No. 15-1430

IN THE
Supreme Court of the United States

EILEEN M. HYLIND,
Petitioner,
v.
XEROX CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Petitioner's question presented is:

In cases with multiple judgments fixing damages, does 28 U.S.C. § 1961(a) – which instructs that postjudgment 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?

CORPORATE DISCLOSURE STATEMENT

Under Rule 29.6, Respondent states that Xerox Corporation does not have a parent corporation. No publicly held company has a 10 percent or greater interest in Xerox Corporation.

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INTRODUCTION

In 28 U.S.C. § 1961(a) Congress mandated that postjudgment interest "shall be allowed on any money judgment" and "shall be calculated from the date of the entry of the judgment." Further, it dictated the applicable postjudgment interest rate to use—the weekly average 1-year Treasury bond rate. The Petition argues that the courts of appeals are split as to whether, pursuant to Section 1961(a), a district court may refuse to begin postjudgment interest at an admitted "judgment" and instead delay it until a later judgment (one entered, for example, on remand after an appeal). In particular, the Petitioner contends this would be appropriate where a prevailing plaintiff might obtain a higher interest rate than that required by Section 1961(a) if postjudgment interest is delayed.

There is no active or recognized split on this issue. Instead, when the courts of appeals are confronted with multiple judgments, they consistently apply Section 1961(a) and this Court's precedent in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990). In *Kaiser*, the Court held that a "money judgment" within the meaning of Section 1961(a) is one which meaningfully ascertains a damages award. Accordingly, the courts of appeals carefully assess the relationship between the earlier and later judgments, and conclude that if an earlier judgment was supported by the evidence and meaningfully ascertained damages, postjudgment interest should run from that earlier judgment.

The Petitioner contends that certain courts of appeals employ a freewheeling "equitable" approach.

But only two of the cases she points to have even suggested that it could be appropriate to decline to begin postjudgment interest until the later judgment because a higher prejudgment interest rate is available. One, from the Ninth Circuit, is twenty years old and the court has not applied it for that proposition since. Instead, it has consistently used the analysis employed by the other courts of appeals that looks to the relationship between the earlier and later judgments. The other case is from the Sixth Circuit, but the Sixth Circuit has subsequently repudiated that case's reasoning.

Revealingly, none of the cases Petitioner cites recognize the purported split. Not only is there no split, but this issue is not of national import. The $400,000 figure Petitioner references is the product of a unique combination of factors—such as a successful appeal, a four year period between judgments, and historically low Treasury bill rates—that is unlikely to recur with any frequency.

Moreover, this case is a poor vehicle for addressing this issue. Even if a split existed, it is not clear what position the Fourth Circuit adopted in the brief unpublished decision below or in past precedent; nor is it clear that review by this Court would result in a different disposition in this case.

Finally, Petitioner is wrong that Section 1961(a) permits a court to refuse to begin postjudgment interest once a judgment has been entered. The provision is clear: postjudgment interest must be awarded once a judgment is entered at the statutorily-mandated rate. There was accordingly no error below.

STATEMENT OF THE CASE

Petitioner Eileen Hylind worked for Respondent Xerox Corporation as a commissioned salesperson from 1980 to 1995, when she became unable to work. She has been receiving long-term disability benefits under Xerox's disability plan ever since. In 2003, Hylind filed a *pro se* complaint against Xerox raising various violations of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"). She alleged that her inability to work was caused by discrimination and retaliation during her employment at Xerox.

A jury trial was held four years later, in 2007, where Hylind was represented by counsel she had retained in 2005. The jury returned a verdict finding in Xerox's favor on one count of sex discrimination and one count of retaliation, and in Hylind's favor on one count of sex discrimination and one count of retaliation. It awarded Hylind $1,500,000 in compensatory damages, and no punitive damages. After trial, Hylind's retained counsel withdrew, and the parties briefed economic damages and injunctive relief, among other issues. In 2008, the district court granted Xerox's motion to reduce the jury's award of compensatory damages to $300,000 in accordance with Title VII's statutory cap. 42 U.S.C. § 1981a(b)(3)(D).

On September 17, 2010, the district court entered judgment awarding Hylind backpay totaling $896,509. Pet. App. 61a. The court determined that the appropriate period for backpay was from 1995 to 2002, rejecting Hylind's contention that "Xerox's

conduct left her permanently disabled and unable to work" and that she should therefore receive backpay through judgment and frontpay for the rest of her working life. Pet. App. 48a. Instead, it ruled that "Hylind was steadily improving 4 years after the events sued upon in this case," and found "8 years to be appropriate duration of the disability to attribute to Xerox's actionable conduct." Pet. App. 51a. The district court held that an appropriate salary award for 1995 was $77,037, increased annually for each of the eight years to adjust for inflation. It also determined that the $34,819 annual disability benefits that Xerox paid to Hylind should offset the backpay award in order to prevent "double recovery." Pet. App. 52a, 58a.[1]

The court awarded 6% prejudgment interest on the total backpay award up to the September 17, 2010 judgment. It selected the rate established by the Maryland Constitution, although it noted that it was "not bound by state law." The district court also declined to suspend this award for the seven years that the matter had been pending before state and federal administrative agencies, while observing that the "process took an inordinate amount of time" and that "Hylind may have been able to request a right-to-sue letter earlier than she did." Pet. App. 59a n.11. Accordingly, the district court entered judgment in favor of Hylind for $300,000 in compensatory damages and $896,509 in economic damages (*i.e.*, backpay) on September 17, 2010. *Hylind v. Xerox*

[1] The overall backpay award also included an award of 8% of this base salary for lost benefits. Pet. App. 53a.

