No. _____

In the
Supreme Court of the United States

KIMBERLY D. COLLINS,
Petitioner,
v.

GWENDOLYN THORNTON, PH.D.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD F. HAWKINS, III
Counsel of Record
THE HAWKINS LAW FIRM, PC
2222 Monument Ave.
Richmond, VA 23220
(804) 308-3040 (telephone)
(804) 308-3132 (fax)
rhawkins@thehawkinslawfirm.net

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Some five years ago, in *Chen v. Mayor & City Council of Baltimore, Md.*, 135 S. Ct. 475 (2014) (mem.), this Court recognized at least a 7-1 circuit split -- with the Fourth Circuit standing as the lone outlying circuit -- and granted certiorari on the question of whether a district court has discretion under Federal Rule of Civil Procedure 4(m) to extend the time for service of process absent good cause. The Court was unable to resolve this split, however, because the self-represented petitioner missed a briefing deadline. *Id.* 135 S. Ct. 939 (2015). Since that time, the split (which is actually a 9-1 split) has not only remained in place, but the Fourth Circuit, despite its chances, has refused to remove its outlier status.

The questions presented are thus:

1. Whether, under Federal Rule of Civil Procedure 4(m), a district court has discretion to extend the time for service of process absent a showing of good cause, as the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have held, or whether the district court lacks such discretion, as the Fourth Circuit has held.

2. Whether such discretion under Rule 4(m) is constrained where, as here, the statute of limitations will bar any re-filed claim, such that a district court may only dismiss a complaint for untimely service where there is a clear record of delay or contumacious conduct by the plaintiff.

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellant below, is Kimberly D. Collins.

Respondent, defendant-appellee below, is Gwendolyn Thornton, Ph.D.

STATEMENT OF RELATED PROCEEDINGS

- *Collins v. Thornton*, No. 18-1995 (4th Cir.) (opinion issued and judgment entered August 13, 2018; petition for panel rehearing and rehearing en banc denied September 16, 2019; mandate issued September 24, 2019).
- *Collins v. Thornton*, 3:18cv210-HEH (E.D. Va.) (order denying motion for extension of time to complete service and dismissing case entered June 27, 2018; order denying Rule 59 motion to alter judgment entered July 27, 2018).

There are no additional proceedings in any court that are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kimberly D. Collins respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion is unpublished but reproduced at App. at 1-9. Its order denying panel rehearing and rehearing en banc is unreported but reproduced at App. 23-24. The District Court's order denying Collins' pre-deadline motion for an extension of time to complete service is unreported but reproduced at App. at 19-22. The District Court's order denying Collins' Rule 59 motion regarding its dismissal decision is unreported but reproduced at App. at 10-18.

JURISDICTION

The Fourth Circuit denied Collins' timely petition for panel rehearing and rehearing en banc on September 16, 2019. App. at 23. Then, on December 9, 2019, the Chief Justice granted Collins an extension to January 15, 2020 to file this petition for writ of certiorari. Dkt. No. 19A633. This Petition is timely filed within this extended deadline, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE OF CIVIL PROCEDURE INVOLVED

At all relevant times herein, Federal Rule of Civil Procedure 4(m) has provided:

> If a defendant is not served within 90 days after the complaint is filed, 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. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

FED. R. CIV. P. 4(m) (2015).

INTRODUCTION

Unlike nine other circuits, the Fourth Circuit holds that absent good cause, Rule 4(m) of the Federal Rules of Civil Procedure does not allow a district court discretion to extend the time for service of process. It has held this position since 1995 (when it issued its decision in *Mendez v. Elliot*, 45 F.3d 75 (4th Cir. 1995)), even though just a year later, this Court in *Henderson v. United States* recognized (in dicta) that under the 1993 amendments to Rule 4, "courts have *been accorded discretion* to enlarge the 120-day[1] period '*even if there is no good cause shown*.'" 517 U.S. 654, 662 (1996) (emphasis added) (quoting Fed. R. Civ. P. 4 Advisory Committee's Notes – 1993 amendment,

[1] In 2015, Rule 4 was amended to reduce the time in which to effect service of process from 120 to 90 days. FED. R. CIV. P. 4(m) (2015).

subdivision (m)). Since that time, *Mendez* has become a pariah in the law, so much so that "courts and commentators are virtually unanimous in the view that *Mendez* is wrong." *Robinson v. G.D.C. Inc.*, 193 F. Supp.3d 577, 582 n. 1 (2016).

This Court recognized the split caused by *Mendez* when it granted certiorari in *Chen v. Mayor & City Council of Baltimore, Md.*, 135 S. Ct. 475 (2014) (mem.). In that grant, this Court noted a 7-1 circuit split on discretionary extensions under Rule 4(m) – with the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits on one side of the ledger (saying "Yes" to discretionary extensions even without good cause) and the Fourth Circuit all by itself on the other (saying "No"). In fact, the split is even more lopsided than this Court noted because both the Eighth Circuit and the D.C. Circuit also hold that Rule 4(m) affords such discretion. Although this Court was unable to resolve the circuit conflict due to the self-represented petitioner's failure to file a merits brief, *Chen*, 135 S. Ct. 939 (2015) (mem.), the 9-1 split remains firmly in place.

