No. 15-___

IN THE

Supreme Court of the United States

EILEEN M. HYLIND,

Petitioner,

v.

XEROX CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In many cases, a district court judgment that fixes damages incorrectly is later modified by, or replaced with, a judgment that correctly fixes the amount of damages. In such cases, courts must choose which judgment starts the running of postjudgment interest. Seven courts of appeals are split over the following question:

In cases with multiple judgments fixing damages, does 28 U.S.C. § 1961(a) – which instructs that postjustment interest should run from "the entry of the judgment" – require federal courts invariably to begin running postjudgment interest from the first judgment, or may courts take into account other factors, such as the availability of prejudgment interest, in deciding from when postjudgment interest runs?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eileen M. Hylind respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, Pet. App. 3a, is unpublished but is available at 2015 WL 8536808. The opinion of the United States District Court for the District of Maryland, Pet. App. 9a, is published at 31 F. Supp. 3d 729.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 11, 2015. Pet. App. 4a. Petitioner's request for rehearing and rehearing en banc was denied on January 26, 2016. Pet. App. 1a. On March 30, 2016, the Chief Justice extended the time to file this petition for a writ of certiorari to and including May 25, 2016. *See* No. 15A1004. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1961(a) provides in relevant part: "Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal

Reserve System, for the calendar week preceding[] the date of the judgment."

INTRODUCTION

Prevailing plaintiffs who recover monetary awards in federal cases are often entitled to prejudgment interest. In addition, through 28 U.S.C. § 1961(a), Congress has provided all litigants who prevail in federal court an entitlement to postjudgment interest, calculated from "the date of the entry of the judgment."

This case involves the choice between two judgments that both awarded damages. Specifically, petitioner received a favorable initial judgment awarding her some of the backpay she sought after she won a Title VII lawsuit. She ultimately obtained a substantially larger backpay judgment after a successful appeal vacated the initial award. Faced with these two judgments, the Fourth Circuit read Section 1961(a) to require setting the demarcation point between prejudgment and postjudgment interest at the first judgment, depriving petitioner of nearly $400,000 in interest. This decision deepened a longstanding conflict among the circuits over whether Section 1961(a) requires federal courts to invariably run postjudgment interest from the first judgment or whether federal courts should take into account factors other than which judgment was first in time.

STATEMENT OF THE CASE

1. This long-running Title VII case was filed in 1995 but not fully resolved on the merits until 2015. The question presented in this petition involves the

question of how to calculate the interest on that resolution.

In 1980, petitioner Eileen Hylind began working at respondent Xerox Corporation as a commissioned salesperson. Over the next decade, she frequently ranked as a top performer.

During her career at Xerox, Hylind was subjected to severe sexual harassment and assault by a co-worker and two supervisors. After she reported these incidents to upper management, Xerox retaliated against her by assigning her to less lucrative accounts.

In 1995, Hylind brought her concerns about her work assignment to her General Manager. The General Manager's response triggered a severe post-traumatic stress reaction that permanently disabled her. Amicus Br. of the EEOC at 9, *Hylind v. Xerox*, Pet. App. 33a (No. 11-1318), ECF 42. Shortly thereafter, Xerox placed her on its disability plan, where she has remained ever since.[1] Opinion at 2-3, *Hylind v. Xerox*, Civ. No. PJM 03-116 (D. Md. Aug. 18, 2008), ECF 340.

2. Later that year, Hylind filed charges of sex discrimination and retaliation with the Montgomery County Office of Human Rights and the Equal Employment Opportunity Commission.

In 2002, after exhausting the administrative process, Hylind received her Notice of Right to Sue from the EEOC and filed suit *pro se* in the United

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[1] Those payments will cease later this year when Hylind reaches the age of sixty-five.

States District Court for the District of Maryland. Her complaint raised claims under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e et seq.

In 2007, after extensive pretrial motions and a fifteen-day trial, the jury returned a verdict in Hylind's favor, awarding her $1.5 million in compensatory damages on her sex discrimination and retaliation claims.[2] The district court subsequently reduced those damages to the $300,000 statutory maximum provided by 42 U.S.C. § 1981a(b)(3)(D). Opinion at 3, 9, *Hylind v. Xerox*, Civ. No. PJM 03-116 (D. Md. Aug. 18, 2008), ECF 340.

The district court also held that Hylind was entitled to backpay from 1995 to 2002 and conducted further lengthy proceedings to determine the appropriate amount. In 2010, the district court found that Hylind would have earned $739,845 over those eight years. Pet. App. 61a.

But the court also decided that Hylind's disability payments should offset her recovery. Pet. App. 57a. Thus, it reduced the backpay award to $461,293.

In addition, the district court determined that Hylind was entitled to prejudgment interest on the backpay. Using the Maryland state prejudgment interest rate of 6%, *see* Md. Const. art. III, § 57, the district court calculated the prejudgment interest from 1995 to 2010 at $435,216 and so awarded

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[2] The district court had dismissed Hylind's other claims as time-barred.

Hylind a total of $896,509 in backpay principal and interest. Pet. App. 61a.

On September 17, 2010, the district court entered a judgment for the backpay principal and interest as well as for the jury's compensatory award. Pet. App. 70a-71a. On February 28, 2011, the district court combined that judgment with an award of attorneys' fees and litigation costs into a final, appealable judgment. Final Order of Judgment, *Hylind v. Xerox*, Civ. No. PJM 03-116 (D. Md. Feb. 28, 2011), ECF 419.