Corp., No. 8:03cv116 (D. Md.), ECF 380. Thereafter, the district court ruled on a number of motions, including motions for costs and fees. *Id.*, ECF 418. With all pending motions resolved, the district court entered final judgment on February 28, 2011. *Id.*, ECF 419.

Hylind then filed her first *pro se* appeal in the Fourth Circuit, raising numerous claims of error. Xerox then cross-appealed. On June 6, 2012, the court affirmed all of the district court's decisions except for one: the decision to offset the disability payments from the backpay award. On that sole issue, the Fourth Circuit vacated the district court's judgment and remanded the case for the district court to re-assess its offset determination in light of recent Fourth Circuit precedent. Pet. App. 43a (citing *Sloas v. CSX Transp. Inc.*, 616 F.3d 380 (4th Cir. 2010)). The Fourth Circuit also rejected Xerox's argument that the 6% prejudgment interest rate through the 2010 judgment was improper, noting that although "the actual rate of inflation during the years in question hovered around 2.5%," the district court's decision was not an abuse of its discretion. Pet. App. 36a-37a.

On remand, the district court permitted discovery and briefing on the offset issue. On July 9, 2014, it reversed its earlier decision and concluded that the disability payments Xerox had made to Hylind should not be deducted from the backpay award. The final backpay award without the offset totaled $1,445,781. Pet. App. 32a.

The district court further held that post-judgment interest on the backpay should run,

pursuant to 28 U.S.C. § 1961, from September 17, 2010, the date the court first entered judgment, and directed counsel (Hylind had retained new counsel on remand) to submit calculations of that post-judgment interest. Citing *Kaiser* and Section 1961, it held that "[s]ince judgment was entered on the back pay award on September 17, 2010, it is from that date that the federal post-judgment rate of interest must run." Pet. App. 31a. On November 24, 2014, the district court issued its Final Order of Judgment on Remand. *Hylind v. Xerox Corp.*, No. 8:03cv116 (D. Md.), ECF 570.

Thereafter, Hylind filed various post-judgment motions. After those were resolved, Hylind noticed her second *pro se* appeal in the Fourth Circuit in April 2015. Xerox again cross-appealed. On December 11, 2015, the Fourth Circuit affirmed the district court's decisions after the remand from the first appeal, save a modification to confirm that postjudgment interest is compound. Pet. App. 8a. As to Hylind's claim of error that postjudgment interest on the backpay award should not have commenced until 2014, the Fourth Circuit held that "the district court did not err" because:

> [O]ur prior decision vacated the back pay award to permit the district court to reconsider its application of the collateral source rule – but did not affect Hylind's entitlement to at least the quantum of back pay awarded prior to that appeal. Thus, the date of the prior judgment awarding back pay was the proper date for commencement of postjudgment interest. *See Kaiser*

Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835-36 (1990).

Pet. App. 7a. The Fourth Circuit denied Hylind's ensuing petition for panel rehearing and rehearing en banc, Pet. App. 2a. Xerox satisfied the $1.5 million judgment on February 26, 2016. *Hylind v. Xerox*, No. 8:03cv116 (D. Md. Mar. 4, 2016), ECF 594.

REASONS FOR DENYING THE PETITION

I. There is no split among the courts of appeals.

A. Section 1961(a) and *Kaiser*

The question presented concerns when a federal court must begin to run postjudgment interest. The answer is governed by 28 U.S.C. § 1961(a), which directs courts to "allow" interest "on any money judgment in a civil case recovered in a district court." Section 1961(a) sets forth both the date on which interest must begin—"[s]uch interest shall be calculated from the date of the entry of the judgment"—as well as the interest rate to be applied—"the weekly average 1-year constant maturity Treasury yield . . . for the calendar week preceding . . . the date of the judgment."

In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), this Court held that "money judgment" as used in Section 1961(a) means a judgment that ascertains damages in a meaningful way. In *Kaiser*, the district court had initially entered a judgment of $5.4 million after a jury trial in accordance with the jury's award. *Id.* at 830. The

district court subsequently held that the evidence did not support that award and ordered a new trial on damages. *Ibid.* The limited retrial occurred two years later, and the district court entered a judgment of $9.6 million in accordance with the jury's award.

The Court held that the applicable date for purposes of Section 1961(a) was that of the later judgment. First, it rejected the argument, which some courts of appeals had adopted, that the date of the jury verdict, and not the date of the entry of judgment, was the proper date. Noting that the courts that looked to the verdict date had relied on "the policy underlying [Section 1961(a)]—compensation of the plaintiff for the loss of the use of the money," the Court held that such a reading was contrary to the statutory language and that "the allocation of the costs accruing from litigation is a matter for the legislature, not the courts." *Id.* at 835.

Second, *Kaiser* held that as between the two dates on which the district court had entered judgment, the later one was the appropriate point for postjudgment interest to begin. It held that "[w]here the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way." *Id.* at 835-36. Because the district court had held that the prior judgment was contrary to the evidence, that earlier judgment was not a "judgment" within the meaning of Section 1961(a).

B. The courts of appeals employ the same approach.

Hylind claims that in applying Section 1961(a) and *Kaiser* to determine when to begin postjudgment

interest when there are multiple judgments, certain courts of appeals apply an inflexible "mechanical" approach, while others employ an unstructured "equitable" approach. This purported split is illusory, and it incorrectly characterizes the courts' approaches. In reality, the courts of appeals recite and employ the same test to determine when to begin postjudgment interest, and this test is neither entirely "mechanical" nor entirely "equitable."