The Fourth Circuit's interpretation of Rule 4(m) is irreconcilable with these holdings and causes disparate results in like cases – even *within* the circuit itself -- based solely on the serendipity of one's geography. In this case, for example, the Richmond-Virginia-based District Court, when twice rejecting Collins' requests to extend the deadline for service, repeatedly emphasized a lack of good cause for justifying an extension. It also expressly noted that *Mendez* was "the only binding authority on [the issue of discretion under Rule 4(m)]

in this Circuit." App. at 16. At almost the exact same time, however, less than two hundred miles away in Roanoke, Virginia (*within* the Fourth Circuit but in another federal district in Virginia), the chief judge of the Western District of Virginia held that *Mendez* was not good law and, following factors set forth in the Fifth Circuit's decision in *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 325-26 (5th Cir. 2008), granted an extension of time to effect service because, even though no good cause was shown, the statute of limitations would have barred a future re-filing. *Broome v. Iron Tiger Logistics, Inc.*, 2018 WL 3978998 at *4 (W.D. Va. Aug. 20, 2018). If only Collins had been so fortunate to live in Roanoke. And if Collins had been in any federal court in Louisiana, Texas, or Mississippi, the holding in *Millan* would have categorically prevented a district court from dismissing her Complaint based on the facts of record here. In other words, identically-situated litigants in different federal courts and in different circuits receive different types of justice.

In short, the need for this Court's review is as imperative now (if not more so) as it was in *Chen*. Indeed, since *Chen*, the Fourth Circuit has twice been presented with petitions for rehearing that would have given it a clear opportunity to self-correct its Rule 4 jurisprudence, but it has refused to do so. This Court's intervention is warranted, and this Petition should be granted.

STATEMENT OF THE CASE

I. Background Regarding Federal Rule of Civil Procedure 4(m) (Formerly Rule 4(j))

A. The Current Rule

At all relevant times herein, Federal Rule of Civil Procedure 4(m) has provided:

> If a defendant is not served within 90[2] days after the complaint is filed, 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. But if the plaintiff shows good cause for the failure, the court must

---

[2] The 90-day time limit is relatively recent. Prior to 2015, a plaintiff had 120 days to complete service – i.e., 25% more time. The reduction, together with other rule changes, was intended to reduce delay at the beginning of litigation. However, as the Advisory Committee to the proposed amendment noted: "[s]hortening the presumptive time for service will increase the frequency of occasions to extend the time for good cause." FED. R. CIV. P. 4(m) Advisory Committee's Note to 2015 Amendment. Indeed, the reduction was approved even though the written comments were roughly 7 to 1 against the shortening of the service deadline. Patricia W. Moore, *A Review of the Proposed Change to FRCP 4(m)* https://lawprofessors.typepad.com/civpro/2014/08/a-review-of-the-proposed-change-to-frcp-4m.html (visited on January15, 2020). Commenters noted that even dismissals without prejudice would cause plaintiffs to incur costs to re-file and also predicted an increase in motion practice "as plaintiff would need to move for extensions more frequently." *Id.*

> extend the time for service for an appropriate period.

FED. R. CIV. P. 4(m) (2015).[3]

The text of the rule makes plain that after the expiration of the 90-day time limit, a plaintiff has two methods by which to avoid dismissal of her complaint: through a showing of "good cause," or by convincing the district court that it should exercise its discretion and extend the time for service even absent a showing of good cause.

B. The Pre-1993 Rule (Rule 4(j))

By contrast, district court discretion was nowhere to be found in the pre-1993 version of the rule (what was then Rule 4(j)). That version read:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of 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 upon the court's own initiative with notice to such party or upon motion.

FED. R. CIV. P. 4(j) (1988) (emphasis added). Under that version of the rule, a plaintiff had one – and *only one* -- avenue to avoid dismissal if service was not made

---

[3] With this exception of the 90-day period, discussed separately, *infrra* n.2, the language of this rule has been substantively the same from 1993 to the present.

within 120 days: good cause. Failure to show good cause meant that dismissal was mandated. *Morgan v. Sebelius*, 2010 WL 1404100, at *2 (S.D.W.Va. Mar. 31, 2010) ("It is clear that from 1983 until 1993, the applicable rule did not allow courts to extend the time for service if the plaintiff could not show good cause.").

C. The Purpose of the 1993 Amendments

The 1993 amendments thus flipped the script on the way district courts are required to analyze potential dismissals under Rule 4(m). As the Advisory Committee's notes explain: "[t]he 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(m) Advisory Committee's Note (1993) (emphasis added). The Committee's notes continue that "[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action." *Id.* This Court specifically cited the Committee's notes in its 1996 *Henderson v. United States*, decision, where it stated that under Rule 4(m), "courts have been accorded discretion to enlarge the [service] period even if there is no good cause shown." 517 U.S. 654, 662 (quoting Advisory Committee Notes).

D. *Mendez v. Elliot*

In 1995, the Fourth Circuit decided *Mendez v. Elliot*, 45 F.3d 75 (4th Cir. 1995). There, the Court of Appeals applied the predecessor to Rule 4(m), but held that there was no substantive difference between the old rule and the new rule. As such, it held that "*Rule 4(m) requires* if the complaint is not served within 120 days after it is filed, the complaint *must be dismissed* absent a showing of good cause." *Id.* at 78. (emphasis added). The Fourth Circuit also expressly rejected the notion that the running of a plaintiff's statute of limitations could justify relief under either the new or old version of the rule. As the court stated: "Rule 4(j) does not . . . give the appellant a right to refile *without consequences of time defenses*, such as the statute of limitations." *Id.* (emphasis added).