3. Both parties appealed to the Fourth Circuit. Because Hylind had filed her Notice of Appeal one day before Xerox filed its, the district court granted a stay of execution on the judgment without requiring Xerox to file a supersedeas bond. Memorandum Order, *Hylind v. Xerox*, Civ. No. PJM 03-116 (D. Md. Aug. 3, 2011), ECF 461. Xerox thus had full use of the judgment amount during the appeal and remand.

The Fourth Circuit rejected all of Xerox's challenges to the verdict in Hylind's favor. It therefore affirmed the finding of liability. Pet. App. 35a-37a.

As to the amount of damages, Hylind – and the Equal Employment Opportunity Commission, which filed an amicus brief on her behalf – argued that the district court had erred in using Hylind's disability payments to offset her backpay award. The Fourth Circuit held that the district court had applied the wrong legal standard in considering the offset question. Pet. App. 43a. Accordingly, it "vacate[d] the damages award" and remanded the case to the

district court "for it to re-assess its offset determinations." *Id.*

4. On remand, after additional extensive discovery and another round of briefing, the district court held that the disability payments could not offset the backpay award. Pet. App. 29a. Thus, it determined that Hylind was entitled to the full backpay principal of $739,845, rather than the $461,293 it had previously awarded. *Id.* 30a.

The court then calculated pre- and postjudgment interest. Given that two judgments had been entered in Hylind's favor, the court had to choose from which judgment to run postjudgment interest – the question presented by this petition. Neither party disputed that Hylind was entitled to prejudgment interest at the Maryland rate of 6% through at least the initial entry of judgment in 2010. The question was which rate to apply after 2010. Hylind argued that she should continue to receive prejudgment interest until the court finally entered judgment on the entire backpay recovery in 2014. Xerox, on the other hand, argued that it should be required to pay only postjudgment interest at the federal rate of 0.26% after the initial entry of judgment in 2010 even though the Fourth Circuit had "vacate[d]" that award in 2012. Pet. App. 43a.

The district court rejected Hylind's argument that she should receive prejudgment interest until entry of a corrected judgment. The court thought its decision was governed by *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990). There, this Court had held that postjudgment interest may only run from a judgment that quantifies the damages in a "meaningful way." *Id.* at

836. Thus, in Hylind's case, because "judgment was entered on the backpay award on September 17, 2010," the court ruled that "it is from that date that the federal post-judgment rate of interest must run." Pet. App. 31a. It did so despite its prior acknowledgment that the prejudgment interest rate "reflect[ed] the lost time-value of money in [Maryland]." *Id.* 59a. The court never addressed the fact that the 2010 judgment did not encompass the full backpay award or that it had later been vacated.

Accordingly, on November 24, 2014, the court entered judgment awarding Hylind $1,445,781 in backpay and prejudgment interest (at the Maryland rate of 6%) – calculated through September 17, 2010. Final Order of Judgment on Remand, *Hylind v. Xerox*, Civ. No. PJM 03-116 (D. Md. Nov. 24, 2014), ECF 570. It also awarded Hylind postjudgment interest (at the federal rate of 0.26%) for the time between the 2010 and 2014 judgments. *Id.* Because the district court set the demarcation point at the 2010 judgment rather than at the 2014 one, Xerox paid only $15,000 – rather than nearly $400,000 – in interest during the four-year intermediary period.

5. Both parties cross-appealed on numerous issues. As is relevant here, Hylind argued that the district court had erred in cutting off her entitlement to prejudgment interest in 2010 rather than in 2014.

The Fourth Circuit rejected Hylind's argument and affirmed the district court. Citing *Kaiser*, the panel concluded that the district court had used "the proper date" because the intervening appeals "did not

affect Hylind's entitlement to at least the quantum of back pay awarded prior to the appeal." Pet. App. 7a.[3]

6. Hylind sought rehearing and rehearing en banc, arguing that the Fourth Circuit's approach to drawing the dividing line between pre- and postjudgment interest conflicted with the approach taken by other circuits. Rehearing Petition at 11, *Hylind v. Xerox*, Pet. App. 3a (No. 15-1425), ECF 29. On January 26, 2016, the petition was denied. Pet. App. 2a.

On February 26, 2016, Xerox satisfied the judgment. Notice of Satisfaction of Judgment, *Hylind v. Xerox*, Civ. No. PJM 03-116 (D. Md. Mar. 4, 2016), ECF 594. The table on the following page compares Hylind's request (which uses the 2014 judgment as the dividing line between pre- and postjudgment interest) with the judgment actually entered (which used the 2010 judgment as the dividing line).

* * * *

[3] The Fourth Circuit agreed with Hylind that the district court had erred in awarding simple, rather than compound, interest. Pet. App. 8a. Accordingly, the Fourth Circuit "modified" the district court's judgment in that respect. *Id.*

Table Comparing Hylind's Calculated Principal and Interest with the Judgment Actually Entered

	Hylind's Calculation (using 2014 judgment)	Judgment Entered (using 2010 judgment)	Difference
Backpay Principal	$739,845	$739,845	N/A
Prejudgment Interest[4]	$1,105,820	$705,936	$399,884
Postjudgment Interest	$3,250[5]	$20,583[6]	($17,333)
Total	$1,848,915	$1,466,364	**$382,551**

[4] The prejudgment interest rate was was 6%, compounded annually on September 17, from 1995 until the ultimate entry of judgment on November 24, 2014.

[5] If the transition point between pre- and postjudgment interest is the 2014 judgment, then the relevant postjudgment interest rate is 0.14% – based on the federal Treasury Bill rate the week before the ultimate entry of judgment on November 24, 2014. *See* 28 U.S.C. § 1961(a) (directing the court to set postjudgment interest based on the relevant Treasury rate for "the calendar week preceding the date of the judgment"). That interest runs from November 24, 2014 until Xerox's payment on February 26, 2016.