Tellingly, neither the Fourth Circuit below, nor any of the cases Hylind cites as examples of this purported split, claim or acknowledge such a split. This is for good reason. Applying Section 1961(a) and *Kaiser*'s meaningful ascertainment framework, the courts of appeals agree that the inquiry into which entry of judgment triggers postjudgment interest depends on the extent of the amendment to the earlier judgment. In other words, courts assess the degree to which the earlier judgment was changed by the later judgment. If later proceedings make clear that the earlier judgment meaningfully ascertained damages and was supported by the evidence, courts begin postjudgment interest at that earlier judgment.

Circuits on both sides of Hylind's alleged split employ this analysis. For example, the Tenth Circuit, one of the courts supposedly on the "mechanical" side, states that "[i]n determining whether postjudgment interest should accrue from the date of the district court's original judgment or the date of a later judgment, we examine the extent to which the case was reversed." *Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc.*, 103 F.3d 80, 81 (10th Cir. 1996) (citation omitted). "Where the original judgment lacks an evidentiary or legal basis,

postjudgment interest accrues from the second trial court judgment; where the original judgment is basically sound but is modified on remand, post-judgment interest accrues from the date of the first judgment." *Ibid.* (citing cases from the First, Third, and Sixth Circuits).[2]

The Second Circuit also looks to the degree of divergence between the original and subsequent judgment, and does not do so in a "mechanical" fashion. In *Indu Craft, Inc. v. Bank of Baroda*, the court noted that "post-judgment interest is to commence from a judgment that is ascertained in [a] meaningful way and is supported by the evidence." 87 F.3d 614, 620 (2d Cir.), *cert. denied*, 519 U.S. 1041 (1996) (citations omitted). Far from applying this test in a perfunctory way, *Indu Craft* thoughtfully distinguished the procedural posture of *Kaiser*, noting that "here we did not disturb the jury's factual findings on appeal and the original judgment was sufficiently substantiated by the evidence." *Ibid.* The Second Circuit cases Hylind cites apply the same test, and similarly recite different factual scenarios that could lead to different outcomes. *E.g.*, *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 104 (2d Cir. 2004) (hypothesizing that where an

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[2] The other Tenth Circuit case Hylind cites, *Reed v. Mineta*, 438 F.3d 1063 (10th Cir. 2006), has no bearing on the issue in this case—when to begin *post*judgment interest—because *Reed* concerned how to calculate *pre*judgment interest. *Id.* at 1067 (holding that the plaintiff's injuries "were incrementally inflicted" and that "prejudgment interest should have been calculated to coincide therewith"). *Reed* said nothing about how to determine when postjudgment interest should begin.

appellate court reverses the district court's granting of a post-trial judgment for a matter of law, "it may be proper to calculate post-judgment interest from the original judgment").[3]

The courts of appeals that Hylind puts on the "equitable" side of the split are no different. The Eleventh Circuit in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), had to determine whether postjudgment interest on a punitive damage award began with a larger original judgment or a later remitted judgment. The Eleventh Circuit noted that this question was controlled by Section 1961(a) and *Kaiser*, and stated that "[t]he law on this issue is clear. . . . When an original judgment is not completely vacated, the date from which post-judgment interest runs turns on the degree to which the original judgment is upheld or invalidated." *Id.* at 1339-40. It cited cases from the Third, Fifth, Sixth, and Ninth Circuits, noting no apparent division among the courts of appeals. The court concluded that interest should run from the

[3] Hylind uses a truncated quote from another Second Circuit case, *Andrulonis*, regarding equity entirely out of context. Pet. 15. The full sentence is: "When calculating postjudgment interest under section 1961, courts do not enjoy some amorphous equitable power *to select a date other than the 'date of the entry of judgment'* to trigger the running of interest, even if their laudable aim is to effectuate the compensatory purpose of the postjudgment interest statute." *Andrulonis v. United States*, 26 F.3d 1224, 1233 (2d Cir. 1994) (emphasis added). As the full sentence makes clear, the Second Circuit was rejecting the premise that postjudgment interest could be triggered by some action other than an entry of judgment, a proposition that is not in dispute in this case.

initial judgment because the unremitted portion of damages had been ascertained at that time, and did not refer to any sort of unstructured equitable approach. *Ibid.*

Johansen is more recent than the per curiam Eleventh Circuit case Hylind cites. Pet. 13 (discussing *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 997 F.2d 1340 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993)). *DeLong* concerned the interpretation of Federal Rule of Appellate Procedure 37, which is not at issue in this case. And although *DeLong* referenced equity, it noted that "equity ordinarily, *and perhaps always*, commands that interest be awarded from the date of the original judgment." *Id.* at 1342 (emphasis added). No court within the Eleventh Circuit appears to have subsequently cited *DeLong* for establishing any sort of discretionary or equitable approach to beginning postjudgment interest, while at least one district court has applied *Johansen*. *McCloud v. Fortune*, 510 F. Supp. 2d 649, 660 n.25 (N.D. Fl. 2007).

