretion under Rule 4(m)." *Espinoza* v. *United States*, 52 F.3d 838, 842 (1995).

Five other circuits also treat the limitations period as one factor for a district court to consider under Rule 4(m). Indeed, the Second, Sixth, Seventh, Eighth, and Ninth Circuits all describe the relevant standards in this context in nearly identical terms to the D.C. Circuit. Compare Pet. App. 15a (quoting *Mann*, 681 F.3d at 376-377), with *Zapata* v. *City of New York*, 502 F.3d 192, 195-197 (2d Cir. 2007), cert. denied, 552 U.S. 1243 (2008); *United States* v. *Oakland Physicians Med. Ctr., LLC*, 44 F.4th 565, 569 (6th Cir. 2022); *Jones* v. *Ramos*, 12 F.4th 745, 749 (7th Cir. 2021); *Kurka* v. *Iowa Cnty.*, 628 F.3d 953, 958 (8th Cir. 2010); *Lemoge* v. *United*

States, 587 F.3d 1188, 1195-1198 (9th Cir. 2009). All of those courts of appeals review a Rule 4(m) dismissal under ordinary abuse-of-discretion principles. See, *e.g.*, *Kurka*, 628 F.3d at 958-959 (affirming Rule 4(m) dismissal, despite limitations bar, where the district court determined that the plaintiff failed to act diligently after discovering failure to serve defendant).

c. The shallow conflict resulting from the Fifth Circuit's outlier decisions does not warrant further review. As the D.C. Circuit observed below, the Fifth Circuit's decision in *Pond* v. *Braniff Airways*, *supra*, "has been on the books for 50 years * * * without being adopted by any other" court of appeals in the context of Rule 4(m). Pet. App. 10a n.3. The decision below, in which the court of appeals simply adhered to the majority approach, provides no sound reason for this Court to take up a conflict that has existed for decades.

Petitioners also overstate (Pet. 21-23) the practical significance of their disagreement with the D.C. Circuit. By its plain terms, Rule 4(m) already requires the district court to grant an extension of the service deadline whenever a plaintiff can establish "good cause" for a failure to meet the default deadline. Fed. R. Civ. P. 4(m). Any dispute about the proper scope of the district court's discretion to dismiss under Rule 4(m) therefore arises only for those plaintiffs who fail to meet the deadline *without* good cause, and who otherwise fail to qualify for the mandatory extensions available under Rule 4(i)(4) in suits against federal officers or agencies. And within that subset of plaintiffs, petitioners' approach would apply only when the claims in the complaint would be time-barred if refiled after dismissal and only when the district court is aware of that fact. Moreover, even under petitioners' proposed approach, a district

court could still dismiss the complaint after the limitations period has expired, as long as the court makes the requisite findings under Rule 41(b).

3. In any event, these cases would be unsuitable vehicles in which to address petitioners' contention that different standards should apply to a Rule 4(m) dismissal when the district court "knows that the dismissal will end the case forever." Pet. 2. Petitioners fail to show that the district courts in fact had that knowledge when the courts applied Rule 4(m). Thus, petitioners fail to show that adopting their position would alter the results below.

Petitioners' complaints both recited that their claims were brought after they received 90-day right-to-sue letters from the EEOC. See pp. 4, 6, *supra*. But petitioners had not taken any affirmative steps to bring the limitations period to the district courts' attention, and the orders of dismissal in each case do not suggest that the courts were aware of any limitations issue in dismissing the cases. Pet. App. 77a, 91a. In Morrissey's case, the district court raised the statute of limitations, apparently of its own accord, only in the course of denying Morrisey's post-dismissal motion to reinstate the action. See *id.* at 74a (observing that Morrissey's complaint "alludes to a limitations period that has long since expired"). And in Stephenson's case, Stephenson apprised the court of the limitations problem only in his post-dismissal motion for reconsideration. *Id.* at 89a. In each case, petitioners had "ample opportunity to move for an extension" before dismissal if petitioners anticipated being unable to perfect service by the deadline and were concerned about the limitations period, but they failed to do so. *Ibid.*

The court of appeals determined that it would be "particularly inappropriate" in these cases to adopt "the Fifth Circuit's heightened standard," given that petitioners first advocated for that standard only in motions filed after dismissal. Pet. App. 10a n.3. Motions for reconsideration "are not vehicles to make arguments that could have been presented earlier." *Id.* at 89a. This Court should likewise decline petitioners' invitation to address a question concerning the scope of a district court's discretion to dismiss under Rule 4(m) in the face of a time bar, where petitioners themselves took no steps to bring that issue to the district courts' attention before dismissal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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