In reaching its decision in *Mendez*, the Fourth Circuit believed that "Rule 4(j) was edited *without a change in substance*." *Id.* at 78 (emphasis added). Clearly, it was. *Escalante v. Tobar Construction, Inc.*, 2019 WL 109369 at *2 (D. Md. Jan. 3, 2019) ("When *Mendez* was decided, the Rule in question had recently been amended. *Mendez*, without analysis, treated the new Rule 4(m) as if it were substantively the same rule as its predecessor, Rule 4(j). . . However, in comparing the two Rules, clearly it was *not*.") (emphasis added). The court of appeals also inexplicably did not mention or discuss the Advisory Committee's Notes, which, notably, advise that a district court may "relieve a plaintiff of the consequences of an application" of the service deadline "even if there is no good cause shown."

Despite these problems, *Mendez* has never been overruled. In fact, even after this Court dismissed the writ of certiorari in *Chen*, some courts in the Fourth Circuit have continued to rely on *Mendez*.[4] Thus, for the last twenty-five years[5], the Fourth Circuit's binding precedent has said that under Rule 4(m), a district court has no discretion to extend the time for a plaintiff to complete service if good cause could not be shown.

II. Factual and Procedural Background

A. Collins' Files Her Complaint And Files A Pre-Deadline Motion To Extend The Time To Complete Service Of Process

On March 28, 2018, Collins filed her Complaint against Thornton. JA6-10[6]. Collins sought relief under 42 U.S.C. § 1983 for violations of her Fifth and Fourteenth Amendment due process rights after Thornton falsely accused her of stealing time while she was out on FMLA and disability leave at her job at

---

[4] *See, e.g., Addison v. Amica Mut. Ins. Co.,* 2019 WL 2191795, at *3 (D.S.C. May 21, 2019) (applying *Mendez* and holding that, as such, "the court cannot avail itself the option that appears to be offered by Rule 4(m)—that is, directing Plaintiff to effect service by a certain time—unless good cause is shown for the failure to timely serve Defendant") and *Martin v. S.C. Dep't of Corrs.,* 2019 WL 2124957, at *3 (D.S.C. Apr. 23, 2019) (same).

[5] *Mendez* was decided on January 25, 1995 and today's date is January 15, 2020 – not quite twenty-five full years. However, by the time this Petition is circulated to the Court for its consideration, a full twenty-five years will have passed since *Mendez* was decided.

[6] "JA" refers to the Joint Appendix filed in the Fourth Circuit.

Virginia State University ("VSU") and, consequently, causing Collins to be suspended from employment as a result. *Id.* at 8-9. Thornton had a particular dislike of Collins and falsely called her "retarded" and "mentally slow." *Id.* at 7.

On Tuesday, June 19, 2018, a week before the expiration of the 90-day service period in this case, Collins' counsel put service of the Complaint on his "to do" list for the day. JA41. This task had not been completed sooner because he had been busy with other then-active federal lawsuits and wanted to control the pace of his older and newer lawsuits so as not to overextend himself. *Id.*

Unfortunately, his plans for that day changed (and, indeed, most were scuttled) when he learned, just before noon, that his wife's 90-year-old grandmother had fainted and fallen that morning and had been taken to the hospital for concerns about heart trouble and seriously low blood pressure. JA41. At that time, counsel picked up his wife from their home, drove her to the hospital, and stayed with her and her other family members for the remainder of the afternoon and into the early evening. *Id.* Collins' counsel did no work during that time period and, instead, helped provide comfort and support to his wife and her family. Id.

The next day, on June 20, 2018, after learning that his wife's 90-year-old grandmother's blood pressure had stabilized and that she would soon be released from the hospital, Collins' counsel caught up on the work from the day before. *Id.* As part thereof, he sent an e-mail to Ms. Ramona Taylor, counsel for Thornton's employer,

VSU, asking if she would be willing to accept service of the Complaint on behalf of Thornton. JA41-42.

Based on counsel's prior experience with Ms. Taylor in an earlier lawsuit involving Collins suing Thornton, he believed this approach was both reasonable and even efficient. JA42. Indeed, in the prior case, even though Thornton had been represented by the Office of the Attorney General (of Virginia) in the actual federal lawsuit, Ms. Taylor had participated in various e-mails and phone calls between opposing counsel during that case. *Id*. Moreover, even before Collins served her first lawsuit on either VSU or Thornton, Collins' counsel had sent the initial Complaint to Ms. Taylor in an effort at possible resolution of the disputes between the parties. *Id*. and JA45-47 (e-mails between counsel).

Ms. Taylor did not respond to the June 20, 2018 e-mail. JA42.

On Friday, June 22, 2018, Collins' counsel again e-mailed Ms. Taylor to follow up on his prior e-mail and to again inquire as to whether she would agree to accept service, or be willing to complete a Waiver of Service Form, for Thornton. *Id.* Ms. Taylor did not respond to this e-mail either. *Id.*

Having heard nothing from Ms. Taylor, Collins' counsel hired a process server on June 26, 2018 to serve the lawsuit and the summons on Thornton. *Id*. The server went straight to VSU, where he was told that even though Thornton was out of the office for the day, her assistant would accept service on her behalf. *Id*. Moments later, however, apparently after

communications between the assistant and the VSU legal department, the assistant changed her position and refused to accept service for Thornton. *Id.* She also informed the server that Thornton would not actually be back to VSU until the following week. *Id.*

The process server's business then called Collins' counsel, explained the above, and advised that after all of the back-and-forth, it left a copy of the lawsuit with the assistant. JA42-43. Worried that what he just had been told might not comply with Rule 4, Collins' counsel, in an abundance of caution, filed a (pre-deadline) motion to extend the time to file service. *Id.* at 17-18. He also filed a supporting memorandum. *Id.* at 19-22.

