No. 16-1546

In The Supreme Court of the United States

ADRIAN R. SCOTT,

Petitioner,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIAN E. FROSH
Attorney General of Maryland

MATTHEW J. FADER*
JULIA DOYLE BERNHARDT
JESSICA V. CARTER
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
mfader@oag.state.md.us
(410) 576-7906

Counsel for Respondents

*Counsel of Record

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Did the court of appeals properly conclude that the district court's dismissal for insufficient service of process was not an abuse of discretion where the plaintiff repeatedly refused to follow the district court's instructions regarding making proper service and never filed a motion seeking an extension of time to make service?

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RULE OF CIVIL PROCEDURE INVOLVED

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

> If a defendant is not served within 120 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) (2014).[1]

STATEMENT

Petitioner Adrian R. Scott asks this Court to review one of the five independent grounds on which the district court dismissed his complaint against the Maryland Department of Labor, Licensing and Regulation ("DLLR"): insufficient service of process. Mr. Scott's petition centers on his contention that the court of appeals followed incorrect Fourth Circuit precedent in affirming the dismissal "on the sole basis that he had not shown good cause for extending the time in which to properly serve DLLR." Pet. 2 (citing *Mendez v. Elliott*, 45 F.3d 75, 78 (4th Cir. 1995)). But although the Fourth Circuit found that Mr. Scott lacked good

[1] Effective December 1, 2015, the 120-day service period was amended to 90 days. Fed. R. Civ. P. 4(m) (2015).

cause, it neither stated nor applied what Mr. Scott calls the "*Mendez* rule," i.e., that Federal Rule of Civil Procedure 4(m) "requires that if the complaint is not served within 120 days after it is filed, the complaint *must be dismissed absent a showing of good cause*." Pet. 3 (quoting *Mendez*, 45 F.3d at 78 (emphasis added in Petition)). Instead, the court of appeals dismissed the complaint because Mr. Scott repeatedly failed to make sufficient service notwithstanding being provided with instructions as to how to do so from the court and DLLR, and Mr. Scott never moved for an extension of time to effectuate service.

1. On July 30, 2014, Mr. Scott filed a pro se employment discrimination complaint in the United States District Court for the District of Maryland against DLLR and six of DLLR's employees. Pet. App. 2a-4a. He alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e – 2000e-17 ("Title VII"), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 – 634 ("ADEA"). Pet. App. 2a.

In his first of three failed attempts at service, Mr. Scott mailed a copy of his complaint by certified mail, without a summons, to a DLLR satellite office that housed neither the Department's Secretary nor any registered resident agent. Pet. App. 4a. On October 30, 2014, the district court provided Mr. Scott with notice of his mistake and specific instructions on how to serve DLLR. The court's instructions included both the website address and a telephone number that Mr. Scott could call to obtain the proper name and address of

DLLR's resident agent. *Id.* at 4a-5a, 10a-11a. In November 2014, Mr. Scott made a second attempt at service, but he did not follow the court's instructions. Instead, Mr. Scott again directed that service be made at the same incorrect satellite office address. Pet. App. 5a, 10a-11a.

On January 22, 2015, the defendants moved to dismiss the complaint on several grounds, including, as to DLLR: insufficient service, immunity, and failure to state a claim on which relief could be granted. Pet. App. 5a; *see also* Pet. App. 15a-16a. In the motion, the defendants described how to effectuate service of process on DLLR. Joint Appendix 38-41, No. 15-1617 (4th Cir. Sept. 11, 2015).

Mr. Scott attempted service on DLLR for a third time in February 2015, but yet again he directed that service be made at the same incorrect satellite office address. Pet. App. 5a, 9a. In March 2015, Mr. Scott's attorney entered her appearance and the parties agreed to a second 30-day extension of time for Mr. Scott to respond to the motion to dismiss, which he did on April 10, 2015. Pet. App. 6a. Mr. Scott's attorney did not make an attempt to serve DLLR after entering her appearance, and neither Mr. Scott nor his attorney ever filed a motion to extend the time in which to serve the defendants.[2] *Id.*

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[2] The closest Mr. Scott came to requesting an extension was when his counsel, one month after entering her appearance, included only a "brief, one-sentence request for an extension in her response to the defendants' motion to dismiss." Pet. App. 5a, 13a.

On May 7, 2015, the district court granted the defendants' motion to dismiss on multiple grounds. Pet. App. 15a-16a. As to DLLR, the district court concluded that (1) plaintiff did not properly effect service; (2) DLLR is immune from suit in federal court; (3) DLLR is not subject to suit under Title VII because it was not plaintiff's employer; (4) DLLR is not subject to suit under the ADEA; and (5) the complaint does not state a claim on which relief can be granted. Pet. App. 6a, 15a-16a.[3] Mr. Scott appealed to the United States Court of Appeals for the Fourth Circuit. Pet. App. 2a.

