No. 99-694

In the Supreme Court of the United States

FREDDIE C. JOHNSON, SR.,
DBA F.C. JOHNSON CONSTRUCTION COMPANY,
PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed, as within the discretionary authority of the district court, the district court's grant of a 30-day extension of time for service of the complaint.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 10-13) is unpublished, but the decision is noted at 182 F.3d 914 (Table). The memorandum opinion of the district court (Pet. App. 1-9) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1999, and a timely petition for rehearing was denied on July 29, 1999. Pet. App. 14. The petition for a writ of certiorari was filed on October 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Freddie Johnson owned and operated an unincorporated construction company. Pet. App. 1-2. Following an inspection of petitioner's workplace, the Secretary of Labor issued two citations on June 16, 1994, alleging violations of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, which petitioner failed to contest. Pet. App. 2. On February 14, 1995, the Occupational Safety and Health Review Commission (OSHRC) granted the Secretary's motion for a default judgment and entered an order affirming a total penalty of $7,350. *Ibid.* Petitioner appealed to the Fifth Circuit, which denied the appeal. 78 F.3d 582 (1996) (Table). This Court denied petitioner's subsequent petition for a writ certiorari. 519 U.S. 981 (1996).

After petitioner failed to pay the penalty assessed in the citations, the Secretary filed this action in district court to recover the penalty. Pet. App. 2. Petitioner counterclaimed, alleging a number of errors in the underlying OSHRC proceeding, and moved to dismiss the Secretary's complaint on the same basis. He additionally claimed that the Secretary had not properly served him with the complaint, and that the court lacked jurisdiction over the matter. *Id.* at 3-5. The Secretary moved to dismiss Johnson's counterclaim, and moved for summary judgment on her complaint seeking enforcement of the penalty. *Id.* at 5-8.

2. The district court denied petitioner's motion to dismiss the enforcement action, dismissed petitioner's counterclaim, and granted the Secretary's motion for summary judgment. Pet. App. 8. The court first addressed petitioner's argument that the case should be dismissed because the Secretary did not serve him with

the complaint and summons within 120 days of the filing of the complaint, as provided in Rule 4(m) of the Federal Rules of Civil Procedure. *Id.* at 3-4. The court noted that petitioner was served on July 26, 1997, 143 days after the complaint was filed. *Id.* at 4. Although the Secretary had pointed out that she had served petitioner with a request for waiver of service on March 10, 1997, the court held that service of the notice and waiver forms do not establish "good cause" for failure to meet the 120-day time limit. *Id.* at 3-4. Nevertheless, "[i]n accordance with its discretionary powers, the court [found] that the time period for service of process should be extended 30 days to August 2, 1997." *Id.* at 4.

The district court then addressed and rejected petitioner's remaining arguments for dismissal. First, the court held that it had jurisdiction over the Secretary's action to enforce the penalty pursuant to 29 U.S.C. 666(1). Pet. App. 4-5. The court further held that petitioner's arguments concerning the merits of the underlying OSHRC proceeding were barred by res judicata and collateral estoppel. *Id.* at 5. The court next dismissed petitioner's counterclaim, concluding that it did not involve a proper subject matter for a counterclaim under Rule 13(a), Fed. R. Civ. P., because it was based on the underlying OSHRC proceeding, and not on the enforcement of the penalty. Pet. App. 6. Finally, the court granted the Secretary's motion for summary judgment. *Id.* at 8.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 10-13. First, noting that there is no jurisdictional amount in OSH Act enforcement cases, the court rejected as frivolous petitioner's argument that the district court lacked jurisdiction over the case because the amount in controversy was

less than $50,000. *Id.* at 11. The court also rejected as frivolous petitioner's argument that, absent a finding of good cause, the district court lacked the discretionary authority to extend the time for service. *Ibid.* (citing Fed. R. Civ. P. 4(m), the Advisory Committee's Notes to Rule 4, and *Thompson* v. *Brown*, 91 F.3d 20, 21 (5th Cir. 1996). The court rejected petitioner's remaining arguments as waived, and dismissed the appeal as "without arguable merit." Pet. App. 11-12.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. While the decision in this case conflicts with a decision of the Fourth Circuit, the continued validity of the Fourth Circuit decision is questionable in light of this Court's decision in *Henderson* v. *United States*, 517 U.S. 654 (1996), as the Fourth Circuit itself has recognized. Moreover, the remaining circuits that have addressed the issue are all in agreement with the approach taken by the Fifth Circuit in this case. Accordingly, further review is unwarranted.

