No. 15-1430

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Xerox claims that the courts of appeals agree that under *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), "the only possible way to comply with Section 1961(a) is to begin postjudgment interest at the earliest judgment" constituting a "money" judgment, BIO 28; *see id.* at 1 (claiming courts of appeals "consistently" go with the "earlier" judgment if it is "supported by the evidence").

Wrong. As petitioner has already explained, *Kaiser* did not address, let alone answer, that question. Pet. 27-28. And the courts of appeals disagree on whether postjudgment interest must invariably run from the first judgment that ascertains *some* amount of money damages or whether courts may take equitable factors into account. Pet. 11-18. The "great disarray as to when the postjudgment interest meter clicks into the 'ON' position," *Clifford v. M/V Islander*, 882 F.2d 12, 14 (1st Cir. 1989), has gone on long enough. This Court should grant certiorari.

I. The Conflict Among The Circuits Is Longstanding And Real.

Prior to this Court's decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), there was widespread, acknowledged disagreement among the circuits over whether "an initial money judgment for a plaintiff" could begin the running of postjudgment interest under 28 U.S.C. § 1961(a) even if that judgment was subsequently vacated and superseded by a "greater" judgment,

Chattem, Inc. v. Bailey, 486 U.S. 1059, 1059, 1060 (1988) (White, J., dissenting from the denial of certiorari) (citing cases both contributing to, and acknowledging, the conflict). Courts of appeals had reached a "plethora of conflicting conclusions" on how to pick the date from which postjudgment interests runs when there are two judgments for money damages. *Clifford v. M/V Islander*, 882 F.2d 12, 13 (1st Cir. 1989).

This Court's decision in *Kaiser* answered one permutation of that question: a district court is *permitted* to run postjudgment interest from an initial judgment rather than from a later judgment if (but only if) the initial judgment was "supported by the evidence" and "ascertained" the "damages." 494 U.S. at 836. In *Kaiser* itself, because the initial (vacated) judgment did not meet that standard, there was only one judgment—the later one—from which postjudgment interest could run. Since there was only one qualifying judgment, this Court did not answer the question whether postjudgment interest *must* run from the first judgment even if multiple judgments supported by the evidence ascertain at least some portion of a plaintiff's damages.

In cases (like *Kaiser* itself) where prejudgment interest is unavailable, there is a strong argument for running postjudgment interest from the earliest possible judgment date that satisfies *Kaiser*'s requirements. Otherwise, a prevailing plaintiff will receive no compensation for "the loss of use of money due as damages from the time the claim accrues until judgment is entered," *West Virginia v. United States*, 479 U.S. 305, 310-11 n.2 (1987).

By contrast, in the growing range of cases where prejudgment interest is available, *see* Pet. 22, the question in a case with multiple judgments, each of which quantifies a plaintiff's damages in some way, is not *whether* the plaintiff will receive interest prior to the entry of the later judgment, but *what sort* of interest should be awarded in the period leading up to that judgment. District courts must decide whether (1) to award prejudgment interest up to the entry of the conclusive judgment, in which case they have the authority—and in some circumstances, a clear responsibility—to award prejudgment interest at a rate that provides the plaintiff with "complete compensation," *West Virginia*, 479 U.S. at 310, or (2) to instead award postjudgment interest from the time of the initial award under the mechanical formula dictated by Section 1961(a). [1]

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[1] In federal question cases, district courts often look to the statutory prejudgment interest rate of the state in which they sit. Pet. 20; *see also, e.g.*, *Perez v. Bruister*, 823 F.3d 250, 274 (5th Cir. 2016) (stating that "[b]ecause there is no ERISA law setting prejudgment interest rates, courts look to state law for that purpose"). In diversity cases, of course, district courts *must* apply state law regarding prejudgment interest. *See, e.g.*, *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 633 (4th Cir. 1999).