2. In affirming the judgment of the district court, the court of appeals determined that the district court did not abuse its discretion when it dismissed the claims against DLLR under Federal Rule of Civil Procedure 12(b)(5).[4] Pet. App. 2a. Although the court of appeals found that Mr. Scott's multiple attempts at

[3] The district court also granted the motion to dismiss as to the six individual defendants, concluding that (1) they were not served timely; (2) they are immune from suit; (3) they are not proper defendants under Title VII; (4) they are not subject to suit under the ADEA; and (5) the complaint does not state a claim on which relief can be granted. Pet App. 15a-16a. Presumably because the Fourth Circuit based its affirmance of the district court's order as to the six individual defendants on grounds other than service, Mr. Scott does not raise issues concerning those defendants in his petition. Pet. 11, n.8. However, it is only as to those defendants, and *not* DLLR, that the district court ruled that service was untimely. Pet. App. 15a.

[4] The court of appeals also affirmed the judgment in favor of the six DLLR employees on the ground that they are not subject to suit in their individual capacities. Pet. App. 2a.

service on DLLR were timely,[5] the court held that those attempts were insufficient because, notwithstanding clear rules for service on a government agency and the district court's efforts to assist Mr. Scott in meeting those requirements, Pet. App. 8a-11a, Mr. Scott "failed to direct service to the proper address both in November 2014 and also in February 2015; instead he directed that service be made at a satellite DLLR office." Pet. App. 10a. Mr. Scott's error was "more than a 'mere technicalit[y],'" and could not be simply overlooked without "eviscerat[ing] the clear requirements of Rule 4." Pet. App. 11a.

In rejecting Mr. Scott's contention on appeal that the district court should have afforded him additional time to make yet a fourth attempt at service, the court of appeals first articulated the applicable standard, stating that Federal Rule of Civil Procedure 4(m) "requires extension of the 120-day service period only when the plaintiff can show good cause for his failure to serve." Pet. App. 11a. The court held that Mr. Scott had failed to demonstrate good cause, because "service of process on DLLR was insufficient on both occasions for the sole reason that Scott refused to follow the district court's specific instructions about how to find the proper service address for DLLR." Pet. App. 12a. Moreover, the court observed, neither

[5] The Fourth Circuit concluded that Mr. Scott's attempts at service were timely under Federal Rule of Civil Procedure 4(m), considering: (1) the tolling of the 120-day period for service required by *Robinson v. Clipse*, 602 F.3d 605, 608 (4th Cir. 2010), Pet. App. 8a-9a; and (2) delay that was outside of Mr. Scott's control, Pet. App. 7a-10a.

Mr. Scott nor his counsel ever filed a motion to extend the time for service pursuant to Federal Rule of Civil Procedure 6(b). Pet. App. 13a. Under these circumstances, the court of appeals held, the district court did not abuse its discretion in dismissing the complaint for insufficient service of process. *Id.*

Mr. Scott filed a petition for rehearing en banc, which the court of appeals denied. Pet. App. 25a.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present the Question of Whether a District Court Has Discretion to Extend the Time for Service Absent Good Cause.

This case does not present a "compelling reason[]" for review by this Court, S. Ct. Rule 10, because, contrary to Mr. Scott's claim, the case does not present a conflict between the Fourth Circuit and any other United States court of appeals because the Fourth Circuit did not affirm the dismissal of his claims against DLLR "on the sole basis that he had not shown good cause for extending the time in which to properly serve DLLR," Pet. 2. Instead, the court of appeals dismissed the complaint because Mr. Scott repeatedly failed to make sufficient service notwithstanding the provision of instructions as to how to do so from the court and DLLR, and Mr. Scott never moved for an extension of time to effectuate service. As such, this case presents a straightforward application of the text of Rule 4(m).

Mr. Scott's assertion that the Fourth Circuit's decision conflicts with that of other courts of appeals rests on the faulty premise that the Fourth Circuit relied on the so-called "*Mendez* rule," Pet. 3, but the court of appeals neither stated nor applied that rule in connection with its dismissal of the claims against DLLR. Instead, the court of appeals (1) stated 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," Pet. App. 11a (emphasis added); (2) found an absence of good cause, Pet. App. 12a-13a; and (3) then held that, in consideration of the relevant facts, the district court did not abuse its discretion in dismissing for insufficient service, Pet. App. 13a. In other words, contrary to Mr. Scott's contention that the Fourth Circuit concluded that the district court *lacked* discretion to extend the time for service, what the court actually held was "that the district court *did not abuse its discretion* by dismissing the complaint for insufficient service of process." *Id.* (emphasis added).