1. Rule 4(m), which was added to the Federal Rules of Civil Procedure in December 1993, states:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant *or direct that service be effected within a specified time*; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m) (emphasis added). This rule replaced former Rule 4(j), which provided that if service was not accomplished within 120 days of filing the complaint, "and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant." Fed. R. Civ. P. 4(j), 28 U.S.C. app. (1988). Thus, by its terms, the current rule departs from its predecessor by granting district courts the discretion to extend the time for service, irrespective of good cause, while requiring courts to extend the time if good cause is shown. The Advisory Committee's Notes to Rule 4 confirm this reading of the current rule:

> The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown.

Fed. R. Civ. P. 4, Advisory Committee Notes.

2. Despite the clarity of the current rule, petitioner argues that the district court lacked the authority under Rule 4(m) to extend the time for service, and was required to dismiss the case, because the Secretary failed to show good cause for her failure to serve petitioner within 120 days of the filing of the complaint. Pet. 8. In this regard, petitioner claims, without explanation, that the court of appeals' affirmance of the district court's decision extending the time for service in this case conflicts with this Court's decision in *Henderson* v. *United States*, *supra*. In fact, however, the *Henderson* decision—which held that the Suits in Admiralty Act's requirement that complaints be served

"forthwith" had been superseded by "Rule 4's extendable 120-day time prescription," 517 U.S. at 663–-is entirely consistent with the Fifth Circuit's ruling in this case. As the Court in *Henderson* explained, whereas under the former Rule 4(j) district courts were authorized to extend the 120-day period only upon a showing of good cause, under Rule 4(m) "courts have been accorded discretion to enlarge the 120-day period 'even if there is no good cause shown.'" *Id.* at 662 (quoting Advisory Committee's Notes to Fed. R. Civ. P. 4).

Petitioner's contention (Pet. 8-9) that the Fifth Circuit's ruling conflicts with decisions of the First, Second, Third, Fifth, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits is likewise meritless. In fact, most of the decisions that petitioner cites were based on former Rule 4(j), which was effective until December 1, 1993, and which indeed only allowed extensions for good cause. See *McDonald* v. *United States*, 898 F.2d 466, 467-468 (5th Cir. 1990); *Smith-Bey* v. *Cripe*, 852 F.2d 592, 593 (D.C. Cir. 1988); *United States* v. *Gluklick*, 801 F.2d 834, 837 (6th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *Wei* v. *Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985); *Morse* v. *Elmira Country Club*, 752 F.2d 35, 41 (2d Cir. 1984); *Dean* v. *KIS Corp.*, 121 F.R.D. 74, 77 (N.D. Ill. 1988); *Bernard* v. *Strang Air, Inc.*, 109 F.R.D. 336, 337 (D. Neb. 1985); *Madden* v. *Cleland*, 105 F.R.D. 520, 526 (N.D. Ga. 1985); see also *Media Duplication Servs., Ltd.* v. *HDG Software, Inc.*, 928 F.2d 1228, 1233-1234 (1st Cir. 1991) (discussing Fed. R. Civ. P. 4(c)(2)(C)(i) and (ii)). Moreover, far from supporting his contention that the district court lacked the discretion to grant an extension in this case, two of the cases petitioner cites hold that Rule 4(m) "broadens the district court's discretion by allowing it to extend

the time for service *even when the plaintiff has not shown good cause*." *Espinoza* v. *United States*, 52 F.3d 838, 840-841 (10th Cir. 1995) (emphasis added), cert. denied, 520 U.S. 1176 (1997); *Petrucelli* v. *Bohringer & Ratzinger, GMBH*, 46 F.3d 1298, 1305 (3d Cir. 1995). Furthermore, the *Espinoza* and *Petrucelli* decisions are, with one exception, in accord with the conclusion of every court of appeals that has ruled on the matter. See *Troxell* v. *Fedders of North Am., Inc.*, 160 F.3d 381, 383 (7th Cir. 1998); *De Tie* v. *Orange County*, 152 F.3d 1109, 1111 n.5 (9th Cir. 1998); *Thompson* v. *Brown*, 91 F.3d 20, 21 (5th Cir. 1996); *Adams* v. *AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1996).

