No. 16-1546

IN THE

Supreme Court of the United States

ADRIAN R. SCOTT,

Petitioner,

v.

MARYLAND STATE DEPARTMENT OF LABOR, LICENSING & REGULATION, *et al.,*

Respondents.

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

REPLY BRIEF FOR PETITIONER

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This Court has already decided that the question presented warrants review, *Chen* v. *Mayor & City Council of Balti., Md.*, 135 S. Ct. 475 (2014), and Respondent DLLR does not and cannot dispute any of the fundamental reasons why. DLLR does not deny that the Fourth Circuit is firmly entrenched on the minority side of a pervasive circuit split over Federal Rule of Civil Procedure 4(m). Nor does DLLR defend the merits of the Fourth Circuit's position on the subject. And DLLR nowhere quarrels with the importance of this issue, which determines litigants' access to federal courts and, at present, does so differently in different parts of the country.

With nothing to rebut the usual bases for certiorari, DLLR instead rests its brief in opposition on a handful of alleged—but contrived—vehicle issues. They are all meritless. The court of appeals and the district court in this case faithfully followed the Fourth Circuit's still-binding *Mendez* rule, as they were required to do, and the full court of appeals then declined to revisit that rule en banc. The Court should grant certiorari again, as it did in *Chen*, and reverse.

I. DLLR DOES NOT DISPUTE THAT THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW.

DLLR understandably takes no apparent issue with the worthiness of the question presented for review by this Court.

First, DLLR does not dispute that the circuits are divided about how to interpret and apply Rule 4(m). Nor could it. Pet. 12–16. In nine circuits, courts may exercise their discretion to extend the time for service of process without good cause, and at least three of those

circuits *require* courts to consider such equitable extensions. *Id.* (citing cases). But the Fourth and (seemingly) Sixth Circuits have a different view, mandating dismissal—full stop—whenever a claimant fails to show good cause. *Id.* (citing *Mendez* v. *Elliot*, 45 F.3d 75 (4th Cir. 1995) and other cases); see also Pet. App. 11a (citing and quoting *Mendez* and a Sixth Circuit decision). And the Fourth Circuit has affirmatively declined to revisit its outlier position after *Chen*—a point DLLR ignores entirely.

Second, DLLR also does not counter Mr. Scott's showings that the *Mendez* rule is inconsistent with the text and history of Rule 4(m), or with this Court's interpretations of the Rule. Pet. 16–18.

Third, DLLR likewise does not deny many of the reasons why this case is an excellent vehicle for considering the question presented. It does not challenge, for example, the fact that the equities of Mr. Scott's case would have presented ample grounds for an extension in the many circuits where that is possible. Pet. 18–21 (reviewing numerous equitable factors that should have weighed in Mr. Scott's favor).

In short, DLLR effectively concedes that the Court should decide the question presented and that the equities of Mr. Scott's case provide the opportunity to do so. Certiorari should be granted.

II. DLLR'S ARGUMENTS AGAINST CERTIORARI ARE UNFOUNDED DISTRACTIONS.

Despite all of this, DLLR offers a grab bag of arguments urging the Court to deny certiorari and to await yet another case to settle the question presented. DLLR's contentions all fail.

A. This Case Squarely Presents The Same Issue As *Chen*.

DLLR's principal argument is that the Fourth Circuit "neither stated nor applied" the interpretation of Rule 4(m) first articulated in *Mendez* and later applied in *Chen*. Opp. 7–10. That is wishful thinking at best.

1. Despite DLLR's assertion that "[n]either of the lower courts in this case concluded that the district court lacked discretion to extend the service deadline in the absence of good cause," Opp. 10, the lack of the formal announcement DLLR appears to seek is immaterial when both courts clearly refused to consider an extension absent good cause.

The district court's order, in accordance wffith *Mendez's* strictures, dismissed the complaint because Mr. Scott "ha[d] not shown good cause for extending [Rule 4(m)'s then 120-day] period." Pet. App. 15a. The order does not consider the equities and does not mention discretion to go beyond the good cause inquiry. *Id.* at 15a–16a. The same district judge, moreover, is on record recognizing that "Fourth Circuit precedent requires a showing of good cause before a court can grant an extension of time." *Knott* v. *Atl. Bingo Supply, Inc.*, No. 05-1747, 2005 WL 3593743, at *1 & n.1 (D. Md. Dec. 22, 2005) (citing *Mendez*). The district court thus did not consider an equitable extension because the district court knew that it was bound by Circuit precedent.