The Ninth Circuit, which Hylind also characterizes as employing an "equitable" test, also focuses on the extent to which the earlier judgment was modified by the later judgment. It has held in multiple cases that "determining from which judgment interest should run requires an inquiry into 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.), *cert. denied*, 555 U.S. 824 (2008) (quoting *Guam Soc'y*

of Obstetricians & Gynecologists v. Ada, 100 F.3d 691, 702 (9th Cir. 1996), *cert. denied*, 522 U.S. 949 (1997)).[4]

All of the factors of this framework assess how extensively the earlier judgment was modified, just like the other courts of appeals. Accordingly, the Ninth Circuit in *Planned Parenthood* concluded that in a case where the subsequent change is minor and the original judgment meaningfully ascertained damages and was supported by the evidence, "post-judgment interest is ordinarily computed *from the date of the judgment's initial entry*." *Id.* at 1018 (emphasis added) (punctuation omitted). Thus, in *Southern Union Co. v. Irvin*, 563 F.3d 788, 792-93 (9th Cir. 2008), the court held, with no discussion of any discretion or equity, that post-judgment interest should run from an original judgment after a remittitur. Similarly, in *Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077, 1080 (9th Cir. 2009), the court stated that "*Planned Parenthood* thus makes it clear that interest ordinarily should be computed from the date of the original judgment's initial entry when the evidentiary and legal bases for an award were sound." It held that it had "no discretion to deviate from § 1961's instructions on the calculation of interest." *Ibid.*

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[4] Hylind incorrectly states that *Planned Parenthood* and *Guam Society* also looked to "the availability and rate of prejudgment interest"—admittedly the "most salient" factor in her case. Pet. 12. These decisions, however, made no mention at all of pre-judgment interest.

True, *Planned Parenthood* once referenced "equitable principles." 518 F.3d at 1021. However, it did not discuss or consider any factors other than whether the original judgment meaningfully ascertained damages and to what extent that judgment had been modified—exactly like the other circuits just discussed. *Ibid.* ("[W]e should have awarded post-judgment interest from the date of the Original Judgment *because the basis for the punitive damages award had already been meaningfully ascertained*." (emphasis added)).

The Third and the First Circuits, which Hylind does not mention, also provide salient examples of the overall approach. The Third Circuit has explained that "when [*Kaiser*'s] inquiry is distilled to its essence," the proper question is "the extent to which liability and damages, as finally determined, were ascertained or established in the first judgmen[t]." *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 98 (3d Cir. 1993). Noting that the difficult cases are those which fall between the two extremes of 1) an original judgment affirmed in whole on appeal, where postjudgment interest would run from the original judgment, and 2) a complete reversal of an original judgment, where postjudgment interest would begin accruing at the later judgment, *Loughman* emphasized that *Kaiser*'s "application in particular cases is often very fact specific." *Ibid.*

The First Circuit applies a similar inquiry. Shortly after *Kaiser*, it held that "where a first judgment lacks an evidentiary or legal basis, post-judgment interest accrues from the date of the second judgment; where the original judgment is basically

sound but is modified on remand, post-judgment interest accrues from the date of the first judgment." *Cordero v. De Jesus-Mendez*, 922 F.2d 11, 16 (1st Cir. 1990). In support of this conclusion, it cited with approval cases from both the Ninth and Tenth Circuits—courts which Hylind characterizes as being on opposite sides of the purported split. *See also Fiorentino v. Rio Mar Associates LP, SE*, 626 F.3d 648, 652 (1st Cir. 2010) (citing the Ninth Circuit and holding that postjudgment interest should run from the earlier judgment because although that "judgment was later modified, all of the damages that were ultimately awarded were embodied in the original judgment"). *See also H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 261-62 (8th Cir. 1991) (running postjudgment interest from earlier judgment where "[o]ur remand for retrial on punitive damages involved the tortious interference claim only and did not affect the portion of the damages award that was affirmed").

Although Hylind broadly alludes to a multi-factored equitable approach throughout her Petition, the only equitable factor that she puts at issue in this case is the potential availability of a higher prejudgment interest rate for a prevailing plaintiff. *E.g.*, Pet. *i*; Pet. 12 (referring to the "availability and rate of prejudgment interest" as the "most salient" factor). Of all of the cases from the courts of appeals she cites as representative of the equitable approach, only two even mention this factor.

One is a twenty-year-old decision from the Ninth Circuit, *AT&T Co. v. United Computer Systems, Inc.*, 98 F.3d 1206 (9th Cir. 1996). There, the Ninth Circuit did give the availability of a higher

prejudgment interest rate as one reason for its decision to begin postjudgment interest at a later judgment. However, the court appeared to consider even more important the fact that the initial judgment had been vacated by the actions of the party seeking to benefit from the lower postjudgment rate: "Where a prior judgment awarding damages has been vacated *pursuant to the actions of an ultimately losing party*, equitable principles favor calculating the interest in a manner that more fully compensates the prevailing party." *Id.* at 1211 (emphasis added); *see also ibid.* ("[T]he award of prejudgment interest under state law more fully compensates [the plaintiff] for the loss of use of its money due to the delay occasioned by [the defendant's] actions.").[5]

Further confirming that the Ninth Circuit does not find an available higher prejudgment interest rate to be an important factor, the Ninth Circuit has not cited *AT&T* for this proposition in the intervening twenty years since the case was decided, and has instead applied the test described above,

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[5] Here, the remand from the Fourth Circuit on the first appeal for the district court to reconsider the offset issue was based on a recent Fourth Circuit decision issued after the parties had briefed the issue in the district court but before it rendered its decision. Pet. App. 42a (noting that *Sloas v. CSX Transportation, Inc.*, 616 F.3d 380 (4th Cir. 2010), was decided "[w]hile the parties' motions pertaining to damages were pending before the district court"). Although *Sloas* was decided in July 2010, Hylind did not bring it to the district court's attention until October 2010, *after* the September 2010 judgment. *Hylind v. Xerox Corp.*, No. 8:03-cv-116, ECF 390-1 at 33-34.