[6] If the transition point between pre- and postjudgment interest is the 2010 judgment, then the relevant postjudgment interest rate is 0.26% – based on the federal Treasury Bill rate the week before the entry of judgment on September 17, 2010. That interest runs from September 17, 2010 until Xerox's payment on February 26, 2016.

REASONS FOR GRANTING THE WRIT

Prevailing plaintiffs in federal court can be entitled to two kinds of interest on a judgment in their favor. This Court has "repeatedly stated that prejudgment interest 'is an element of [plaintiffs'] complete compensation'" for many federal causes of action. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989) (quoting *West Virginia v. United States*, 479 U.S. 305, 310 (1987)). Similarly, in diversity cases, state law also often provides for prejudgment interest. "By compensating 'for the loss of use of money due as damages from the time the claim accrues until judgment is entered,' an award of prejudgment interest helps achieve the goal of restoring a party to the condition it enjoyed before the injury occurred." *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 196 (1995) (citation omitted) (quoting *West Virginia*, 479 U.S. at 310-11 n.2).

At the same time, Congress has required that all prevailing plaintiffs in federal court receive postjudgment interest "from the date of the entry of the judgment." 28 U.S.C. § 1961(a). This interest is meant to "compensate the successful plaintiff for being deprived of compensation." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Poleto v. Consol. Rail Corp.*, 826 F.2d 1270, 1280 (3d Cir. 1987)).

The transition point between prejudgment and postjudgment interest can be quite consequential, especially if the rates differ. There is no uniform federal prejudgment interest rate; accordingly, federal courts often borrow state-set rates. Currently, those rates vary from roughly 2% to 12%.

Postjudgment interest, by contrast, is set statutorily by 28 U.S.C. § 1961(a) at a "rate equal to the weekly average 1-year constant maturity Treasury yield" for the week preceding the date of judgment.[7]

When there is only one judgment in a plaintiff's favor, the line demarcating the transition point from prejudgment to postjudgment interest is clear. But when there are multiple judgments in a plaintiff's favor, determining which judgment serves as the transition point is more difficult. In *Kaiser*, this Court provided an answer for one situation: When there are multiple judgments but only one of them quantifies the damages "in any meaningful way," postjudgment interest must run from that judgment. 494 U.S. at 836.

But this Court has yet to answer the question presented in this case: how to determine the transition point in cases where more than one judgment has quantified damages.

I. The Courts Of Appeals Are Split Over When Postjudgment Interest Begins To Run In A Case With Multiple Judgments.

In the absence of guidance from this Court, the courts of appeals have split on the question of how to determine when postjudgment interest begins to run in cases with multiple judgments fixing damages. Some circuits have held that courts should consider multiple factors in choosing which judgment is the

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[7] *See 1-Year Treasury Constant Maturity Rate*, Fed. Reserve Bank of St. Louis (last visited May 15, 2016), http://research.stlouisfed.org/fred2/series/DGS1.

appropriate starting point under Section 1961(a) for postjudgment interest. Other circuits, by contrast, require running postjudgment interest from the first judgment ascertaining damages regardless of the equities.

1. *The equitable-factors approach*. The Ninth, Eleventh, and D.C. Circuits hold that courts should apply principles of equity in cases with multiple judgments to determine which judgment is the one from which postjudgment interest should begin.

The Ninth Circuit has repeatedly held that "equitable principles" must be used to select "between two judgments" when both judgments satisfy *Kaiser*'s requirement that damages be fixed in a meaningful way. *Planned Parenthood of the Columbia/ Willamette Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1021 (9th Cir.), *cert. denied*, 555 U.S. 824 (2008). The Ninth Circuit looks to factors like the character of the initial judgment, the results of any appeals and remands, the relationship between the initial and subsequent judgments, and – most salient here – the availability and rate of prejudgment interest. *Id.*; *see also Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 702 (9th Cir. 1996), *cert. denied*, 522 U.S. 949 (1997).

The Ninth Circuit's decision in *AT&T Co. v. United Computer Systems, Inc.* illustrates this approach. 98 F.3d 1206 (9th Cir. 1996). There, the district court entered an initial judgment for the plaintiff in 1991. *Id.* at 1207. After multiple appeals and remands, the district court entered another judgment for the plaintiff in 1994 and awarded prejudgment interest (at the California rate of 10%) through the 1991 judgment and postjudgment

interest thereafter (at the then-prevailing federal rate of 5.57%). *Id.* at 1208. The Ninth Circuit reversed. It held that "nothing" in *Kaiser* "supports the contention that interest must be calculated from the entry date of the *first* judgment ascertaining damages." *Id.* at 1210 (emphasis in original). In further holding that the district court erred by running (the lower) postjudgment interest from 1991, rather than continuing to run prejudgment interest through 1994, the Ninth Circuit reasoned that the latter approach was required by "equitable principles" because it "more fully compensates" the prevailing plaintiff. *Id.* at 1211.

