No. 19-898

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 REHEARING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULE

OTHER AUTHORITIES

PETITION FOR REHEARING

Pursuant to Rule 44.1 of this Court, Petitioner Kimberly Collins respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment below of the United States Court of Appeals for the Fourth Circuit. Following Rule 44.2, Collins submits that intervening circumstances of a substantial or controlling effect and substantial grounds not previously presented warrant this petition.

The original certiorari petition asked this Court to resolve a 9-1 Circuit split on the question of 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. The Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have all said "yes," but the Fourth Circuit, the Court of Appeals from which certiorari is taken in this case, has said "no." That "no" was outcome-determinative in the dismissal of Collins' Complaint below.

The Fourth Circuit has held its "no" position since 1995 (when it issued its decision in *Mendez v. Elliot*, 45 F.3d 75 (4th Cir. 1995)). This, 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

[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).

Notes – 1993 amendment, *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. GDC, Inc.*, 193 F. Supp.3d 577, 582 n. 1 (E.D. Va. 2016).[2]

Since the filing, and denial, of the original certiorari petition, significant events have occurred. Most notably, *within* the Fourth Circuit, where *Mendez* is the controlling authority, district courts have reached conflicting decisions as to whether they have discretion under Rule 4(m) to extend the time for service in the absence of good cause. One specifically held it did *not*, dismissing the case for lack of service and stating that "*Mendez* has yet to be overruled and is still good law in this circuit" and that it was "bound by . . . Fourth Circuit precedent and must enforce the rules of law contained therein." *Craig v. Global Solution Biz LLC*, 2020 WL 528015 at *4 (D.S.C. Feb. 3, 2020). Another, however, ignored *Mendez* completely, granted a discretionary extension, and held that "even in the absence of good cause, a court may, in its discretion extend the time for proper service of process." *Battle v.*

---

[2] *See also* 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.").

Ruby Tuesday, Inc., 2020 WL 998754 at *1 (E.D.N.C. Mar. 2, 2020).[3]

As well, in the *Fifth Circuit*, where the rule of law is that where the statute of limitations will bar any re-filed claim, 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, *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 325 (5th Cir. 2008), two district courts followed this rule and reached the exact opposite conclusion than did the district court in *Craig*. As one of them explained: "where 'the statute of limitations prevents or *arguably may* prevent a party from refiling his [or her] case, . . . a dismissal for lack of service 'is an extreme sanction that deprives a litigant of the opportunity to pursue his [or her] claim." *Yiru v. WorldVentures Holdings, LLC*, 2020 WL 572872 at *3 (N.D. Texas Feb. 4, 2020) (quoting *Millan*, 546 F.3d at 326). *See also Doe v. Chevron N. Am. Exploration & Production Co.*, 2020 WL 491184 at *5-6 (E.D. La. Jan. 30, 2020) (explaining that where a Rule4(m) dismissal for lack of service would cause new claims to be barred

---

[3] *See also Gabbidon v. Wilson*, 2020 WL 1312871 at*2-3 (S.D. W.Va. Mar. 17, 2020) (citing the Fourth Circuit's decision in this case but applying the factors set forth in *Robinson v. GDC, Inc.*, 193 F. Supp.3d 577 (E.D. Va. 2016), a decision expressly criticized by the Fourth Circuit in its decision in this case, to hold that a discretionary extension under Rule 4(m) was appropriate); *Richards v. PHH Mortgage Corp.*, 2020 WL 1234634 at *6 (M.D.N.C. Mar. 13, 2020) (finding "good cause" under Rule 4(m) but using the factors set forth in the *Robinson*, a decision expressly criticized by the Fourth Circuit in its decision below).

by the statute of limitations, "the Fifth Circuit has held that a dismissal without prejudice is akin to a dismissal *with* prejudice and that the heightened standard for dismissing cases with prejudice should apply") (emphasis added).