mirroring the approach of the other courts of appeals. *E.g.*, *Snyder v. Freight, Constr., General Drivers, Warehousemen & Helpers, Local No. 287*, 175 F.3d 680, 690 (9th Cir. 1999) (citing *AT&T* for the proposition that interest on damages after a remand for possible remittitur should begin from the original judgment because "[t]hat judgment was legally sufficient to allow adequate 'ascertainment of the damage[s]") (citation omitted)).[6]

The second case Hylind cites in support of a supposed reliance on a higher prejudgment interest rate is the Sixth Circuit's decision in *Scotts Co. v. Central Garden & Pet Co.*, 403 F.3d 781, 793 (6th Cir. 2005). The Sixth Circuit, however, has explicitly distanced itself from that decision. Seven years after *Scotts*, the Sixth Circuit in *Stryker* rebuffed the argument that *Scotts* meant "that the prevailing party should be entitled to an extended period of pre-judgment interest." *Stryker Corp. v. XL Ins. Am.*, 735

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[6] Besides the Ninth and Eleventh Circuit, Hylind also claims the D.C. Circuit employs an equitable approach. Pet. 14. But that court has addressed this issue infrequently, and the decisions that do exist are unclear and do not address the factor of a higher prejudgment interest rate. *Mergentime Corp. v. Washington Metropolitan Area Transit Authority*, 166 F.3d 1257 (D.C. Cir. 1999), involved the highly unique factual circumstances of a judge with a terminal illness who entered judgment for one cross-claiming party and then passed away. The other case Hylind references, *Modern Electric Inc. v. Ideal Electronic Security Co.*, 145 F.3d 395, 397 (D.C. Cir. 1998), concerned whether the district court had abused its discretion in awarding *pre*-judgment interest, which it stated "in no way implicated the *post*-judgment interest statute." The court made only a passing reference to Section 1961 and did not discuss *Kaiser* at all.

F.3d 349, 362 (6th Cir. 2012). Instead, because the district court in that case had not awarded prejudgment interest in any earlier judgment, "the *Scotts* opinion 'merely aligned the accrual of prejudgment interest with the date that prejudgment interest was first awarded." *Ibid.* Here, the district court clearly awarded Hylind prejudgment interest in the 2010 judgment. Pet. App. 59a.

Therefore, there is no reason to think the Sixth Circuit would have reached a different result in this case. Like all of the other courts of appeals discussed above, the Sixth Circuit resolves the question of post-judgment analysis with a careful comparison of the earlier and later judgments and intervening court actions. *E.g.*, *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 429 (6th Cir. 1999), *cert. denied*, 530 U.S. 1242 (2000); *Adkins v. Asbestos Corp., Ltd.*, 18 F.3d 1349, 1351-52 (6th Cir. 1994).

II. No issue of pressing national importance is presented.

Hylind gives three reasons why this issue is sufficiently important to merit this Court's review. First, she says it is of particular importance when "there is a long delay between two judgments due to appeals or proceedings on remand." Pet. 19. Yet she provides no information that would indicate that the four-year period between judgments in this case is typical or common.

Statistics on the federal judiciary indicate that the procedural posture of this case is unusual because it represents a subset of a subset of cases. This case had two judgments because of (1) an appeal (2) that did not result in an affirmance. In 2015, the

number of filings in the courts of appeals was less than twenty percent of the number of filings in the district courts. Supreme Court of the U.S., Public Information Office, *2015 Year-End Report on the Federal Judiciary* 14, http://1.usa.gov/1U4e0Ec. Moreover, fewer than 15% of the private civil cases that were appealed resulted in a reversal. U.S. Courts, *Federal Judicial Caseload Statistics 2015 Table B-5*, *Decisions in Cases Terminated on the Merits, by Nature of Proceedings*, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015-tables.

In the subset of cases where there is an appeal, the usual time of resolution is much less than four years. In the courts of appeals, the median time from filing a notice of appeal to the disposition in 2015 ranged from five months (Eighth Circuit) to fifteen months (Ninth Circuit). *See also Eaves v. Cnty. of Cape May*, 239 F.3d 527, 530 n.5 (3d Cir. 2001) ("We note that the circumstances of this case are unusual in that the delay between the District Court's first and second orders spanned approximately seventeen months."). In the year ending March 31, 2016, the median time from filing to disposition of an entire civil case in federal district courts was 8.7 months. U.S. Courts, *United States District Courts – Federal Court Management Statistics – Profiles – During the 12-Month Periods Ending March 31, 2011 Through 2016*, http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2016/03/31-1.

Second, Hylind argues this issue is important because postjudgment and prejudgment rates greatly differ. Pet. 20. Section 1961(a) incorporates a

Treasury bill rate that adjusts weekly, while many state rates are much less flexible—here, for example, the Maryland rate was set by that state's constitution. Yet the current Treasury bill rates incorporated in Section 1961(a) are historically low. Lawrence Lewitinn, *Here's 222 years of interest rate history on one chart*, CNBC (Sept. 23, 2013), http://www.cnbc.com/2013/09/23/heres-222-years-of-interest-rate-history-on-one-chart.html (noting that the average 30-year Treasury bond rate "has been 5.18% since the start of this country's history"). The Federal Reserve has indicated it will increase these rates in the future. *See* Binyamin Appelbaum, *Janet Yellen Says Fed Still Plans to Raise Interest Rates but Carefully*, N.Y. Times (March 29, 2016), http://nyti.ms/22YmUqZ.