In support of the motion, Collins's counsel (i) laid out his prior dealings with VSU's counsel in their earlier case involving the same two parties; (ii) explained his recent requests for a Waiver of Service; (iii) explained the apparent troubles that had occurred at VSU when his process server had attempted to serve Thornton there; (iv) said that the only prejudice – which is not legally valid prejudice under the law[7] – to the defendant would be having to defend the lawsuit without the benefit of the statute of limitations running; and (v) requested two extra weeks to complete service on Thornton. *See* JA19-22.

---

[7] *Boley v. Kaymark*, 123 F.3d 756, 759 (3d Cir. 1997) ("We are aware of no decisions refusing to grant an extension under Rule 4(m) solely on the ground that denying the defendant the benefit of the running of the statute of limitations amounts to cognizable prejudice.").

B. The District Court Denies Collins' Extension Motion And Then, Without Any Prior Notice, *Sua Sponte* Dismisses The Complaint.

Less than 24 hours after Collins filed her motion, the District Court denied it. App. at 22. Without any citation to legal authority and without any discussion of the harm that would result from the running of the statute of limitations if the case was dismissed (even if dismissed without prejudice), the court stated that it did "not find that the reasons stated in the Motion to Extend Time demonstrate either good cause or excusable neglect." *Id.*

In the very same order, however, the District Court *sua sponte* dismissed the Complaint and closed the case. *Id.* The court did not give Collins any *advance* notice that it would be dismissing the case. This was contrary to the requirements of Rule 4(m), which states that dismissal is appropriate only "*after* notice to the plaintiff." FED. R. CIV. P. 4(m) (emphasis added).

C. The District Court Denies Collins' Rule 59 Motion For Reconsideration And, In Doing So, Expressly Invokes The Precedential And Binding Effect Of The Fourth Circuit's Decision in *Mendez v. Elliot*.

Three weeks later, Collins' process server filed a sworn, fully-executed Proof of Service form with the District Court's clerk's office. JA1, 23-24. In that document, the server declared under penalty of perjury that he had, in fact, served Thornton on June 26, 2018

(the last day available) by leaving the summons with her agent, Tracy Williams. JA24. Notably, Williams is listed as an administrative assistant in the VSU Department of Social Work, the Department where Thornton works as an Assistant Professor. *See* JA31, n.4.

After seeing this new filing and after personally speaking with the process server, Collins' counsel realized that the lawsuit paperwork had not simply been "left" with the assistant, but in fact had been "accepted" by the assistant. JA43. According to the server, the administrative assistant's final acceptance was basically consistent with her initial agreement to accept the papers. *Id.* In other words, she initially said *yes*, then said *no*, and then actually ***accepted*** the papers. *Id.* Unlike when she said she would not accept service (when she refused to even take the lawsuit papers), in her final interaction with the process server, the assistant took the lawsuit paperwork. *Id.*

It was because of this final interaction that the process server completed and filed the fully executed proof of service with the District Court. As the process server explained to Collins' counsel at that time, he had often served paperwork on individuals at VSU in this manner – i.e., by having it accepted by the individual's administrative assistant – without incident. *Id.*

Based on this new information and also believing the District Court had failed to properly consider the harsh impact of the running of the statute of limitations on her claim against Thornton, Collins filed a timely Rule 59 motion asking the District Court to vacate its dismissal of her Complaint. *See* JA27-50. The

District Court promptly denied the motion, however, focusing mostly on its continued belief that service on Thornton's administrative assistant – even with the sworn proof of service – did not constitute proper service. App. at 12-13.

At the same time, the District Court made several startling revelations about its legal and factual reasons for denying Collins' Motion to Extend in the first place. Most importantly, the District Court – despite paying lip service about the possibility of granting a discretionary extension under Rule 4(m) – made it plain that it believed that *Mendez* was binding precedent that controlled the outcome of its decision. In clear and unambiguous language, the court said that

> Since *Mendez*, Rule 4(m) has been amended to shorten the period for service from 120 days to 90 days. Other than that, there have been no substantive changes to the Rule, and *Mendez* ***remains the only binding authority on the issue in this Circuit***.

App. at 16, n.2. (underscore, italics, and bold added).

It also cited the unpublished district court case of *Patterson v. Brown*, 2008 WL 219965 (W.D.N.C. Jan. 24, 2008) as supporting legal authority for the continued validity of *Mendez*. *Id.* at 16, n.2. There, the Western District of North Carolina stated:

> . . . while the continuing validity of Mendez is in serious doubt, it is clear that *Mendez* is still binding authority in this Circuit. . .. Accordingly, under controlling Fourth Circuit precedent, the Plaintiff is required to establish

> good cause for extending the period for service beyond the 120 days provided in Rule 4(m).

Patterson, 2008 WL 219965 at *14. The court then held that since Plaintiff had failed to show good cause, the case was dismissed. *Id*

What the District Court failed to mention, however, was the that the Fourth Circuit actually *reversed* the dismissal of plaintiff's Complaint in *Patterson* on other grounds, thus vacating the entire decision upon which the District Court had relied. As the Fourth Circuit explained in its reversal decision, because of its reversal, it did not need to address the plaintiff's remaining claims of error – one of which was "that the district court abused its discretion in refusing to extent the time to complete service of process." *Patterson v. Whitlock*, 392 Fed. Appx. 185, 193 n.7 (4th Cir. Aug. 23, 2010).