And finally, in the other Circuits where discretionary extensions are part of the rule of law for Rule 4(m), at least three different district courts have issued post-denial decisions following a rule of law that is the exact opposite of the Fourth Circuit's rule in *Mendez*. *See, e.g., Nicolosi v. Dept. of Homeland Security DPB Secretary*, 2020 WL 1234951 (W.D.N.Y. Mar. 11, 2020) (granting discretionary extension of time to complete service under Rule 4(m)); *George v. Beaver County*, 2020 WL 1158257 (D. Utah Mar. 10, 2020) (same); *Small v. Georgia*, 2020 WL 1080390 (S.D. Ga. Mar. 5, 2020) (same).

Simply put, post-petition and post-denial decisions abound – and will continue to proliferate – applying inconsistent rules of law as to Rule 4(m). 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). These recent developments show that such uniformity is sorely lacking as to Rule 4(m) and will continue to be deficient unless and until this Court acts. "As the Court of law resort in the federal system," this Court "has supervisory authority" over that system" and "must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 8 (1984) (Stevens, J., dissenting). The performance of this function is warranted here and, as

the subsequent district court decisions show, the Petition should be granted.

REASONS FOR GRANTING THE PETITION

A. The Sheer Magnitude And Scope Of The 9-1 Circuit Split At Issue In This Case

As explained in the original certiorari petition, six years ago, this Court recognized the split caused by *Mendez* when it granted certiorari in *Chen v. Mayor & City Council of Baltimore, Md.* 136 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[4] 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.[5] Although this Court was unable to resolve the circuit conflict due to the self-represented

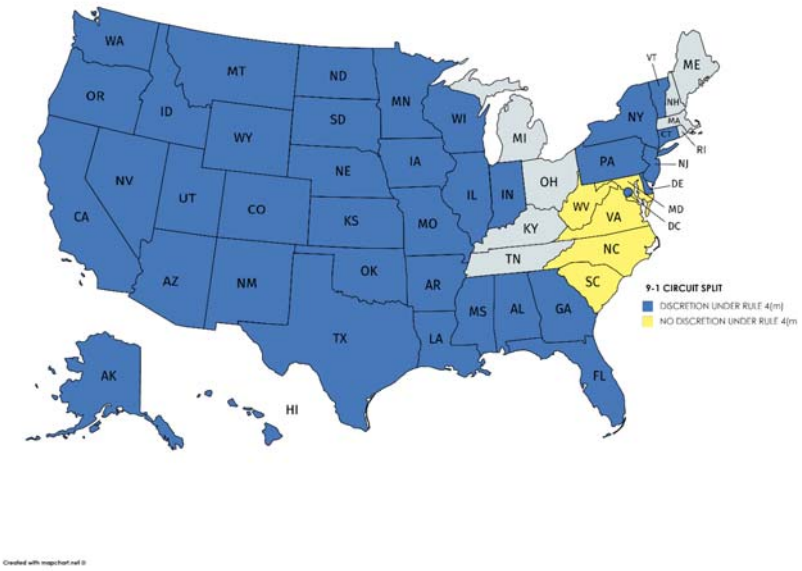
---

[4] *See, e.g., 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); *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).

[5] *Mann v. Castiel*, 681 F.3d 368, 375 (D.C. Cir. 2012); *Adams v. Allied Signal Gen. Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1995).

petitioner's failure to file a merits brief, *Chen*, 135 S. Ct. 939 (2015) (mem.), the 9-1 split remains firmly in place.

It is hard to overstate the magnitude and scope of the Circuit split. As the following graphic illustrates, litigants in 37 states and the District of Columbia follow one rule of law for Rule 4(m), while litigants in the 5 states of the Fourth Circuit follow a contrary one.



To put it into more stark numerical terms, 70 out of the 94[6] federal district courts (74%)[7], governing roughly 75% of the population of the United States[8], are controlled by one rule of law, whereas 9 federal district courts (10% of the federal district courts), governing approximately 8.39% of the population, live under another. In other words, if Collins had been one of the almost 250 million people living in the nine Circuits where discretionary extensions are expressly permitted under 4(m), her Complaint would not have been dismissed.