The disparity present in this case is therefore likely to decrease in the future. Indeed, the current federal postjudgment rate (0.53% as of July 29, 2016) is more than double what it was at the time of the 2010 judgment (0.26%). U.S. Courts, *Post Judgement Interest Rate*, http://www.uscourts.gov/services-forms/fees/post-judgement-interest-rate.

Third, Hylind claims that this issue should be addressed because prejudgment interest is "available" in "many federal cases." Pet. 22. But in federal question cases, no federal statute governs prejudgment interest, and that rate "is a matter left to the discretion of the district court." *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1031 (4th Cir. 1993). *See also City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 194 (1995) (the absence of a statute governing prejudgment interest means "that the question is governed by traditional

judge-made principles"); *Oldham v. Korean Air Lines Co., Ltd.*, 127 F.3d 43, 54 (D.C Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998) (the award of prejudgment interest "is subject to the discretion of the court and equitable considerations" (citation omitted)).

More importantly, Hylind's observation is of little relevance standing alone, for any "availability"[7] does not determine what that prejudgment interest rate is. Hylind apparently assumes that courts always apply the state rate. Yet in practice, in federal question cases district courts "adop[t] a wide variety of prejudgment interest rates," *Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, 689 F. Supp. 2d 585, 614 (S.D.N.Y. 2010), and they are "not bound by the interest rate of the forum state in determining the rate of prejudgment interest." *United States v. Dollar Rent A Car Sys., Inc.*, 712 F.2d 938 (4th Cir. 1983).

In fact, in many federal question cases district courts find it appropriate to apply the rate mandated by Section 1961(a) for not only postjudgment interest but for prejudgment interest as well. This practice further narrows the universe of cases where the issue in this case could make a difference. *See, e.g.*, *Blankenship v. Liberty Life Assur. Co. of Boston*, 486 F.3d 620, 627-28 (9th Cir. 2007) (holding in an ERISA case that "the interest rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is

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[7] Even availability is not a given, for "[t]here may be circumstances in which an award of prejudgment interest should not be made" at all. *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 54 (2d Cir. 2009).

appropriate for fixing the rate of pre-judgment interest unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate" (citation omitted)); *United States v. Gordon*, 393 F.3d 1044, 1058 n.12 (9th Cir. 2004), *cert. denied*, 546 U.S. 957 (2005) (holding the same in a criminal case as to restitution); *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir. 1998) ("Although a district court may look to state law for guidance in determining the appropriate prejudgment interest rate . . . we have held previously that the statutory postjudgment framework set forth in 28 U.S.C. § 1961 is a reasonable method for calculating prejudgment interest awards."); *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 955 (Fed. Cir. 1997) (no abuse of discretion in using rate set forth in Section 1961(a)); *In re M/V Nicole Trahan*, 10 F.3d 1190, 1196-97 (5th Cir. 1994) (in an admiralty case, no abuse of discretion in awarding prejudgment interest at the federal rate, which was lower than the applicable commercial interest rate); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3d Cir. 1986) ("In exercising that discretion [to award prejudgment interest], however, the court may be guided by the rate set out in 28 U.S.C. § 1961 (1982).").

All told, the $400,000 disparity in this case that Hylind points to was created by (1) a successful appeal that created multiple judgments ascertaining damages, (2) a four year period between the two judgments at issue, (3) current economic conditions, and (4) an assumption that the district court would necessarily award the higher state prejudgment

interest rate. This coincidence of factors means that this issue is far less common than Hylind suggests.

III. This case is a poor vehicle for addressing any split, even if one existed.

Even if Hylind had demonstrated a split meriting this Court's attention, this case would be a poor vehicle for addressing it. First, the Fourth Circuit has not, in this case or elsewhere, examined this issue in depth. Besides the decision below, Hylind does not mention any case law from the Fourth Circuit at all. The opinion below is short and unpublished, and the Fourth Circuit does not appear to have ever addressed this issue in a published decision. And in one of the unpublished decisions that deal with Section 1961(a), the Fourth Circuit recited a test identical to the Ninth Circuit's, a court supposedly in tension with the Fourth Circuit. *Biscayne Oil & Gas, Inc. v Burdette Oil & Gas Co., Inc.*, 947 F.2d 940 (Table), 1991 WL 224261, at *5 (4th Cir. 1991) (unpublished) ("Determining the equity of the statute in a case like this requires an inquiry into 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." (citation omitted)).[8]

[8] Of course, the Ninth Circuit's approach and *Biscayne*'s "equitable" test is not in any tension with the purportedly "mechanical" decision below, because there is no split: the various formulations are all making the same substantive inquiry.

Second, the decision below was unpublished, and therefore it is not binding precedent within the Fourth Circuit. Pet. App. 4a. As Hylind correctly notes, this Court does occasionally grant certiorari to review unpublished decisions. Pet. 24. The Fourth Circuit's analysis of the issue in this case, however, was comprised of two sentences that did not purport to take sides on a circuit split[9] and instead properly invoked *Kaiser*. Hylind's *pro se* appeal followed the Fourth Circuit's informal briefing procedures, Fourth Cir. Local Rule 34(b), and there was no oral argument.