Xerox points to some federal-question cases where federal courts have approved using the Section 1961(a) rate for prejudgment interest. BIO 21-22. But in one of the cases Xerox cites, *Blankenship v. Liberty Life Assur. Co.*, 486 F.3d 620 (9th Cir. 2007), the Ninth Circuit actually reaffirmed its position that courts are *not* required to use that rate when "the equities of that particular case require a different rate." *Id.* at 628 (quoting prior cases). Thus, the Ninth Circuit affirmed the

This is the question on which the courts of appeals are divided. Courts on the "equitable factors" side of the divide do not invariably go with the first possible judgment that satisfies *Kaiser*'s requirements of evidentiary support and an ascertainment of damages.[2] The Ninth Circuit, for example, held that "nothing" in *Kaiser* "supports the contention that interest must be calculated from the entry date of the *first* judgment ascertaining damages." *AT&T Co. v. United Computer Systems, Inc.*, 98 F.3d 1206, 1210 (9th Cir. 1996). Contrary to Xerox's intimation, *see* BIO 2, 15-16, this precedent remains vital, and district courts within the circuit cite it today. *See* Pet. 22-23. The D.C. Circuit expressly aligned itself with this approach, *see id.* at 14, and the Eleventh Circuit and (sometimes) the Sixth Circuit are in this camp, *see id.* at 13-14, 17-18. At the same time, courts adopting the "mechanical" approach, like the Second and Tenth Circuits, have squarely held that district courts *must* run postjudgment interest (thereby cutting off prejudgment interest) from the first judgment that ascertains *any* amount of the plaintiff's damages, even when doing so is plainly inequitable. *See* Pet. 14-16.

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award of prejudgment interest at a rate roughly twice as high as Section 1961(a)'s because that was the rate of return produced by a mutual fund in which plaintiff was invested, *see* 486 F.3d at 628. *See also infra* pages 9-10.

[2] This approach is hardly "freewheeling." BIO 1. To the contrary, it involves a set of sensible factors. Pet. 12-14, 28-31.

Xerox seeks to deflect attention from this conflict by suggesting that when "[d]etermining which judgment *or judgments*" satisfy *Kaiser*'s framework, courts of appeals take a "nuanced" approach. BIO 28 (emphasis added). True, but irrelevant. Xerox ignores entirely the disagreement among the circuits over what to do once they have made that determination, have concluded that more than one judgment meets *Kaiser*'s standard, and are faced with a prevailing plaintiff's contention that postjudgment interest should run only from the *later* judgment. That is where the conflict lies.

II. The Question Presented Is Important, And This Case Provides The Right Opportunity To Resolve It.

Xerox is right about one thing: the Fourth Circuit did not examine the question presented "in depth." BIO 23. Instead, it and the district court wrongly thought that *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), had already answered the question. *See* Pet. App. 7a; 31a (citing *Kaiser* and concluding that the 2010 judgment is the date from which "the federal post-judgment rate of interest *must* run") (emphasis added).[3] But contrary to

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[3] Xerox misunderstands the Fourth Circuit's prior decision in *Biscayne Oil & Gas, Inc. v. Burdette Oil & Gas Co.*, 947 F.2d 940 (4th Cir. 1991). *See* BIO 23 & 25 (discussing the case). There, the court actually acknowledged that "[t]he circuits differ over when postjudgment interest attaches if the appellate court vacates a judgment for the plaintiff and the plaintiff then wins a second judgment in the district court." 947 F.2d at *4. Having recognized that disagreement, the court then came down on the

Xerox's intimation, the combination of conclusory and contradictory decisions by courts of appeals, many of them purporting to rest on *Kaiser*, actually underscores the need for this Court's intervention.

1. Xerox is simply wrong to suggest that the question presented by this case seldom arises or makes a difference. *See* BIO 18-23.

The issue of how to determine the transition point between pre- and postjudgment interest in a case with multiple judgments is not unusual. The Federal Judicial Center report on which Xerox relies, *see* BIO 19, reveals that the courts of appeals reverse or remand nearly 800 civil cases involving private litigants each year. *See* U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2015, *available at* http://tinyurl.com/ Hylind-CR3 (last visited Aug. 17, 2016).