B. Intervening Circumstances Of A Substantial Or Controlling Effect And Other Substantial Grounds Merit Granting This Petition

Here, intervening circumstances of a substantial effect and other substantial grounds merit granting this Petition. Specifically, *since* the denial of the original certiorari petition, district courts in the Fourth

---

[6] https://www.uscourts.gov/about-federal-courts/court-role-and-structure

[7] https://en.wikipedia.org/wiki/List_of_United_States_district_and_territorial_courts

[8] According to the United States Census Bureau, roughly 247,328,005 million people (out of an estimated population of 328,239,523) live in the 37 states and the District of Columbia governed by the nine Circuits which hold that district courts have discretion under Rule 4(m) to grant extensions. http://www2.census.gov/programs-surveys/popest/datasets/2010-2019/national/totals/nst-est2019-alldata.csv?#. On the other hand, 27,567,740 million people live in the five states governed by the Fourth Circuit. *Id.*

Circuit have issued two legally incomprehensible decisions about how to apply Rule 4(m). First, in *Gabbidon v. Wilson*, 2020 WL 1312871 at*2-3 (S.D. W.Va. Mar. 17, 2020), the district court *cited* the Fourth Circuit's unpublished decision *in this case* but then granted a discretionary extension using the factors set forth in *Robinson v. GDC, Inc. supra.* This juxtaposition is mystifying, since the Fourth Circuit expressly minimized *Robinson* in its decision below, saying that it did ***not*** set forth factors that district courts "in this Circuit" must consider. *Collins v. Thornton*, 782 Fed. Appx. 264, 267 (4th Cir. Aug. 13, 2019). Yet the district court considered them anyway – and did so in the context of a discretionary extension analysis ostensibly prohibited by *Mendez*.

The second case, *Richards v. PHH Mortgage Corp.*, 2020 WL 1234634 at *6 (M.D.N.C. Mar. 13, 2020), is even more bewildering. As did the court in *Gabbidon*, the district court in *Richards* inexplicably applied the factors from *Robinson* in its Rule 4(m) analysis. But even worse, it did so as part of its "good cause" analysis -- even though the Fourth Circuit in its decision below expressly said that courts are not required to consider such factors *as part of their "good cause" analyses*. *Collins*, 782 Fed. Appx. at 267.

And, of course, even though it was issued *after* the original certiorari petition was filed in this case but *before* this Court denied the petition, the district court's decision in *Craig v. Global Solution Biz LLC*, 2020 WL 528015 at *4 (D.S.C. Feb. 3, 2020) shows that the intra-Circuit Rule 4(m) conflict about the validity of *Mendez* remains alive and well in the Fourth Circuit.

Specifically, in *Craig*, the district court *refused* to even entertain the notion of granting a discretionary extension of time under Rule 4(m) and expressly held that *Mendez* is good law.

These decisions, together with the various post-filing and post-denial district court decisions from *outside* the Fourth Circuit,[9] show that the proliferation of conflicting, inconsistent, confusing, varying, and disparate decisions is not going to go away and that the only way to staunch the flow of these decisions is for this Court to intervene and grant this Petition.[10]

CONCLUSION

As explained above, the post-denial flow of inconsistent federal district court decisions about the availability of discretionary extensions under Rule 4(m) and the varying rules of law related thereto show that this Court's action is urgently needed to bring uniformity to this area of jurisprudence. This petition should be granted, this Court should accept this case for a decision on the merits, and the Fourth Circuit's decision below should be vacated.

---

[9] *See, e.g., Nicolosi v. Dept. of Homeland Security DPB Secretary*, 2020 WL 1234951 (W.D.N.Y. Mar. 11, 2020) (granting discretionary extension of time to complete service under Rule 4(m)); *George v. Beaver County*, 2020 WL 1158257 (D. Utah Mar. 10, 2020) (same); *Small v. Georgia*, 2020 WL 1080390 (S.D. Ga. Mar. 5, 2020) (same).

[10] *Florida v. Rodriguez*, *supra* at 8 (noting that the "principal ground" advanced by the petitioner in its petition for rehearing was a succession of clearly erroneous decisions in the Florida courts).

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

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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