The Eleventh Circuit also employs the equitable approach, as shown by *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 997 F.2d 1340 (11th Cir.) (per curiam), *cert. denied*, 510 U.S. 1012 (1993). In that case, the district court first entered a judgment for the plaintiff on antitrust claims but then ordered a new trial. On an appeal from that decision, the court of appeals reversed and ordered the district court to reinstate the judgment in the plaintiff's favor. *Id.* at 1341. The plaintiff argued that postjudgment interest should run from the initial judgment, while the defendants argued that postjudgment interest should accrue only from the second judgment. *Id.*

The Eleventh Circuit held that courts have "discretion to select" the judgment "from which interest should run." *DeLong*, 997 F.2d at 1342. Under the circumstances of that case, where prejudgment interest was not available, equity "command[ed] that interest be awarded from the date of the original judgment." *Id.* The court pointed out

that during the interim three years, the defendant had retained the use of the money – and had presumably been "earning some sort of interest" on it during that period. *Id.* Thus, the court explained, the defendant "would receive a windfall" if it did not pay the plaintiff interest for its use of the money during that time. *Id.*

Finally, the D.C. Circuit has joined the Ninth and Eleventh Circuits in employing an equitable framework. Like the Ninth Circuit, the D.C. Circuit has declared that "nothing" in *Kaiser* requires interest "to run from the date of the original" judgment. *Mergentime Corp. v. WMATA*, 166 F.3d 1257, 1268 (D.C. Cir. 1999). The court therefore ran prejudgment interest up to the time of the second judgment in *Modern Electric, Inc. v. Ideal Electronic Security Co.*, 145 F.3d 395 (D.C. Cir. 1998) (per curiam). There, the plaintiff won a verdict at trial and both parties appealed. The court of appeals vacated the first judgment and remanded for further proceedings. On remand, the plaintiff won a larger award and the district court granted prejudgment interest through the date of the second judgment. *Id.* at 396-97. The D.C. Circuit affirmed this decision, holding that it compensated the plaintiff for the "continuing time-value of its money" better than setting the dividing line at the first judgment would have done. *Id.* at 397.

2. *The mechanical approach.* On the other side of the split, the Second and Tenth Circuits have held – like the Fourth Circuit here – that Section 1961(a) requires postjudgment interest to start (and so prejudgment interest to stop) on the date of the first

judgment that ascertains damages regardless of the equities.

In *Andrulonis v. United States*, the Second Circuit interpreted *Kaiser* to reject the equitable-factors approach for setting the appropriate date from which postjudgment interest should run: "[C]ourts do not enjoy some amorphous equitable power" to depart from a mechanical approach, "even if their laudable aim is to effectuate the compensatory purpose of the postjudgment interest statute." 26 F.3d 1224, 1233 (2d Cir. 1994) (citing *Kaiser*, 494 U.S. at 834). In contrast to the equitable-factors approach, the Second Circuit laid out a clear first-judgment rule in *Westinghouse Credit Corp. v. D'Urso*: In a case with multiple judgments, "post-judgment interest should be calculated from whenever judgment was first ascertained in a meaningful way." 371 F.3d 96, 104 (2d Cir. 2004) (citing *Kaiser*, 494 U.S. at 836).

The Second Circuit applied that rule in a case with multiple judgments ascertaining damages in *Adrian v. Town of Yorktown*, 620 F.3d 104 (2d Cir. 2010) (per curiam). The plaintiffs initially received a judgment for $150,000 on a pendent state-law claim. *Id.* at 105. After the district court vacated the verdict on that claim, the Second Circuit reinstated the verdict on appeal. *Id.* On a subsequent appeal, the Second Circuit recognized that the question of when plaintiffs' entitlement to prejudgment interest should end and their entitlement to postjudgment interest begin was "significant." *Id.* at 107. Noting that its case law provided "a clear answer to this question," the Second Circuit again held that postjudgment

interest must begin at the first judgment that meaningfully ascertains damages. *Id.* at 107-08.

The Tenth Circuit has joined the Second Circuit in interpreting *Kaiser* to require postjudgment interest to run from the first meaningfully ascertained judgment regardless of equitable considerations, even when the plaintiff obtains a larger award on remand. In *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*, 103 F.3d 80 (10th Cir. 1996), the plaintiff won a judgment that entitled it to prejudgment interest. Both parties appealed, and on remand, the plaintiff obtained a second judgment that was larger than the first. It sought prejudgment interest through the entry of the second judgment, but the Tenth Circuit held that the mechanical rule applied: The switch from prejudgment interest to postjudgment interest must occur at the first judgment. *Id.* at 81-82.

In *Reed v. Mineta*, the Tenth Circuit applied the *Bancamerica* mechanical rule in the context of a Title VII backpay award. 438 F.3d 1063 (10th Cir. 2006). In that case, the district court on remand increased the initial jury award for the plaintiff. Nevertheless, the Tenth Circuit cut off prejudgment interest at the entry of the initial judgment. *Id.* at 1067. The court rejected the plaintiff's argument that given the large differential between the applicable pre- and postjudgment interest rates, the defendant had, "in essence," received "a long-term interest-free loan" from the plaintiff. *Id.* at 1067 (internal quotation marks omitted). According to the Tenth Circuit, any concern with equity "misses the point." *Id.*

3. *The Sixth Circuit*. Reflecting the national confusion over the issue, the Sixth Circuit has changed its position three times in twenty-five years.

Originally, the Sixth Circuit took the approach used by the Ninth, Eleventh, and D.C. Circuits. It looked to the "equity of the statute" in determining when postjudgment interest should accrue – an analysis that included the nature of the initial judgment, the action of the appellate court, the subsequent events upon remand, and the relationship between the first judgment and the modified judgment. *Bailey v. Chattem, Inc.*, 838 F.2d 149, 154 (6th Cir.), *cert. denied*, 486 U.S. 1059 (1988).

In the aftermath of *Kaiser*, the Sixth Circuit switched to the approach employed by the Second, Fourth, and Tenth Circuits. The court read *Kaiser* to require "that post-judgment interest run[] from the date of any judgment that is not entirely set aside." *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 429 (6th Cir. 1999), *cert. denied*, 530 U.S. 1242 (2000).