Just as revealing, in discussing the impact of the running of Collins' statute of limitations, the District Court specifically invoked *Mendez's* mantra that Rule 4(m) does not "give the [plaintiff] a right to refile without the consequence of time defenses, such as statute of limitations." App. at 16. The District Court also cited to the Seventh Circuit's 1989 decision *Powell v. Starwalt*, 866 F.2d 964, 966 (7th Cir. 1989), which applied the pre-1993-amendment Rule 4(j) and emphasized that "'Without prejudice' does not mean 'without consequence.'" App. at 16. Both *Mendez* and *Powell*, however, arose solely in the context of holdings that Rule 4 (whether Rule 4(j) or Rule 4(m)) *required* a showing of "good cause" in order to permit a court to extend the time to complete service. In other words,

the District Court's legal analysis of the consequences of the running of the statute of limitations on Collins' claim was clearly controlled by the precedent of *Mendez* and not by the 1993 Advisory Committee's Notes about Rule 4(m).

The District Court entered its order denying Collins' Rule 59 motion on July 27, 2018. App. at 18.

D. At The Exact Same Time That The District Court Issues Its Decision In The Eastern District Of Virginia, A Sister Court Issues A Diametrically Opposed Decision In The *Western* District Of Virginia.

Three weeks later, on August 20, 2018 – *before Collins had even filed her appeal to the Fourth Circuit* -- the chief judge of the Western District of Virginia, sitting in Roanoke, Virginia – located less than 200 miles from District Court's situs in Richmond, Virginia – issued a decision that was diametrically opposed to the one just issued by the District Court. Specifically, in *Broome v. Iron Tiger Logistics, Inc.*, 2018 WL 3978998 (W.D. Va. Aug 20, 2018), the court *granted* the plaintiff an extension under Rule 4(m) even in the absence of good cause and denied the defendant's motion to dismiss for lack of timely service.

Broome is diametrically opposed to the District Court's decision in two material respects. First, the court in *Broome* specifically rejected *Mendez* as good law in the Fourth Circuit. Noting the stark disagreement among district courts within the Fourth Circuit about the validity of Mendez, the court held

that *Mendez* had been abrogated due to the most recent amendments to Rule 4(m) from 2015. *Broome*, 2018 WL 3978998 at *4. Second and just as important, the court held that even though it had discretion under Rule 4(m) to extend the time for service in the absence of good cause, that discretion was constrained when the statute of limitations would bar the refiling of a complaint if it was dismissed without prejudice under Rule 4(m) – that is, the dismissal would effectively be a dismissal *with prejudice*. *Id.* The court, following factors set forth the Fifth Circuit's decision in *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 325-326 (5th Cir. 2008), and emphasizing that federal courts are meant to resolve cases on the merits, granted an extension of time for the plaintiff to serve the defendant. *Id.*

E. The Fourth Circuit Affirms The District Court's Dismissal, But Fails To Discuss, Much Less Consider, The Factors Applicable To A Discretionary Extension Under Rule 4(m)

Citing *Broome* in her Notice of Appeal, *see* JA60, n.a., Collins appealed the District Court's orders to the Fourth Circuit. JA58-61. The Fourth Circuit, however, affirmed the orders by unpublished opinion. App. at 1-8. But the Court of Appeals focused its decision solely on the issue of "good cause" under Rule 4(m), *see* App. at 3-5. Indeed, not once did it mention or discuss the Advisory Committee's considerations applicable to discretionary extensions under Rule 4(m) – such as the running of the statute of limitations and the lack of

prejudice to the defendant – in its opinion.[8] This meant, then, that the Court of Appeals blessed the District Court's faulty legal analysis and left it fully in place.

Collins filed a timely petition for panel rehearing and rehearing en banc, where she expressly identified the *Mendez*-based circuit split as a compelling reason to grant the petition. *See* Petition for Panel Rehearing and Rehearing En Banc, p. 2, 3, 10-15, Dkt. Entry 32, 18-1995. Even so, the Fourth Circuit denied Collins' petition. App. at 23-24.

---

[8] Even in its discussion of "good cause" under Rule 4(m), the Fourth Circuit got its facts wrong and downplayed Collins' counsel's efforts at service. Notably, it said that in her initial extension motion with the District Court, Collins failed to provide "any explanation as to why counsel waited approximately two months after issuance of the summons to attempt service or obtain a waiver of service within the 90-day period." App. at 5. But the motion and its supporting memorandum clearly stated that Collins' counsel had sought twice in the week before the expiration of the 90-day period to obtain a Waiver of Service from the same attorney who had previously represented Thornton in a companion case between the same parties. JA19-20. As well, in her Rule 59 and supporting memorandum, Collins fully explained that the reason her counsel had waited to serve Thornton was that he was trying to control the proper pacing of his cases so as to properly balance his caseload. JA31-32. This pacing was unexpectedly derailed when counsel's wife's 90-year-old grandmother had to be hospitalized on the very day counsel had planned to have Thornton served with process. JA32-33.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari To Resolve The Lopsided But Well-Entrenched 9-1 Circuit Split That Exists As To Whether Fed.R.Civ.P. 4(m) Allows A District Court To Extend The Time To Complete Service In The Absence Of Good Cause.

This is a straightforward and compelling case in which to grant certiorari. Both the District Court (which expressly relied on *Mendez*) and the Fourth Circuit (which blessed such reliance) focused on the lack of good cause – to the exclusion of the factors set forth in the Advisory Committee's Notes -- for purposes of concluding it was appropriate to deny an extension of time for Collins to complete service of process. This result affirms *Mendez* and continues the Fourth Circuit's proliferation of its flawed Rule 4(m) jurisprudence, which is in direct conflict with nine other courts of appeals, conflicts with this Court's interpretation of Rule 4(m), and makes no sense under the plain language of Rule 4(m) and the interpretation of that language by the Advisory Committee.