In its unanimous, per curiam decision, the Fourth Circuit simply concluded that the district court "did not err" because the prior remand "did not affect Hylind's entitlement to at least the quantum of back pay awarded prior to that appeal." Pet. App. 7a.

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[9] This may be because Hylind took varied positions on this issue throughout her Fourth Circuit briefing. She did not allege a split in her *pro se* opening brief. Br. of Appellant, *Hylind v. Xerox Corp.*, No. 15-1425, ECF 19 at 45-48. The only case cited in her Petition in this Court that also appeared in her Fourth Circuit opening brief was a D.C. Circuit case that concerned an award of pre-judgment interest. *Id.* at 48 (citing *Modern Elec. ex rel. Modern Elec. v. Ideal Elec. Sec. Co.*, 145 F.3d 395, 397 (D.C. Cir. 1998)). In her reply, she said that the Fourth Circuit took what she now calls the "equitable" approach. Informal Response and Reply Br. of Appellant/Cross-Appellee, *Hylind v. Xerox Corp.*, No. 15-1425, ECF 24 at 33 ("Our Circuit sides with others that look to the purpose and the equity of the statute."). In her petition for rehearing, Hylind referenced only a pre-*Kaiser* split on which she no longer relies. *Hylind v. Xerox Corp.*, ECF 29 at 11 (citing *Chattem, Inc. v. Bailey*, 486 U.S. 1059, 1060 (1988) (WHITE, J., dissenting from denial of certiorari)).

The best reading of the opinion is that the Fourth Circuit, like the other courts of appeals, thought it appropriate to begin postjudgment interest from the earlier judgment where that judgment meaningfully ascertained damages and was not significantly changed on appeal and remand. Even if Hylind's split existed, it is not entirely clear whether the Fourth Circuit concluded that the difference in interest rates Hylind had pointed to was simply irrelevant (under her "mechanical" approach), or relevant but equity did not justify selecting the later date to begin postjudgment interest (under her "equitable" approach). This is particularly problematic for Hylind in light of a prior unpublished decision from the Fourth Circuit that uses the same language as that of the Ninth Circuit. *Biscayne*, 1991 WL 224261, at *5.

Third, Hylind is incorrect that this issue is necessarily "outcome dispositive." Pet. 24. Her argument is that the district judge should not have begun postjudgment interest until after the remand from the first Fourth Circuit appeal, in 2014. If she were to prevail on this point, the relevant question would then be what prejudgment interest rate to award between 2010 and 2014. While she contends in this Court that it would be 6%—the rate set in the Maryland Constitution—that is not necessarily so.

As discussed above, district courts often find it appropriate in federal question cases to use the federal postjudgment rate for prejudgment interest as well. *Supra* Part II. During the same time frame at issue in this case, for example, the Ninth Circuit noted that the Section 1961(a) rate was appropriate "with respect to pre-judgment interest in Title VII

back pay cases." *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 837 (9th Cir. 2012). In light of this authority, Xerox argued in the district court that if postjudgment interest would not begin until 2014, an appropriate prejudgment interest rate beginning in 2010 would be that set forth in Section 1961(a). *Hylind v. Xerox Corp.*, No. 8:03-cv-116, ECF No. 514 at 11-12.

As it turned out, the district court did not need to decide what the prejudgment interest rate should be because it began postjudgment interest in 2010. Nonetheless, it indicated its view of the appropriate rate in November 2013, when the district judge stated (with respect to prejudgment interest for compensatory damages) that Hylind "will not be awarded by me six percent from [2007] forward. She would be making more money than most people in the United States if I were to do that. And it's not fair." *Id.*, ECF No. 544, at 14-15. Therefore, if the district judge were to consider what prejudgment rate to award from 2010 to 2014, it is unlikely that six percent would have been awarded, or that such an award would have been appropriate. *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 54–55 (2d Cir. 2009) (district court does not have discretion to set a prejudgment interest rate that results in a windfall to the plaintiff).

Because the Fourth Circuit has not developed its position in any split, because the decision below is nonprecedential and did not fully explore the question presented, and because the issue would not necessarily benefit Hylind even if she prevailed in this Court, this case is a poor candidate for considering when to begin postjudgment interest.

IV. The Fourth Circuit's decision is correct.

The Fourth Circuit correctly affirmed the district court's decision to begin running postjudgment interest at the 2010 judgment. Hylind does not dispute that the 2010 judgment meaningfully ascertained damages within the meaning of *Kaiser* and therefore qualified as a "money judgment" under Section 1961(a). *E.g.*, Pet. 27 (referring to "multiple judgments that each satisfy *Kaiser*'s standard."). Yet she contends that the district court had the discretion to decline to begin postjudgment interest from that judgment because of the "availability" of a higher prejudgment interest rate.

Courts do not have the authority to circumvent the statutorily-mandated interest rate in Section 1961(a) by refusing to begin postjudgment interest when a judgment meaningfully ascertains damages. Section 1961(a) is "[t]he federal statute governing awards of postjudgment interest." *Kaiser*, 494 U.S. at 831. Unlike prejudgment interest, as to which courts have significant discretion, awards of postjudgment interest are mandatory. *E.g.*, *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382, 1383-84 (9th Cir. 1992), *cert. denied*, 510 U.S. 817 (1993); *Clifford v. M/V Islander*, 882 F.2d 12, 14 (1st Cir. 1989).