Then, in 2005, the Sixth Circuit returned to the equitable approach and explicitly realigned itself with the Ninth Circuit: "The justification given by the Ninth Circuit for calculating postjudgment interest from the date of the final judgment applies with equal force in the present case." *Scotts Co. v. Cent. Garden & Pet Co.*, 403 F.3d 781, 793 (6th Cir. 2005). Because the prejudgment interest rate at the time of *Scotts* was higher than the postjudgment rate, the Sixth Circuit held that postjudgment interest should start at the latter of two judgments – thereby correcting the "equitable imbalance" of "grant[ing] an unjustified benefit" to a losing defendant. *Id.*

Most recently, in *Stryker Corp. v. XL Insurance America*, 735 F.3d 349 (6th Cir. 2012), the Sixth Circuit switched its position yet again. The court reached back to *Skalka* to hold that "any judgment that is not entirely set aside" automatically triggers the running of postjudgment interest. *Id.* at 361 (quoting *Skalka*, 178 F.3d at 429). The court highlighted that its decision was "potentially in tension" with *Scotts*. *Id.*

4. After twenty-five years of post-*Kaiser* confusion, the question of how to select the transition point between pre- and postjudgment interest is ripe for this Court's intervention. Nearly half of the circuits have longstanding rules on the issue: the key cases laying out the circuits' positions came down a generation ago.

In addition, despite the longstanding conflict, no resolution is on the horizon. There are several circuits on each side of the split, and most of them have explicitly reaffirmed their rules in recent years. Moreover, three circuits expressly view their position as compelled by this Court's decision in *Kaiser*. Accordingly, without additional guidance from this Court, circuits are unlikely to reconsider their positions. *See, e.g.*, Pet. App. 31a (citing *Kaiser*); *Andrulonis*, 26 F.3d at 1233 (same); *Bancamerica*, 103 F.3d at 81 (same). In fact, no circuit other than the Sixth Circuit has moved in the past decade – and the Sixth Circuit's haphazard approach does more to confuse the issue than to resolve it.

II. The Timing Of Postjudgment Interest In A Case With Multiple Judgments Is Important.

This Court has repeatedly recognized that interest awards are "necessary to afford the plaintiff full compensation." *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654 (1983); *see also City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 196 (1995); *Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988); *West Virginia v. United States*, 479 U.S. 305, 310 (1987). These cases focused on the conditions for awarding prejudgment interest. By contrast, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), is the only case where this Court has devoted significant attention to the correct application of the federal postjudgment interest statute, 28 U.S.C. § 1961(a).

In no case, however, has this Court addressed how Section 1961(a)'s provision for postjudgment interest should operate in cases with multiple judgments fixing damages. This issue arises with special force in the growing number of cases that involve both pre- and postjudgment interest. In these cases, the choice of where to demarcate the transition point between pre- and postjudgment interest can have significant consequences for a plaintiff's recovery and a defendant's obligations.

1. The decision of when to start postjudgment interest matters. It is particularly important in cases where there is a long delay between two judgments due to appeals or proceedings on remand. In this case, for example, four years elapsed between the district court's initial award of backpay in 2010 and its second award of backpay in 2014. The longer the

amount of time between judgments, the larger the amount of money at stake in the choice of when to begin postjudgment interest. Thus, in these cases, postjudgment interest may form a significant part of the plaintiff's ultimate award.

2. The decision of when to start postjudgment interest is especially important when it also serves to cut off a plaintiff's entitlement to prejudgment interest and the two interest rates differ.

In federal cases, the two rates may differ by up to twelve percentage points due to the way they are set. The postjudgment interest rate is set by Section 1961(a). It is tied to the average U.S. Treasury Bill rate for the calendar week preceding the entry of judgment. By contrast, prejudgment interest rates are not fixed by federal statute. Instead, courts "commonly look to state statuory prejudgment interest provisions as guidelines for a reasonable rate." *Weber v. GE Group Life Assurance Co.*, 541 F.3d 1002, 1016 (10th Cir. 2008).

Over the past five years, Treasury Bill rates have averaged less than 0.5%. *See Historical Treasury Rates*, U.S. Dep't of Treasury, http://1.usa.gov/23W8FBA (last visited May 15, 2016). In this case, for example, the relevant postjudgment interest rate for the 2010 judgment was 0.26%.[8] Moreover, Treasury Bill rates are expected to remain low for the foreseeable future. *See* Neil Irwin, *Why Very Low*

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[8] Had the district court run postjudgment interest from the 2014 judgment, the rate would have been 0.14%.

Interest Rates May Stick Around, N.Y. Times: The Upshot (Dec. 14, 2015), http://nyti.ms/1IQ1HcM.

By contrast, state prejudgment interest rates during the same period have ranged from 2% to 12%, averaging around 6%. *See Pre and Post Judgment Interest Analysis Matrix*, Am. Inst. of CPAs, http://bit.ly/1SuTOI9 (last visited May 15, 2016). In this case, as noted, the relevant Maryland prejudgment interest rate was 6%. *See* Md. Const. art. III, § 57.

Under these circumstances, a court's decision about where to set the dividing line between pre- and postjudgment interest can have a significant impact on the size of a plaintiff's ultimate recovery. *Litton Systems, Inc. v. AT&T Co.*, for example, involved a $40 million difference in the interest award depending on the selection of either pre- or postjudgment interest for the period between judgments. 746 F.2d 168, 169 (2d Cir. 1984). Petitioner's case involves a nearly $400,000 difference on an underlying backpay award of $739,845.

The difference between the two interest rates can also significantly affect the parties' behavior. If plaintiffs expect to receive the lower interest rate during the period between judgments, they are less likely to pursue even meritorious appeals because the increased recovery may not offset the lost time-value of their initial award. If defendants, by contrast, expect to pay the lower interest rate during the period between judgments, they are less likely to settle and more likely to try to prolong litigation. These "wasteful procedural maneuvers" are exactly the gamesmanship that courts should be working to

reduce. *2015 Year-End Report on the Federal Judiciary*, Supreme Court of the U.S., Public Info. Office, http://1.usa.gov/1U4e0Ec.