Focusing only on cases where the second judgment in a plaintiff's favor comes after an appeal actually understates the number of cases affected by the question presented. Multiple judgments need not involve an appeal at all. For example, in the most recent reported decision addressing the pre- to postjudgment interest transition, the multiple

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side of running postjudgment interest from the initial judgment when it could be done. *See id.* at *5-6. Absolutely *nothing* in *Biscayne Oil* suggests that the Fourth Circuit agrees with the Ninth Circuit that equitable considerations can permit using a subsequent judgment instead as the trigger for postjudgment interest.

judgments were the product of the district court ordering a new trial. *Cammeby's Mgmt. Co., LLC v. Alliant Ins. Servs., Inc.*, 2016 WL 3922641, at *1 (S.D.N.Y. July 11, 2016). And undercutting Xerox's suggestion that the choice will seldom be consequential, BIO 22-23, the difference in interest there exceeded $2 million because proceedings in the district court were not concluded until two years after the initial judgment.

Moreover, as petitioner pointed out earlier, the answer to the question presented may determine whether a plaintiff decides to forgo appeal of a first judgment in her favor altogether to avoid being subject to several additional years of minuscule postjudgment interest. Pet. 21.

Xerox's observations about the median time from filing a notice of appeal to disposition by the court of appeals, *see* BIO 19, proves little. That figure includes cases disposed of by summary affirmance through unpublished memorandum dispositions; appellate decisions reversing district courts will often involve published opinions and are thus likely to be significantly above the median. More fundamentally, the relevant time period is not the time on appeal but the time between the initial and conclusive judgments. That figure will (of course) involve more than just the time a case spends in the court of appeals—if, indeed, it even goes there. It will also include any time before the appeal begins—in Hylind's case the five months between the Order of Judgment ascertaining backpay, ECF 380, and the Final Order of Judgment also resolving "all outstanding post-trial matters," ECF 419. And it will include the time between an appellate decision and

entry of a new judgment after remand and whatever additional proceedings remand entails—in Hylind's case, two years between the Order reopening the case on remand, ECF 474, and the Interim Order entering the correct amount of backpay, ECF 546.[4] In short, cases that produce two judgments from which postjudgment interest could run are neither rare nor captured by Xerox's handpicked statistics.

2. Xerox cannot deny that when pre- and postjudgment interest rates differ, the choice of when to begin running postjudgment interest (and thereby cut off prejudgment interest) matters. (After all, Xerox has been vigorously litigating that issue in this case.) But it tries to downplay the actual gap between the two rates, BIO 19-20, and then to suggest that district courts will use Section 1961(a) to set the prejudgment interest rate anyway, BIO 21-22. Neither suggestion is persuasive.

First, as petitioner has already shown, a significant interest-rate gap exists now and has persisted for years. Pet. 20-21. Xerox's response—that over the past six years, the federal postjudgment

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[4] The 8.7 month median time from the filing of a civil case to its disposition, BIO 19, is irrelevant. It includes the large numbers of cases that are settled or are dismissed on the pleadings. In cases where there is an appellate decision on the merits, the median time from filing in the district court to the last opinion or final order in the court of appeals appears to be 27.8 months (and does not include time spent on remand). *See* U.S. Courts of Appeals—Median Times for Cases Terminated on the Merits—During the 12-Month Period Ending September 30, 2015, available at http://tinyurl.com/Hylind-CR2 (last visited Aug. 17, 2016).

interest rate has increased from a minuscule 0.26% to a minuscule 0.53%, *id.* at 20—simply proves the point.

Second, in this case, the district court has already decided that the appropriate prejudgment interest rate in Hylind's case is 6%, not the rate drawn from Section 1961(a). Pet. App. 29a; *see also id.* at 36a (holding Xerox's appeal of the 6% rate was "without merit"). The only question here is when the entitlement to prejudgment interest must be cut off.