The same was true in the Fourth Circuit. The panel (Pet. App. 11a) cited *Mendez*, 45 F.3d 75, and *Nafzinger* v. *McDermott International, Inc.*, 467 F.3d 514 (6th Cir. 2006), both of which stand for the proposition that good cause is the only avenue to an extension. And the panel had no power to ignore *Mendez*

even if it wanted to: "a panel … cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court." *United States* v. *Chong*, 285 F.3d 343, 346 (4th Cir. 2002); see also *Gbane* v. *Capital One, NA*, No. 16-701, 2016 WL 3541281, at *2 (D. Md. June 29, 2016) ("members of this bench view *Chen* as reaffirming the good cause requirement set forth in *Mendez*").[1]

Moreover, the panel's decision makes absolutely clear that its analysis began and ended with a consideration of good cause, just as *Mendez* required. It opened with the proposition that "Rule 4(m) requires extension of the 120-day service period only when the plaintiff can show good cause for his failure to serve," announced that "the question of what constitutes 'good cause' necessarily is determined on a case-by-case basis within the discretion of the district court," and then proceeded to consider such factors and concluded that, "[u]nder the facts in this case, we agree with the district court that Scott *did not demonstrate good cause* for his repeated failure to effect proper service." Pet. App. 11a–13a (emphasis added). The court of appeals stopped there. The panel, like the district court, gave no consideration to whether an equitable extension should have nevertheless been considered or granted. That is a textbook example of the analysis

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[1] The author of *Mendez* was the presiding judge on the panel here. The panel opinion was joined by a district judge sitting by designation who had held that *Mendez* is binding within the Fourth Circuit, despite acknowledging the circuit split and suggesting that the Third Circuit's rule "might be persuasive if this Court were writing on a blank slate [but] the Fourth Circuit Court of Appeals has already interpreted Rule 4(m) and this Court is constrained to follow that interpretation." *T&S Rentals* v. *United States*, 164 F.R.D. 422, 424–25 (N.D.W. Va. 1996) ("the complaint must be dismissed absent a showing of good cause") (quoting *Mendez*, 45 F.3d at 78).

Mendez demands, but that other circuits squarely reject.

Furthermore, even if the panel did not formally reannounce that "the district court lacked discretion to extend the service deadline in the absence of good cause" (Opp. 10), the mere failure to consider such a discretionary extension after finding a lack of good cause would have led to reversal *ab initio* in at least three other circuits. Pet. 13 (collecting cases).

2. DLLR's opposition spends pages rehashing the Fourth Circuit's "analysis of the service issue," Opp. 8–12, but that discussion merely begs the question. If the point is simply to walk through the Fourth Circuit's good cause analysis, it is nothing more than a long distraction: Mr. Scott has not argued that his service was sufficient, nor does his petition contend that an extension was *required* because there was good cause. Instead, the issue is whether the court had discretion under Rule 4(m) to grant an extension *in the absence of good cause*. If, on the other hand, DLLR means to suggest that the Fourth Circuit actually went beyond an analysis of good cause, see, *e.g.*, Opp. 8 ("[r]ather than concluding that the absence of good cause removed the matter from the district court's discretion"), that contention is irreconcilable with the Fourth Circuit's actual opinion, as just explained.

In the end, DLLR's position seems to reduce to the proposition that it would be improper to "infer[]" that the Fourth Circuit applied *Mendez*'s interpretation of Rule 4(m). See, *e.g.*, Opp. 13. There is no need for an "inference." The notion that the panel did otherwise is impossible enough to reconcile with the facts that the panel (i) cited *Mendez*, Pet. App. 11a, (ii) followed *Mendez*'s required method by failing to go beyond an analysis of good cause, *id.* at 11a–13a, and (iii) conspicuously cited out-of-circuit authority, in tandem with

Mendez, from the lone appeals court to apply the *Mendez* rule, *id.* at 11a. In any event, surely the court of appeals cannot insulate itself from this Court's review through the simple expedient of failing to mouth the words "we continue to hold that we are not permitted to consider an equitable extension," especially where neither the panel nor the decision under review considered such an extension. No leap is required to recognize the view of Rule 4(m) that governed and applied below.