3. The decision of where to draw the dividing line between pre- and postjudgment interest is also important because there are many federal cases in which both forms of interest are available. At common law, prejudgment interest was rarely awarded. But informed by the fact that this Court has "repeatedly stated" that complete compensation for plaintiffs requires prejudgment interest, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989), courts of appeals have increasingly held that prejudgment interest is "presumptively" or "generally" available for damages claims arising under federal law. *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) ("presumptively"); *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1549, 1554 (10th Cir. 1992) ("generally"). The courts' decisions underscore the importance of awarding plaintiffs their full entitlement to prejudgment interest, which, in many cases, is affected by where the dividing line between pre- and postjudgment interest is set.

Furthermore, the issue of demarcating the line between pre- and postjudgment interest arises frequently in federal district courts and produces very different answers depending on the circuit involved. Within circuits that use the equitable-factors approach, district courts often set the dividing line between pre- and postjudgment interest at the second judgment. For instance, in *Design Trend International Interiors, Ltd. v. Cathay Enterprises, Inc.*, the district court awarded prejudgment interest

for the interim period between the first and second judgments because the higher prejudgment interest rate would "more fully compensate[] [the plaintiff] for the loss of use of its money." 103 F. Supp. 3d 1051, 1063 (D. Ariz. 2015) (quoting *AT&T Co. v. United Comput. Sys., Inc.*, 98 F.3d 1206, 1211 (9th Cir. 1996)). Similarly, in *Bolt v. Merrimack Pharmaceuticals, Inc.*, the district court awarded prejudgment interest up until entry of the second judgment. No. S-04-0893 WBS DAD, 2005 WL 2298423, at *8 (E.D. Cal. Sept. 20, 2005).

By contrast, in cases from the circuits that have adopted the mechanical first-judgment rule, district courts faced with analogous claims have refused to award prejudgment interest for the interim period preceding the second judgment. In *Kazazian v. Bartlett & Bartlett LLP*, the district court awarded only postjudgment interest through the intermediate period under the Second Circuit's rule that "courts do not enjoy some amorphous equitable power" to determine when postjudgment interest should start. No. 03 Civ. 7699 (LAP), 2007 WL 2077092, at *1 (S.D.N.Y. July 17, 2007) (quoting *Andrulonis v. United States*, 26 F.3d 1224, 1233 (2d Cir. 1994)). A similar result occurred in *Fraser v. Wyeth, Inc.*, 992 F. Supp. 2d 68 (D. Conn. 2014), and in *Faiveley Transport USA, Inc. v. Wabtec Corp.*, No. 10 Civ. 4062 (JSR), 2013 WL 1947411 (S.D.N.Y. May 6, 2013). And in this case, the district court held that postjudgment interest "must run" from the first judgment. Pet. App. 31a.

III. This Case Presents An Ideal Vehicle For Resolving This Conflict.

This is the right case to answer the question of how courts should choose the judgment from which to run postjudgment interest.

1. The issue was squarely pressed and passed on below. Both before the district court and on appeal, petitioner timely sought prejudgment interest on her backpay. Both courts ruled directly on the merits of that claim. Pet. App. 31a (district court opinion); *id.* 7a (court of appeals opinion). There are therefore no obstacles to this Court reaching the question presented.[9]

2. No questions remain involving Xerox's liability under Title VII or the amount of backpay to which petitioner is entitled. A decision on the question presented would fully resolve Hylind's interest entitlement.

Moreover, the question presented is outcome dispositive. Had Hylind brought suit in the Ninth, Eleventh, or D.C. Circuits, the court would not have

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[9] This Court "grants certiorari to review unpublished and summary decisions with some frequency." S. Shapiro et al., Supreme Court Practice 264 (10th ed. 2013); *see, e.g.*, *Manrique v. United States*, No. 15-7250 (cert. granted Apr. 25, 2016); *Murr v. Wisconsin*, No. 15-214 (cert. granted Jan. 15, 2016); *Manuel v. City of Joliet*, No. 14-9496 (cert. granted Jan. 15, 2016). The Fourth Circuit publishes its decisions at only half the national rate. *See* Admin. Office of the U.S. Courts, *Caseload Statistics Data Tables, Judicial Business*, tbl. B-12 (Sept. 30, 2015), http://www.uscourts.gov/statistics/table/b-12/judicial-business/2015/09/30.

mechanically chosen the 2010 judgment as the dividing line between pre- and postjudgment interest. Taking equitable factors into account, courts in those circuits would almost certainly have used the 2014 judgment as the transition point between pre- and postjudgment interest. Instead, the Fourth Circuit applied the mechanical approach of the Second and Tenth Circuits and ignored the facts and equities raised by Hylind's brief, Br. of Appellant, *Hylind v. Xerox*, Pet. App. 3a (No. 15-1425), ECF 19, as legally irrelevant in choosing the 2010 judgment.

3. Hylind's case powerfully illustrates the importance of selecting the correct date for pre- and postjudgment interest calculations. If prejudgment interest runs through the 2014 judgment, Hylind would receive roughly $400,000 in interest for the period between the two judgments. But because the courts below cut off prejudgment interest as of the 2010 judgment and instead awarded postjudgment interest between 2010 and 2014, she received only $15,000 in interest for the same period. Not only is the $385,000 difference in interest large in absolute terms, it also equates to more than half of the backpay principal. As Hylind explains below, the perverse consequence of the Fourth Circuit's mechanical approach is that Hylind would have been economically better off if she had given up her entitlement to the $278,552 in backpay principal that the district court erroneously denied her and instead acquiesced in the initial, inadequate judgment. *See infra* at 32-33.