The Fourth Circuit, alone, has taken the view that Rule 4(m), like its predecessor, requires a showing of good cause for an extension. *Mendez* v. *Elliot*, 45 F.3d 75, 78 (1995) ("if the complaint is not served within 120 days after it is filed, the complaint must be dismissed absent a showing of good cause"). The *Mendez* court based its conclusion on the premise that when the Federal Rules of Civil Procedure were revised in 1993, "Rule 4(j) was edited without a change in substance and renumbered as Rule 4(m)." *Ibid.* The court came to that conclusion, however, without discussing the text of Rule 4(m) or the Advisory Committee's Notes to that rule. For this reason, and in light of this Court's contrary conclusion concerning the meaning of Rule 4(m) in *Henderson*, the continued validity of the Fourth Circuit's decision in *Mendez* is in substantial doubt. Indeed, on these bases, and in view of "the other circuit courts' unanimous rejection of the *Mendez* court's position," one district court in the Fourth Circuit has "conclude[d] that *Mendez* is no longer good law and that, if given the opportunity, the Fourth Circuit perforce would adopt the interpretation of Rule 4(m)

held by the Supreme Court and the other circuit courts." *Hammad* v. *Tate Access Floors, Inc.*, 31 F. Supp. 2d 524, 527-528 (D. Md. 1999). The Fourth Circuit has already demonstrated an inclination to take the course predicted in *Hammad*, albeit in two unpublished per curiam decisions.

In the first, the court concluded that, despite the rule of *Mendez*, "the district court, in its discretion, could have extended the time for proper service of process, notwithstanding its apparent belief to the contrary." *Scruggs* v. *Spartanburg Reg'l Med. Ctr.*, No. 98-2364, 1999 WL 957698, at *2 (4th Cir. Oct. 19, 1999) (unpublished). The *Scruggs* court based that conclusion on this Court's observation in *Henderson* that Rule 4(m) allows courts to extend the time for service even absent a showing of good cause. *Ibid.* (citing *Henderson*, 517 U.S. at 658 n.5). Although the Fourth Circuit correctly noted that that observation was not an actual holding in *Henderson* itself, the court of appeals viewed it "as persuasive as to the meaning of Rule 4(m)." *Ibid.* Nevertheless, because it saw the district court's error as essentially harmless, the Fourth Circuit declined to remand for the district court to apply the "rule suggested by the Court in *Henderson*," and indeed questioned "whether we would even have the authority, as a panel, to overrule our court's precedent in *Mendez*, given that the Supreme Court's statement in *Henderson* as to the meaning of Rule 4(m) was dicta." *Id.* at *2 & n.2.

In the second case, the Fourth Circuit, citing *Henderson*, stated that "[e]ven if a plaintiff does not establish good cause [for failing to effect service within the 120-day period], the district court may in its discretion grant an extension of time for service." *Giacomo-Tano* v. *Levine*, No. 98-2060, 1999 WL 976481, at *1 (Oct. 27,

1999) (unpublished). The court, however, neither mentioned *Mendez*, nor remanded for application of the rule of *Henderson*, despite the fact that the district court apparently dismissed solely on the basis that "good cause" was not shown. See *id.* at *2. Thus, neither *Scruggs* nor *Giacomo-Tano* purports to overrule *Mendez* or apply the rule of *Henderson*, and indeed, as unpublished decisions, neither case is binding precedent in the Fourth Circuit. Nevertheless, those cases cast strong doubt on the continued validity of the *Mendez* rule in the Fourth Circuit, the only circuit court decision in conflict with the decision in this case and the unanimous view of the other circuits that have addressed the issue. There is no occasion for this Court to intervene before the Fourth Circuit is given a full opportunity to determine—in a published decision, and considering the issue en banc if necessary—whether to continue to follow *Mendez* in light of *Henderson*. Accordingly, further review in this case to resolve the asserted conflict is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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