Third, district courts in the circuits that Xerox claims use Section 1961(a) to set prejudgment interest, BIO 21-22, in fact often deviate for reasons of fairness. They have found that "a prejudgment interest award based on the current Treasury bill rates would be inappropriate" because those rates "have been kept artificially low for the past few years by the Federal Reserve for reasons having to do with the state of the economy," and reflect neither "the rate of return plaintiff may have earned" had she had the use of the money wrongly denied her nor the rate "defendant likely earned while retaining the use of this money." *White v. Coblentz, Patch & Bass LLP Long Term Disability Ins. Plan*, 2011 U.S. Dist. LEXIS 90530 at *3 (N.D. Cal. Aug. 15, 2011).[5]

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[5] *See also, e.g.*, *Barboza v. California Ass'n of Prof'l Firefighters*, 144 F. Supp. 3d 1151, 1158 (E.D. Cal. 2015) (awarding prejudgment interest at a 5% rate when the Section 1961(a) rate was "about 0.50 percent" because the plaintiff had "paid interest rates of 4.92 percent to 9.10 percent on a home equity line of credit to cover his expenses"). In the Fifth Circuit, *see*, *e.g., Idom v. Natchez-Adams Sch. Dist.*, 2016 WL 320954, at *9 (S.D. Miss. Jan. 25, 2016) (using the federal prime rate,

Tellingly, Xerox nowhere claims that it earned only 0.26% (or 0.52%, for that matter) on Hylind's judgment during the time that money was in its possession due to the district court's legal error.[6]

3. Xerox's additional vehicle arguments are meritless. Xerox does not deny that the question presented was pressed and passed on below. Instead, it simply repeats that the Fourth Circuit gave the question little thought. But Xerox's insistence that the Fourth Circuit's offhanded resolution was appropriate because it "properly invoked *Kaiser*," BIO 24, reinforces the conclusion that this Court should answer the question *Kaiser* left open.

Xerox is right that the amount of interest at stake here is striking. BIO 22. But that argues in favor of, not against, granting review. Despite the practical importance of this issue to many litigants (defendants as well as plaintiffs), few cases raising it will reach this Court. Pet. 26. For most other litigants, the difference in the amount of their

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which was 3.5%, rather than the below-1% rate Section 1961(a) would dictate).

[6] The Sixth Circuit, which Xerox claims uses Section 1961(a) to set prejudgment interest, BIO at 22, recently emphasized that a "mechanical application" of the Section 1961(a) rate to the award of prejudgment interest "amounts to an abuse of discretion." *Schumacher v. AK Steel Corp. Retirement Accumulation Pension Plan*, 711 F.3d 675, 686 (6th Cir. 2013). It reversed a district court's use of that rate when using it meant that the defendant "would essentially be rewarded for [its] wrongdoing," given that its "rate on return (6.55%) and its borrowing costs (7.75%) were much higher than the 0.12%" dictated by Section 1961(a), *id.*

recovery if they appeal an initial judgment or in the interest that should be awarded is exceeded by the costs (in direct litigation expense and lost time) that pressing their claim all the way to this Court would entail. This case provides the rare vehicle enabling this Court to address an important question.

III. The Fourth Circuit's Decision Was Incorrect.

Xerox cannot deny that the first and only judgment determining that Hylind was entitled to $739,845 in backpay was entered on July 9, 2014. Interim Order, ECF 546.[7] Under well-developed principles of Title VII law, petitioner should have received prejudgment interest on this award from the time her entitlement to the backpay accrued until the time of that judgment. *See* Pet. 32; *Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988).

Instead, the courts below mistakenly cut off Hylind's entitlement to prejudgment interest as of September 17, 2010, the date on which the district court had entered an erroneous earlier judgment for a dramatically smaller "quantum of back pay," Pet. App. 7a. They adopted this position even though the 2010 "judgment on damages" never "ascertained" the amount Hylind ultimately was awarded—the trigger this Court identified in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 836 (1990), for marking the point at which postjudgment interest can begin. And they did so despite the fact that the

[7] *See* Pet. App. 30a (providing the calculation underlying the Interim Order).

erroneous 2010 judgment on damages had been "vacate[d]" in 2012, Pet. App. 43a, leaving petitioner with *no* enforceable money judgment in place from 2012 to 2014.

Nowhere does Xerox explain how the 2010 judgment could have "'ascertained' in any meaningful way," *Kaiser*, 494 U.S. at 836, that Hylind was entitled to an amount of backpay that the district court flatly refused to award her. Under the circumstances, Hylind should have received prejudgment interest until the final judgment resolving her backpay award. Pet. 26-34. Nothing in Section 1961(a) required the contrary.

CONCLUSION

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

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