The Fourth Circuit's application of Rule 4(m) in this case is thus consistent with the plain language of Rule 4(m), Mr. Scott's stated position regarding Rule 4(m), and the case law from other circuits on which Mr. Scott relies. Rule 4(m) itself provides only that "if the plaintiff shows good cause for the failure [to serve timely], the court must extend the time for service for an appropriate period." The rule does not require an extension in the absence of good cause. Mr. Scott agrees: "Rule 4(m) mandates that a court extend time for service when good cause is shown. When no good

cause exists, the rule otherwise grants the court discretion between dismissing the action and ordering that service be made within some specified time." Pet. 4. And the decisions of other circuits on which Mr. Scott relies all agree that district courts have discretion to extend the time for service absent good cause, not that they are required to do so. *Mann v. Castiel*, 681 F.3d 368, 374-76 (D.C. Cir. 2012); *Zapata v. City of New York*, 502 F.3d 192, 195-96 (2d Cir. 2007); *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1131-32 (11th Cir. 2005); *In re Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001); *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340-41 (7th Cir. 1996); *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); *Espinoza v. United States*, 52 F.3d 838, 840-41 (10th Cir. 1995); *Petrucelli v. Bohringer & Ratzinger, GMBH*, 46 F.3d 1298, 1305 (3d Cir. 1995).

Here, the Fourth Circuit agreed with the district court that Mr. Scott failed to demonstrate good cause for his failure to make sufficient service on DLLR. Pet. App. 12a-13a. Rather than concluding that the absence of good cause removed the matter from the district court's discretion – which would have been the result of the rule that Mr. Scott claims the court applied – the court of appeals instead applied an abuse-of-discretion standard and held, in consideration of all relevant facts, that the district court had not abused its discretion in dismissing the claims against DLLR. Pet. App. 13a.

Moreover, because Mr. Scott never moved for an extension of time to effectuate service, the district court was never confronted directly with the question of whether to extend that time period. Contrary to Mr. Scott's claim before this Court, Pet. 19 ("This entire dispute has been about timeliness. . . ."), the district court dismissed the claims against DLLR, and the Fourth Circuit affirmed that dismissal, not because Mr. Scott's attempts at service were untimely, but because Mr. Scott inexplicably refused to comply with the specific instructions that the district court gave him about how to serve DLLR. Pet. App. 12a-13a ("Setting aside issues of timeliness, service of process on DLLR was insufficient. . . ."). As discussed in Part III below, the district court also addressed the merits of Mr. Scott's claims against DLLR, and so dismissed the complaint on several other independent grounds as well.

By contrast, in *Chen v. Baltimore*, 135 S. Ct. 475 (2014), the district court initially granted the plaintiff a 60-day extension of time in which to effect service of process, without requiring a showing of good cause, *Chen v. Baltimore*, 292 F.R.D. 288, 291 (D. Md. 2013). The defendant filed a motion to vacate, premised upon *Mendez*, arguing that an extension was not available in the absence of good cause. *Id.* Concluding that *Mendez* remained good law in the Fourth Circuit, *id.* at 291-93, and in the absence of good cause, the district court found that it had no choice but to deny the extension and vacate its earlier order. *Id.* at 295.

Neither 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, nor was the timeliness of Mr. Scott's efforts at serving DLLR the basis for dismissal. Thus, the Fourth Circuit did not apply the "*Mendez* rule," and the question Mr. Scott asks this Court to resolve – whether "a district court has discretion to extend the time for service of process even without a showing of good cause," Pet. i – is not presented by this case.

II. The Fourth Circuit Correctly Applied Established Standards of Dismissal in Determining That the District Court Did Not Abuse Its Discretion in Dismissing the Complaint.

As the Fourth Circuit recognized, a motion to dismiss for improper service of process under Federal Rule of Civil Procedure 12(b)(5) is reviewed under an abuse-of-discretion standard. Pet. App. 6a-7a (citing *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 708 (4th Cir. 1993); *Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir. 2010)). The district court's decision that Mr. Scott had not properly effected service on DLLR was based on Mr. Scott's repeated failure to make proper service of process notwithstanding the court's clear instructions on how to do so. Pet. App. 6a-11a, 15a. Under those circumstances, the Fourth Circuit

properly concluded that the district court did not abuse its discretion.

The Fourth Circuit's analysis of the service issue was straightforward. The court observed that valid service of process is a prerequisite to obtaining personal jurisdiction over a defendant. Pet. App. 10a; *see Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.") (quoting *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946)). Under Federal Rule of Civil Procedure 4(j), service on a state-created government agency can be effectuated by "delivering a copy of the summons and the complaint to its chief executive officer" or "serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant." Under Maryland law, service may be made on a state agency like DLLR by serving the entity's resident agent, if any, or the Maryland Attorney General. Md. Rule 2-124(k) (2017).