At the same time, Xerox has received a nearly interest-free loan on Hylind's award. For four years, it had use of the $896,509 (in backpay and interest it

should have paid Hylind) on which it paid only 0.26% interest.

4. Despite the importance of the question presented, this is the rare case that climbs the appellate ladder onto this Court's certiorari docket. In other cases, the circuits' unwavering adherence to their respective approaches, the cost of counsel, the desire for finality, the lost time-value of money, and the ratio between the costs of litigation and the amount of interest at stake will prevent parties from continuing to litigate this issue all the way to this Court.

IV. The Fourth Circuit's Decision Is Incorrect.

In cases where an initial judgment is later modified by, or replaced with, a corrected one, courts should select the judgment from which postjudgment interest runs by taking into account "considerations of fairness." *Blau v. Lehman*, 368 U.S. 403, 413 (1962); *see also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989). Contrary to the Fourth Circuit's assertion, this Court's decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), does not compel courts to terminate a plaintiff's entitlement to prejudgment interest at the first possible moment. Accordingly, Hylind should have been awarded prejudgment interest until the 2014 judgment that finally resolved the question of how much backpay she should receive.

A. Courts Should Take Equitable Factors Into Account When Choosing Which Judgment Marks The Transition Point Between Pre- And Postjudgment Interest.

1. Neither the text of Section 1961(a) nor this Court's decision in *Kaiser* dictates when prejudgment interest ends – and when postjudgment interest begins – in cases like petitioner's. The federal postjudgment interest statute, 28 U.S.C. § 1961(a), provides only that postjudgment interest "shall be calculated from the date of the entry of the judgment," *id.* However, in a case with multiple judgments, the statute does not specify *which* judgment triggers postjudgment interest. In addition, Section 1961(a) is silent as to whether the statute can be applied to cut off a prevailing plaintiff's entitlement to prejudgment interest during a period prior to the last judgment in the plaintiff's favor.

This Court elaborated in *Kaiser* that Section 1961(a) precludes courts from running postjudgment interest from a judgment that does not quantify damages "in any meaningful way." 494 U.S. at 836. But this Court did not answer the question of when postjudgment interest should begin in a case where there are multiple judgments that each satisfy *Kaiser*'s standard. As Justice White observed, the Court's opinion did not address "various other fact patterns not before" the Court. *Id.* at 870-71 (White, J., dissenting).

Kaiser differs from the present case in two material ways. First, faced with two judgments in *Kaiser*, the Court ordered postjudgment interest to run from the *second* judgment because the initial judgment "was not supported by the evidence." 494

U.S. at 836. As such, there was only one judgment from which postjudgment *could* run. Second, prejudgment interest was not at issue in *Kaiser*. Thus, this Court never addressed how to set the transition point between pre- and postjudgment interest.

2. The appropriate standard for determining that transition point is provided by the equitable-factor framework adopted by the Ninth, Eleventh, and D.C. Circuits because it best vindicates both Section 1961(a) and the prejudgment interest rule – each of which is designed to make prevailing plaintiffs whole by compensating them for the lost time-value of their money. *See West Virginia v. United States*, 479 U.S. 305, 310 (1987) (prejudgment interest); *Kaiser*, 494 U.S. at 836 (postjudgment interest). Thus, when determining which judgment marks the dividing line, courts should look to a range of considerations, including, among others, the presence and rate of prejudgment interest, "the nature of the initial judgment, the action of the appellate court, the subsequent events upon remand, and the relationship between the first judgment and the modified judgment." *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1021 (9th Cir. 2008) (quoting *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 702 (9th Cir. 1996)).

The legislative history of Section 1961(a) confirms that Congress intended the statute to be applied equitably. When Congress set a uniform federal postjudgment interest rate formula in 1982, it sought to ensure that prevailing plaintiffs would be fully compensated. To do so, it looked to the Treasury

Bill rate because the existing state rates were "significantly lower than market rates." *Kaiser*, 494 U.S. at 838. This Court has recognized that the amendment to Section 1961(a) was intended to eliminate the "economic incentive" for a defendant to "retain his money and accumulate interest on it at the commercial rate during the pendency of appeal." *Id.* (quoting S. Rep. No. 97-275, at 30 (1981)).

In a case with both pre- and postjudgment interest, where the prejudgment interest rate better approximates the actual time-value of money, using Section 1961(a) to prematurely cut off prejudgment interest undermines the central purpose of the awarding prejudgment interest in the first place as well as the purpose of Section 1961(a). It renders the prevailing plaintiff less than whole. At the same time, it gives the at-fault defendant a windfall and an incentive to prolong litigation. Given that Congress intended postjudgment interest to ensure that plaintiffs were fully compensated and to prevent at-fault defendants from capitalizing on delay, a rote application of Section 1961(a) would undermine the statutory purpose.

3. When faced with a case involving multiple judgments, a court properly applying Section 1961(a) must determine whether prejudgment interest should continue through the ultimate judgment. The equitable-factors framework enables a court to award postjudgment interest from whichever judgment better serves the purposes of the pre- and postjudgment interest rules.

Consider, for example, cases where (1) the court finds that the prejudgment interest better approximates the time-value of money and (2) the

latter judgment is more favorable to the plaintiff. Under these circumstances, prejudgment interest should continue until the ultimate judgment because the prevailing plaintiff will otherwise be deprived of the full time-value of her money and the at-fault defendant will unfairly "reap the benefits of a low interest rate." *AT&T Co. v. United Comput. Sys., Inc.*, 98 F.3d 1206, 1211 (9th Cir. 1996).