1. At least nine circuits hold that Rule 4(m) makes an extension of time for service *mandatory* if good cause is shown and *discretionary* based on various equitable factors (including whether the running of the statute of limitations will bar a re-filed action) if good cause is not shown. These nine circuits include the seven this Court identified when it granted certiorari in *Chen*, 135 S.Ct. 475, as well as the Eighth and D.C. Circuits. *See, e.g., Mann v. Castiel*, 681 F.3d 368, 375 (D.C. Cir. 2012); *Zapata v. City of N.Y.*, 502 F.3d 192,

196 (2d Cir. 2007); *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1133 (11th Cir. 2005); *Mann v. Am. Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003); *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996); *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340 (7th Cir. 1996); *Adams v. Allied Signal Gen. Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1995); *Espinoza v. United States*, 52 F.3d 838, 840 (10th Cir. 1995); *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1304 (3d Cir. 1995).

The rationale behind these decisions is self-evident: the language of the 1993 amendments to Rule 4(m) means what it says. But another common theme in these decisions is the importance of considering the running of the statute of limitations when deciding whether or not to grant a discretionary extension of time to complete service under the rule. *See, e.g., De Tie v. Orange Cty*, 152 F.3d 1109, 1111 n.5 (9th Cir. 1998) (recognizing that an extension may be warranted if the statute of limitations has run); *Panaras v. Liquid Carbonic Industries Corp.*, 94 F.3d at 341 ("because the statute of limitations . . . would bar a new complaint in this case . . . *it was incumbent upon the district court to fully consider this factor*") (emphasis added); *Espinoza*, 52 F.3d at 842 ("upon reconsideration of Mr. Espinoza's claim, the district court should consider the limitations period in deciding whether to exercise its discretion under Rule 4(m)"); *Petrucelli*, 46 F.3d at 1306, n.8 (noting that "because the statute of limitations would be the refiled action here, it would be appropriate for the district court to consider this factor" on remand). The Eleventh Circuit even went so far as to suggest that such factor "militates in favor of the exercise of the

district court's discretion" to grant an extension. *Horenkamp*, 402 F.3d at 1133.

Moreover, several of those courts also hold that Rule 4(m) *requires* district courts to consider whether to grant a discretionary extension and that the failure to do so is an automatic abuse of discretion. *See, Corbett v. ManorCare, Inc.*, 224 F. App'x 572, 574 (9th Cir. 2007); *Okla. Ex rel. Bd. Of Regents v. Fellman*, 153 F. App'x 505, 507 (10th Cir. 2005); *Veal v. United States*, 94 F. App'x 253, 256 (3d Cir. 2004); *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 341 (7th Cir. 1996).

The Fourth Circuit, on the other hand, stands alone in holding that a showing of good cause is the *only* way that a district court is authorized to extend the time for service under Rule 4(m). *Mendez*, 45 F.3d at 78-79. Despite criticism[9] and even its own inconsistent

---

[9] *See* 4A WRIGHT & MILLER, Federal Practice & Procedure: Civil 2d § 1137, at 64, n. 13 (2d ed. 1987; 1993 Supp.) ("The Fourth Circuit improperly held [in *Mendez*] that Rule 4(j) was edited without substantial change and renumbered as Rule 4(m) by the 1993 Amendments."). *See also Escalante*, 2019 WL 109369 at *2 ("courts in this district have rightfully questioned whether *Mendez* properly reached the new Rule 4(m)").

unpublished opinions[10], the Fourth Circuit has held firm to this rule for more than 20 years.

In short, this 9-1 conflict, which is well-developed and well-entrenched, warrants this Court's review just as it did in *Chen*.

2. In addition to continuing to foster a deep and severely lopsided circuit split, the Fourth Circuit's *Mendez* rule is plainly wrong. Most obviously, it is inconsistent with this Court's decision in *Henderson v. United States*, 517 U.S. 654 (1996). Albeit in *dicta*, this Court in *Henderson* explained that under the 1993 amendments to the Federal Rules, under Rule 4, "courts have been ***accorded discretion*** to enlarge the 120-day period 'even if there is no good cause shown.'" *Id.* at 662 (emphasis added) (quoting Advisory Committee's Notes on Fed. Rule Civ. Proc. 4). Thus, in the words of at least one lower court judge in the Fourth Circuit, "the Supreme Court thinks *Mendez* is wrong." *Robinson v. G.D.C. Inc.*, 193 F. Supp.3d 577, 582 n. 1 (2016).

---

[10] *See, e.g., Hansan v. Fairfax Cty. Sch. Bd.*, 405 F. Appx 793, 793-94 (4th Cir. 2010) (stating rule contrary to *Mendez*); *Giacomo-Tano v. Levine*, 1999 WL 976481, at *1 (4th Cir. Oct. 27, 1999) (same); *Scruggs v. Spartanburg Reg'l. Med. Ctr.*, 1999 WL 957698, at *2 (4th Cir. Oct. 19, 1999) ("[W]e regard the [Supreme] Court's statement [in *Henderson*] as persuasive as to the meaning of Rule 4(m). Accordingly, we believe that the district court, in its discretion, could have extended the time for proper service of process.").