In this case, as the court of appeals recognized, Mr. Scott failed to make proper service under any of these mechanisms "[d]espite the district court's careful instructions. . . ." Pet. App. 5a. Mr. Scott made three timely-but-deficient attempts at service, two of them coming after receiving instructions from the district court and one coming after DLLR itself had described how to effectuate service in its motion to dismiss. Pet. App. 4a-5a, 10a-11a. It was thus Mr. Scott's refusal to

follow the plain language of Rule 4(j), as well as his disregard of the district court's explicit instructions as to how to serve DLLR – not the timing of his attempts at service – that defeated his claims against DLLR. Pet. App. 10a-13a, 15a.

The Fourth Circuit's analysis of Mr. Scott's claim on appeal that he was entitled to an extension of time to make service for good cause was similarly straightforward. Pet. App. 11a-13a. The appellate court rejected that claim – not because it concluded that the district court lacked discretion to extend the time for service in the absence of good cause, i.e., the so-called "*Mendez* rule" – but based on the court of appeals' conclusion that the district court did not abuse its discretion in dismissing the complaint "[i]n consideration of all the[] facts." *Id.* at 13a. In light of Mr. Scott's repeated failures to follow instructions and the fact that neither he nor his attorney, after she entered her appearance, filed a motion to extend the time in which to serve the defendants, Pet. App. 6a, 13a, the Fourth Circuit's decision was correct. Regardless of what might have been the case *if* Mr. Scott had filed a proper motion for extension and *if* Mr. Scott's timely attempts at service had not been so "inexplicably" insufficient, Pet. App. 5a, under the facts and circumstances presented in this case, the Fourth Circuit properly concluded that the district court did not abuse its discretion in dismissing the complaint against DLLR for insufficient service of process. Pet. App. 13a.

III. This Case Is a Poor Vehicle for Addressing the Question Presented in the Petition.

This case is a poor vehicle for addressing the question presented in the petition both because the question – if it is presented at all – is presented only by inference, and because the lack of proper service did not prevent the district court from addressing the merits of Mr. Scott's claims.

First, Mr. Scott would have this Court grant certiorari to reverse the Fourth Circuit's application of a rule that is not stated or applied in the decision at issue, but that Mr. Scott infers must nonetheless have been behind the decision. Mr. Scott does not identify any statement by the district court or the Fourth Circuit that either states or applies the "*Mendez* rule." Instead, he infers that the lower courts applied that rule based on (1) the absence of explicit discussion by those courts of the possibility of extending the time for service based on equitable considerations, Pet. 10-11; and (2) the Fourth Circuit's citation to *Mendez*, 45 F.3d at 78, Pet. 11. Mr. Scott thus asks this Court to take certiorari to resolve an issue he claims is presented only by inference. However, because no motion for extension was ever made, it should be no surprise that the district court's one-paragraph order did not engage in an extended analysis of any equitable considerations for an extension. Pet. App. 15a-16a.

Mr. Scott's complaint is similarly off-base with respect to the Fourth Circuit's decision, which expressly

discussed the failure of Mr. Scott and his attorney to move for an extension; discussed the "equitable considerations" now alleged by Mr. Scott in the course of its analysis, even though it did not use that phrase; and ultimately concluded not that the district court lacked discretion, but that it had not abused that discretion. Pet. App. 10a-13a. As to the Fourth Circuit's citation to *Mendez*, that citation was made in support of the statement 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," Pet. App. 11a, not the "*Mendez* rule" with which Mr. Scott takes issue. If this Court is to take up consideration of the "*Mendez* rule," it should await a decision that actually presents it.

Second, this case is also a poor vehicle because the lack of proper service did not prevent the district court from addressing the merits of Mr. Scott's claims. Indeed, Mr. Scott's failure to make proper service is only one of five independent grounds on which the district court dismissed his complaint against DLLR. As the district court properly concluded: (1) DLLR, an arm of the State of Maryland, is immune from Mr. Scott's suit for monetary damages in federal court, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); (2) DLLR is not subject to suit by Mr. Scott under Title VII because it was not his employer, 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer. . . ."); (3) DLLR is not subject to suit under the ADEA because Congress did not abrogate sovereign immunity under that statute, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000), and Maryland

has not waived it; and (4) the complaint does not otherwise state a claim on which relief can be granted. Pet. App. 15a-16a.

In *Chen*, by contrast, the district court vacated its earlier order and dismissed the complaint based solely on the plaintiff's failure to make proper service within the time allowed by Rule 4(m), and the court's belief that it was powerless to extend that time in the absence of good cause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

MATTHEW J. FADER*
JULIA DOYLE BERNHARDT
JESSICA V. CARTER
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
mfader@oag.state.md.us
(410) 576-7906

Counsel for Respondents

**Counsel of Record*