B. The Abuse-of-Discretion Standard Of Review Has No Bearing On Whether The Fourth Circuit Considered A Discretionary Equitable Extension.

DLLR's next argument, sprinkled throughout the opposition, hinges on the Fourth Circuit's invocation of the abuse-of-discretion standard of review. In particular, DLLR seems to think that the Fourth Circuit's references to the standard of review for good cause findings (*i.e.*, abuse of discretion) simultaneously signaled that the court was also considering—contrary to *Mendez*—the district court's discretion to grant an equitable extension absent good cause. See, *e.g.*, Opp. 14 (court of appeals "ultimately concluded not that the district court lacked discretion, but that it had not abused that discretion"); Opp. 8 (same).

This argument does not advance DLLR's position one inch. Notwithstanding the overlap of the word "discretion," the two issues are entirely distinct. The standard of review was uncontroversial. "A district court's decision on good cause is reviewed for an abuse of discretion," *Quesinberry* v. *Taylor*, 162 F.3d 273, 279 (4th Cir. 1998), and the panel applied that standard here. The panel explained that "the question of what constitutes 'good cause' necessarily is determined on a case-by-case basis within the discretion of the district

court," Pet. App. 11a, listed "a number of factors" relevant to that determination, *id.*, and then "consider[ed] … all th[o]se facts [to] conclude that the district court did not abuse its discretion by dismissing the complaint for insufficient service of process," *id.* at 13a. That analysis was entirely and exclusively about good cause. *Id.* at 11a–13a.

DLLR is wrong to try to impute anything more to these passages, or to try to convert what the court of appeals unquestionably did (*i.e.*, review the good-cause determination for an abuse of discretion) into a proxy for what the court of appeals and the district court plainly did not do (*i.e.*, determine that courts also have discretion to consider an extension even absent good cause and then consider whether such an extension was appropriate). There is no textual support in the panel's opinion for DLLR's attempt to re-write the decision under review. And suffice it to say that an abrupt break from *Mendez*, *Chen*, and binding Circuit precedent would not have come disguised as a routine statement about the appellate standard of review.

C. DLLR's Remaining "Vehicle" Arguments Are Baseless.

DLLR makes two final, but half-hearted, arguments about why this case is not the best vehicle to consider the question presented. Neither holds up.

First, DLLR suggests that Mr. Scott did not preserve the question presented because he did not independently move for an extension of time under Federal Rule of Civil Procedure 6(b). Opp. 6, 9, 12–14. But DLLR never actually brings itself to claiming that the Rule 4(m) issue is waived, and for good reason. Rule 4(m) allows a court to extend the specified period "on motion *or on its own* after notice to the plaintiff." Fed. R. Civ. P. 4(m) (emphasis added). Plus, Mr. Scott's

counsel expressly sought more time to perfect service, Pet. 8–9, the district court's order expressly states Mr. Scott "has not shown good cause for *extending* [Rule 4(m)'s 120-day] period," Pet. App. 15a (emphasis added), and the parties argued below over whether he should be afforded more time pursuant to Rule 4(m) because he had shown good cause *and*, even absent good cause, he should be given an equitable extension. See, *e.g.*, Pet. 8–10. Indeed, whether "the plaintiff asked for an extension of time under Rule 6(b)(1)(A)" is one of many factors to consider in assessing good cause, Pet. App. 11a, and it would be passing strange to think that the same single factor could preclude entirely the consideration of an equitable extension when good cause is not found. The question presented was argued, preserved, and passed upon below and thus is squarely presented for this Court's review.

Second, DLLR points out that the district court would have dismissed Mr. Scott's complaint for additional reasons besides the service of process question. Opp. 1, 14–15. But the court of appeals affirmed the dismissal of Mr. Scott's claims against DLLR for just one reason—the application of Rule 4(m). Pet. App. 7a–13a.[2] The case thus arrives here in precisely the same posture as *Chen*, with the Fourth Circuit's only holding premised on its inflexible and outlier interpretation of Rule 4(m). As the Court did in *Chen*, it should grant review here too.

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[2] This stands in contrast to the Fourth Circuit's disposition of Mr. Scott's claims against the individual defendants, which the court affirmed on the basis that Mr. Scott failed to state a claim. Pet. App. 14a; *see* Pet. 11 n.8.

CONCLUSION

For the foregoing reasons, and those in Mr. Scott's Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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