Mendez, however, ignored the obvious textual difference the new amendments (together with the Advisory Committee's notes discussing the amendments) and former Rule 4(j). While the Fourth Circuit claimed that "Rule 4(j) was edited without a change in substance and renumbered as Rule 4(m)" *Mendez*, 45 F.3d at 78, this was plainly not true, as other circuits have been quick to point out. *See, e.g. Panaras*, 94 F.3d at 340 (noting that the Fourth Circuit in *Mendez* "*erroneously* concluded that Rule 4(j) was amended and renumbered without substantive change") (emphasis added). *See also Thompson*, 91 F.3d at 21, n.1 (explaining that *Mendez* "provides no insight as to why the court disregarded the plain language of rule 4(m) and instead treated the rule as the mirror image of rule 4(j)"). Even district courts *within* the Fourth Circuit have recognized that this assertion is indefensible.[11]

Moreover, for whatever reason, the Fourth Circuit has repeatedly eschewed direct efforts to bring its jurisprudence in line with the nine other circuits. In *Scott v. Maryland State Dept. of Labor*, Record No. 15-1617 (4th Cir.), for example, the court rejected a petition for rehearing en banc where the continued validity of *Mendez* was squarely raised. Dkt. Entry No. 50 (March 30, 2017). It did the same in this case.

---

[11] *Escalante,* 2019 WL 109369 at *2 ("When *Mendez* was decided, the Rule in question had recently been amended. *Mendez*, without analysis, treated the new Rule 4(m) as if it were substantively the same rule as its predecessor, Rule 4(j). . . However, in comparing the two Rules, clearly it was *not*.") (emphasis added).

3. Finally, the Fourth Circuit's continued inaction as to *Mendez* has led to the proliferation of dozens of irreconcilably inconsistent district court decisions[12] as to whether they have discretion to extend the service period under Rule 4 in the absence of good cause. The inconsistency has raged for years and is alive and well even now. *Compare Addison,* 2019 WL 2191795*,* at *3 (D.S.C. May 21, 2019) (applying *Mendez* and holding that, as such, "the court cannot avail itself the option that appears to be offered by Rule 4(m)—that is, directing Plaintiff to effect service by a certain time—unless good cause is shown for the failure to timely serve Defendant") and *Martin,* 2019 WL 2124957, at *3 (same) *with Mason v. Lewis Contracting Services, LLC*, 2019 WL 2395492 at *2 (W.D.Va. June 6, 2019) (citing *Giacomo-Tano* and *Henderson* and stating that "the court may exercise discretion to extend the service period even in the absence of good cause.") and *Escalante,* 2019 WL 109369, at *4 ("*Mendez* no longer controls the analysis.").

---

[12] *Compare e.g., Tenenbaum v. PNC Bank Nat'l Assoc*., 2011 WL 2038550, *4 (D.Md. May 24, 2011) (noting that "while *Mendez* may stand on shaky footing, it remains the law of this circuit"); *Vantage v. Vantage Travel Serv., Inc*., 2009 WL 735893, *2, *3 (D.S.C. Mar. 20, 2009) (explaining why "the holding in *Mendez* is arguably no longer viable[,]" but also finding that "to the extent *Mendez* ... remains good law," the plaintiff had shown good cause) *with Lane v. Lucent Techs., Inc*., 388 F.Supp.2d 590, 596–97 (M.D.N.C.2005) (noting that Henderson "undermines the validity of *Mendez*'s mandated dismissal absent a showing of good cause" and finding that the court had discretion to extend the time for service absent a showing of good cause).

To say that this inconsistency has jeopardized the integrity of the rule of law as to Rule 4 is an understatement. Not only is the Fourth Circuit's precedential pronouncement as to Rule 4 completely at odds with the law of nine other Circuits, it regularly creates internal havoc *within* the Circuit itself. The simple comparison between this case and *Broome, supra,* is emblematic. Simply stated, two coordinate courts in the same circuit -- within in the *same state*, less than 200 miles apart – reached diametrically opposed results using diametrically opposed rules of law. In other words, if Collins had been fortunate enough to live near Roanoke, Virginia, rather than Richmond, Virginia, her case would not have been dismissed. This is the textbook example of unequal treatment under the law and undermines the whole point of having consistency in the application of the federal rules. As this Court has recognized, "[o]ne of the shaping purposes of the Federal Rules [was] to bring uniformity in the federal courts." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). This Court's review is thus vital to correct this disparate treatment of identically-situated parties and to bring uniformity as to Rule 4 – both among and within the federal circuits.

II. This Court Should Grant Certiorari To Identify The Appropriate Guidelines For District Courts To Follow When They Exercise Their Discretion Under Rule 4(m) To Grant Or Deny An Extension Of Time To Complete Service In The Absence Of Good Cause; In Doing So, It Should Adopt The Rule Of Law Adopted By The Fifth Circuit In *Millan v. USAA Gen. Indem. Co.*

Certiorari should also be granted so that this Court can set the guidelines for district courts to follow -- and identify the factors for them to consider -- when they exercise their discretion under Rule 4(m) to grant or deny an extension of time to complete service in the absence of good cause, particularly where the statute of limitations would bar the re-filing of the Complaint. Although the Advisory Committee's Notes identify several factors – including the running of the statute of limitations – for district courts to consider, they fail to provide meaningful guidance as to *how* to weigh or apply those factors. As Judge Posner colorfully explained in *United States v. McLaughlin*, 470 F.3d 698, 700 (7th Cir. 2006), "the plaintiff who fails to demonstrate good cause for his delay throws himself on the mercy of the court" but "the rule specifies no criteria for the exercise of mercy."

Professor Siegal, in addressing the issue of how to analyze the running of the statute of limitations if an extension is not granted in his Commentaries on Rule 4, put the issue even more bluntly:

> They say that "[r]elief may be justified ... if the ... statute of limitations would bar the refiled

action", but one can't determine whether that by itself is supposed to be "good cause" for an extension, or merely what the committee feels should be an acceptable reason for extending the time even if the plaintiff can't show any "good cause" for letting things go that far.