The command of Section 1961(a) is clear: "Interest shall be allowed on any money judgment in a civil case recovered in a district court" and "shall be calculated from the date of the entry of the judgment." The words "shall" and "any" conclusively show that once a "money judgment" is entered, postjudgment

interest must begin. Hylind's contention that a district court may wait for a later judgment directly contravenes this mandate. This is because refusing to begin postjudgment interest on an earlier judgment means that postjudgment interest is not being "allowed" on a judgment that qualifies as "any money judgment." This is contrary to the plain language of Section 1961(a).

When, as Hylind puts it, "there are multiple judgments that each satisfy *Kaiser*'s standard," Pet. 27, the only possible way to comply with Section 1961(a) is to begin postjudgment interest at the earliest judgment. That way, postjudgment interest is effectively being allowed on all of the money judgments: here, for example, if postjudgment interest begins in 2010, it is being allowed on both the 2010 judgment and the 2014 judgment. If the district court had instead delayed postjudgment interest until the 2014 judgment, it would not have allowed postjudgment interest on the 2010 money judgment.

Determining which judgment or judgments meaningfully ascertains damages, and therefore qualifies as a "money judgment" pursuant to *Kaiser*'s framework, may be a nuanced and complex task. As described above, *supra* Section I.B, it involves an assessment of the relationship between the earlier and later judgments, which is "often very fact specific." *Loughman*, 6 F.3d at 98 (3d Cir. 1993). But once that determination is made, courts do not have flexibility under Section 1961(a) to refuse to award postjudgment interest from the earliest judgment that meaningfully ascertains damages. As the Court held in *Kaiser* when it rejected the

argument that courts could commence postjudgment interest at the jury verdict because it would better compensate the prevailing party, "the courts have been provided a uniform time from which to determine post-judgment issues." 494 U.S. at 835. Even though the application of Section 1961(a) "may result in the plaintiff bearing the burden of the loss of the use of the money from the verdict to judgment, the allocation of the costs accruing from litigation is a matter for the legislature, not the courts." *Ibid.*

Hylind's argument that availability of a different and higher interest rate can be the basis for disregarding a judgment is particularly problematic. As the Court explained in *Kaiser*, Section 1961(a) previously looked to state law for the postjudgment interest rate, providing that "interest shall be calculated . . . at the rate allowed by State law." 494 U.S. at 831 (quoting 28 U.S.C. § 1961 (1976 ed.)). In 1982, Congress amended Section 1961(a) to tie it to the Treasury bill rate instead of to state law. *Ibid.* Hylind's argument is effectively that courts can circumvent this clear legislative choice of an interest rate where it would be more favorable to the prevailing plaintiff. Congress, though, has already determined that the Treasury bill rate accurately reflects market conditions and creates the right incentives for parties in litigation. If Congress wished to ensure that prevailing plaintiffs could trump this rate when advantageous, it could easily have provided that the Treasury bill rate applied unless "the rate allowed by State law" was higher. But it did not do so, and that choice must be followed. *Carcieri v. Salazar*, 555 U.S. 379, 392-93 (2009) ("We need not consider these competing policy views,

because Congress' use of the word 'now' . . . speaks for itself and courts must presume that a legislature says in a statute what it means . . . ." (citation omitted)).

Kaiser is itself instructive. In that case, the Court addressed four separate questions. The first three were whether postjudgment interest could begin at a jury verdict, at which judgment postjudgment interest should commence, and to what extent the 1982 amendments to Section 1961(a) were retroactive. 494 U.S. 827. The fourth question, however, is particularly relevant, as it is a nearly identical question to the one Hylind poses here: whether "the equities of the case require that the rate of interest be set at a rate higher than that afforded by § 1961." *Id.* at 840. The Court's answer was an unequivocal "no." It reasoned that "[a]t common law judgments do not bear interest; interest rests solely upon statutory provision. Where Congress . . . has set a definite interest rate that governs this litigation, the courts may not legislate to the contrary." *Id.*

Hylind's proposed approach would contravene the clearly expressed purpose of Section 1961(a). "The purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the *ascertainment of the damage* and the payment by the defendant." *Kaiser,* 494 U.S. at 835–36 (citation omitted) (emphasis added). In Section 1961(a), Congress determined that this compensation is to occur at a uniform rate. *Cappiello v. ICD Publ'ns, Inc.*, 720 F.3d 109, 114–15 (2d Cir.), *cert. denied*, 134 S. Ct. 683 (2013) ("[T]he universal application of

Section 1961 to all types of claims makes for logical uniformity . . . and therefore easy administration of all federal judgments no matter the nature of the underlying claims. Congress has a legitimate interest in . . . doing so by means of an easily administered, uniform rule."). Moreover, Hylind's suggestion that prevailing plaintiffs should have the benefit of a higher prejudgment rate could create the incentive for plaintiffs to delay proceedings in the district court or themselves file frivolous appeals on ancillary matters as to which they did not prevail. *But see Kaiser*, 494 U.S. at 839 (noting that the legislative history for the 1982 amendments to Section 1961 reflected a desire to curb frivolous appeals).

In sum, there is a good reason why the courts of appeals begin postjudgment interest once they conclude with the earliest judgment that meaningfully ascertains damages: that result is required by Section 1961(a). Even if Hylind is correct that courts retain equitable discretion to disregard a judgment that meaningfully ascertained damages, it would not have been an abuse of that discretion to decline to continue to apply the static 6% rate set forth in the Maryland Constitution, the only other rate Hylind suggests.

CONCLUSION

For all of these reasons, this Court should deny the Petition.

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