By contrast, applying the mechanical first-judgment rule in such cases can produce an absurd result: A plaintiff who obtains two favorable judgments will recover less than a similarly-situated plaintiff who establishes her entitlement to her award only on appeal.

For example, in Hylind's case, the district court in 2010 granted her a portion of the backpay principal to which she was entitled. Not until 2014 did it award her the entire correct amount. For the four-year period between judgments, the court only awarded her postjudgment interest at 0.26%. Suppose, however, that Hylind had been denied backpay altogether in 2010 and had only obtained a backpay award in 2014 upon remand after showing that the district court had erred in failing to award backpay. Then, she would have received 6% prejudgment interest on the entire principal through 2014. Paradoxically, however, because Hylind succeeded in obtaining a portion of the backpay award in 2010, she lost nearly $400,000 in interest.

Consider, alternatively, cases where the postjudgment interest rate better captures the time-value of money or when prejudgment interest is unavailable. In those cases, starting postjudgment interest at the first judgment ascertaining damages

best makes the plaintiff whole. *See, e.g.*, *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 842 F.2d 1154, 1155 n.2 (9th Cir. 1988) (per curiam) (prejudgment interest rate is lower); *DeLong Equip. Co. v. Wash. Mills Electro Minerals Corp.*, 997 F.2d 1340, 1341 (11th Cir. 1993) (per curiam) (prejudgment interest is unavailable).

At the same time, the equitable-factors framework is fair to defendants as well. For example, if a defendant successfully reduces the judgment against him on appeal, choosing the first judgment ascertaining damages as the transition point between pre- and postjudgment interest may avoid unfairly imposing a higher prejudgment interest rate on the defendant for the intervening period. Or, if the prejudgment interest rate exceeds the time-value of money and the postjudgment interest rate better approximates it, the court might set the transition point at the first judgment.

4. Finally, a multi-factor test is administrable because it uses the approach lower courts already apply when determining prejudgment interest awards. This Court has repeatedly instructed district courts to consider a number of equitable factors in "deciding if and how much prejudgment interest should be granted." *Osterneck*, 489 U.S. at 176. For example, district courts already must determine the interest rate that best reflects the time-value of money for the duration of litigation. Lower courts are equally capable of applying the multi-factor framework to set a transition point between pre- and postjudgment interest. District courts in the Ninth, Eleventh, and D.C. Circuits have been using the multi-factor framework for decades without difficulty.

B. In This Case, Prejudgment Interest Should Run Until The 2014 Judgment.

The circumstances here – including the nature of the claim, the actions of both parties, the difference in interest rates, and the relationship between the first and second judgment – require awarding Hylind prejudgment interest until the final judgment resolving her backpay award.

1. The district court's application of Section 1961(a) must "be measured against the purposes which inform Title VII." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Title VII requires courts to award broad relief to "make the victims of unlawful discrimination whole." *Id.* at 421 (quoting 118 Cong. Rec. 7168 (1972)). It is thus not enough that Hylind receive her backpay principal. As this Court stated in *Loeffler*, it "surely is correct" that "Title VII authorizes prejudgment interest as part of the backpay remedy in suits against private employers." 486 U.S. at 557-58.

Given that the district court itself recognized that the prejudgment interest rate of 6% accurately reflects the time-value of money in Maryland, Pet. App. 59a, running prejudgment interest until the last judgment in 2014 is necessary to make Hylind whole. Thus, awarding Hylind only 0.26% interest from 2010 to 2014 plainly contravenes Title VII's make-whole command.

2. Unless Hylind is awarded prejudgment interest until the entry of judgment in 2014, she will actually be penalized for having successfully appealed the district court's original error. Had Hylind taken the initial 2010 judgment of $461,293

in backpay principal plus $435,216 in interest (a total of $896,509) and walked away from the case, she could have invested that money in an S&P 500 index fund. Had she done so, she would have ended up with more than $1.6 million by 2014.[10] Instead, she successfully appealed and received an additional $278,552 in backpay principal. But because the district court erroneously cut off her entitlement to prejudgment interest, she received a final judgment of only $1.4 million in 2014. Put differently, her additional backpay principal was outweighed by her loss of the time-value of her money. Hylind "should not be penalized for delays in the judicial process and discriminating employers should not benefit from such delays." *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1170 (6th Cir. 1996).

3. The conclusion that Hylind is entitled to prejudgment interest until 2014 is reinforced by two additional considerations.

First, as the Fourth Circuit itself implicitly recognized, the 2010 judgment involved only a "quantum" of the backpay award to which Hylind was entitled. Pet. App. 7a. It wasn't until 2014 that she received a judgment for the full amount. Thus, running postjudgment interest on the entire backpay award from 2010 – a point in time when Hylind was

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[10] This number is calculated based on the performance of the S&P 500 Index from the date of the first judgment (September 17, 2010) to the second judgment (November 24, 2014). *See S&P 500 Historical Prices*, Yahoo! Fin., http://yhoo.it/1XNhOdW (last visited May 15, 2016).

not even legally entitled to the full amount – makes no sense.

Second, the Fourth Circuit "vacate[d]" the 2010 backpay award in 2012. Pet. App. 43a. As a result, from 2012 to 2014, Hylind lacked a legally enforceable judgment for any amount from which postjudgment interest could run. Thus, to cut off prejudgment interest in 2010 would be not only unjust but also illogical.

The bottom line is that Hylind paid nearly $400,000 in foregone interest to pursue an appeal necessitated by the district court's error. For its part, Xerox effectively received a $1.4 million loan for which it paid only $15,000 in interest between 2010 and 2014. This cannot be right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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