Under either conclusion, it can be argued that every failure to serve within the 120 days "shall" be excused by the court as long as it is shown that the statute of limitations is now dead. Plaintiffs can live with that, and happily ever after, but is that really what the rule intends? Is the extent of the delay to count at all? Is "good cause" for the delay, which we assume means a good reason for the delay, to play any role when the statute of limitations is on the scene? Or must a subdivision (m) time enlargement be granted—as long as the complaint was filed within the original statute of limitations—every time it appears that a Rule 4 dismissal would now bar a new action?

. . .

What a place for an ambiguity! Here stands the plaintiff at the edge of the grave, and ***the rule doesn't tell the court whether to offer the plaintiff salvation, or a push***.

All the notes really say is that the passing of the statute of limitations "may" justify a time extension, along with the statement that time can be extended "even if there is no good cause

> shown." ***That combination creates a void, not a guide***.

The New (Dec. 1, 1993) Rule 4 of The Federal Rules of Civil Procedure: Change in Summons Service and Personal Jurisdiction, 152 F.R.D. 249, 260-261 (1994) (emphasis added).

With these concerns in mind, the circuits are divided on whether to analyze their discretion through the lens of "excusable neglect" or the various equitable factors identified in the Advisory Committee's Notes. *See* Capone, Gregory M., *You Got Served: Why an Excusable Neglect Standard Should Govern Extensions of Service Time After Untimely Service Under Rule 4(M)*, 83 St. JOHN'S L. REV 665, 667 (2009) (explaining circuit conflict). They too have varying standards in place for how to analyze situations when the running of the statute of limitations would bar a future re-filing. *Compare Millan, supra,* at 326, *with Mendez, supra,* at 78-79.

The most instructive case on the constraints placed upon a court by the strong Circuit-wide policy that federal courts should hear cases on their merits is *Millan v. USAA Gen. Indem.* Co., *supra.* There, in assessing whether the district court erred in refusing to grant the plaintiff a discretionary extension under Rule 4, the Fifth Circuit held that "where the applicable statute of limitations likely bars future litigation, a district court's dismissal of claims under Rule 4(m) should be reviewed under the same heightened standard used to review a dismissal with prejudice." *Millan*, 546 F.3d at 326. In other words, a district court's discretion under Rule 4(m) is limited

and a heightened standard of review applies when a plaintiff's claim would be barred by a statute of limitations if the district court dismissed the case for lack of timely service – even if it does so nominally "without prejudice." Under this heightened standard, the Court of Appeals concluded that dismissal under Rule 4(m) is appropriate "*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.*'" *Id*. (emphasis added). Finding that neither a clear record of delay nor contumacious conduct existed on the record before it, the Fifth Circuit reversed the district court's dismissal under Rule 4(m).

The same rule of law should be adopted by this Court and should be applied here. As was true for the plaintiff in *Millan*, Collins' claim here, if re-filed, would almost certainly be barred by the applicable statute of limitations. As was also true in *Millan*, there is no clear record of delay or evidence of contumacious conduct by either Collins or her counsel. Indeed, this is precisely the rule of law followed by in *Broome*, 2018 WL 3978998 (citing *Millan* and recognizing constraints on discretion for Rule 4(m) discretionary extensions when the statute of limitations will bar future re-filings). Given the strong federal policy in favor of adjudicating cases on their merits, the District Court and the Fourth Circuit should have applied this heightened standard as the proper standard of review for determining whether or not to exercise its discretion to grant a discretionary extension under Rule 4(m). Their failure to do so requires this Court to set the standard.

III. This Case Is An Excellent Vehicle To Resolve The Questions Presented.

This case presents an excellent vehicle through which both to resolve the circuit split upon which this Court previously granted review in *Chen* and to articulate the appropriate guidelines and standards for district courts to use when exercising their discretion under Rule 4(m).

First, the circuit split caused by *Mendez* is squarely at issue. The District Court expressly relied on *Mendez* in denying Collins relief and the Fourth Circuit affirmed the District Court's erroneous rulings without ever addressing the equitable factors – and limits on discretion – that the District Court *should have considered*, *see Millan, supra*, when exercising its discretion under Rule 4(m). Collins also squarely presented this issue to the Fourth Circuit for *en banc* review, but the court of appeals rejected the invitation to correct its erroneous jurisprudence.

Second, the facts of this case clearly show that application of the wrong legal standards in this case was outcome-determinative. Collins did not engage in a clear record of delay or contumacious conduct. Nor did she blithely ignore her service deadline. Quite to the contrary, Collins tried to effect service *within* her 90-day service deadline – twice with requests for Waivers of Service and then, an attempt at personal service on the 90th day – and then moved, pre-deadline, for an extension of time. And she did so even while confronting an unexpected family emergency. These facts would clearly suffice to *require* an extension under the constrained discretion recognized in *Broome*

or the factors applied in *Millan*. In either event, if Collins had been in a federal court governed by those standards, her case would not have been dismissed.

CONCLUSION

A district court in the Fourth Circuit rightly observed that when this Court dismissed the writ of certiorari in *Chen*, "[a] rare opportunity to clarify an important issue and address a split in the circuits has surely been missed." *Harris v. South Charlotte Pre-Owned Auto Warehouse, LLC*, 2015 WL 1893839 at *4 (W.D.N.C. April 27, 2015). We respectfully submit that this Court should not miss this rare opportunity again. The petition for certiorari should be granted.

Respectfully submitted,

RICHARD F. HAWKINS, III
Counsel of Record
THE HAWKINS LAW FIRM, PC
2222 Monument Ave.
Richmond, VA 23220
(804) 308-3040 (telephone)
(804) 308-3132 (fax)
rhawkins@thehawkinslawfirm.net

Counsel for Petitioner