No. _____

In The
Supreme Court of the United States

MIDWEST MACHINING, INC.,

Petitioner,

v.

JENA MCCLELLAN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

GREGORY N. LONGWORTH
Counsel of Record
CYNTHIA M. FILIPOVICH
CLARK HILL PLC
200 Ottawa Ave. NW, Suite 500
Grand Rapids, MI 49503
(616) 608-1100
glongworth@clarkhill.com

Attorneys for Petitioner

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

QUESTIONS PRESENTED

1. Whether the common-law tender-back rule applies to Title VII and Equal Pay Act claims.

2. Whether state law (as opposed to federal common law) determines the applicability of the tender-back rule for Title VII and Equal Pay Act claims.

PARTIES TO THE PROCEEDINGS

The petitioner is Midwest Machining, Inc., the former employer of Respondent Jena McClellan. In addition to the parties listed in the caption, Self Lube, Inc. was a party in the district court but was dismissed in the district court's order dated April 18, 2017. Respondent did not appeal the dismissal of Self Lube, Inc.

RULE 29.6 STATEMENT

Midwest Machining, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of Midwest's stock.

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OPINIONS BELOW

The opinion of the Sixth Circuit, A1-39, is reported at 900 F.3d 297. The United States District Court for the Western District of Michigan issued two opinions: an unreported opinion dated August 3, 2017, which is available at 2017 WL 4512583, A40-51; and an unreported opinion dated April 18, 2017, which is available at 2017 WL 4512577, A52-59.

JURISDICTION

The district court had jurisdiction over the claims of Respondent Jena McClellan ("McClellan") under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. The court issued its judgment reversing the district court on August 16, 2018. A39. Petitioner Midwest Machining, Inc. ("Midwest") filed a petition for panel rehearing and rehearing *en banc* on August 30, 2018, which the court denied on October 12, 2018. A60. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS

There are no specific constitutional or statutory provisions involved in this case.

INTRODUCTION

Under the common law, a person asserting that a release is voidable due to duress ratifies the release by failing to tender back consideration received for the release before suing on the released claims. In this case, McClellan argues that the release she signed is voidable, yet she failed to tender back the consideration she received prior to suing for alleged violations of Title VII and the Equal Pay Act.

Prior to the Sixth Circuit decision in this case, the only courts of appeals to consider the question held that the tender-back rule applies to Title VII and Equal Pay Act claims. The Sixth Circuit disagreed, creating a split of authority on this issue. Certiorari is warranted to bring uniformity to this important national issue.

Alternatively or in addition, the Court should grant certiorari to determine whether state law, as opposed to federal common law, governs this question. The Sixth Circuit decision has opened a split of authority on this issue as well by insisting that federal common law governs the inquiry.

Had the Sixth Circuit followed the lead of other circuits on either issue, it would have affirmed the dismissal of McClellan's claims. Only by charting a different course was the Sixth Circuit able to reverse the district court's judgment.

STATEMENT OF THE CASE

On November 15, 2015, Midwest terminated McClellan's employment. A3. In exchange for severance pay, McClellan released "any and all past, current and future claims" she had against Midwest. A4. Midwest paid, and McClellan accepted, the severance pay. A4.

Despite accepting the severance pay and despite never having tendered back the consideration received or otherwise repudiating the agreement on the basis of duress, on November 9, 2016, McClellan filed her complaint. A5. She later asserted that she signed the release under economic duress.

Midwest filed a summary-judgment motion arguing, among other things, that McClellan ratified the release by failing to tender back the consideration for the release before suing. Midwest primarily relied on *Stefanac v. Cranbrook Educ. Comm.*, 458 N.W.2d 56, 60 (Mich. 1990) (tender back of consideration received is a condition precedent to the right to repudiate a contract for settlement). The district court denied the motion with respect to the tender-back rule, holding that federal common law controlled. A57.

Midwest later renewed the motion citing federal case law, including decisions from the Second and Seventh Circuits. This time the district court granted the motion. A51. McClellan appealed.

On August 16, 2018, the Sixth Circuit reversed the district court's dismissal, holding that the tender-back

rule does not apply to Title VII or Equal Pay Act claims. A10. The Sixth Circuit decision acknowledged that the Seventh Circuit had reached a contrary conclusion, but disagreed with the Seventh Circuit's reasoning. A21-22.

Midwest filed a petition for rehearing *en banc* on August 30, 2018, which the court of appeals denied on October 12, 2018. A60.

REASONS FOR GRANTING THE PETITION

In *United States v. Texas*, 507 U.S. 529 (1993), this Court held "that '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* at 534 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* at 534 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

Congress has not "spoken directly" to the question of ratification of a release, including the tender-back rule, in the context of Title VII and the Equal Pay Act. Thus, these common-law principles apply to claims under those acts.

In this regard, Title VII and the Equal Pay Act—and most, maybe all, other federal statutes—stand in

stark contrast to the Age Discrimination in Employment Act ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA"). In *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 424-425 (1998), this Court explained that the OWBPA added strict statutory requirements that must be followed to release an ADEA claim. These requirements effectively abrogate the tender-back rule in the context of an ADEA claim. Indeed, an ADEA regulation expressly abrogates the tender-back rule for ADEA claims. 29 C.F.R. § 1625.23(a).

I. The Sixth Circuit decision creates a circuit split about whether the tender-back rule applies to Title VII claims.

A. The Seventh and Second Circuits apply the tender-back rule to Title VII claims.

Prior to the Sixth Circuit decision in this case, the courts of appeals were unified in their application of the common-law principles of ratification and the tender-back rule in the context of Title VII claims. The leading case is the Seventh Circuit's decision in *Fleming v. USPSAMF O'Hare*, 27 F.3d 259 (7th Cir. 1994).

Fleming was fired from her job with the United States Postal Service. Believing the USPS had discriminated against her, she sued under Title VII. *Id.* at 259-260. The parties subsequently agreed to settle the lawsuit and the parties signed a settlement agreement. *Id.* at 260. After the court dismissed the lawsuit, but before the USPS paid Fleming under the

settlement, Fleming asked the court to reinstate the case, alleging that she had not understood the settlement agreement's effect on her claim. *Id.* The district court refused. *Id.* Thereafter, Fleming accepted the USPS's settlement check. *Id.*

A few weeks later—apparently after cashing the check—Fleming filed a motion under Rule 60(b), alleging that she had been "'confused, disoriented, and under a lot of pressure' at the settlement hearing and did not remember having instructed her lawyer to accept the Postal Service's offer." *Id.* The district court denied the motion and Fleming appealed. *Id.*

While the parties argued the merits of Rule 60(b), Judge Posner's opinion for the court was based solely on the tender-back rule. *Id.* at 260-262. The court held that it was "one of the most elementary principles of contract law . . . that a party may not rescind a contract without returning to the other party any consideration received under it." *Id.* at 260. It made no difference whether the case was controlled by Illinois law or federal common law because the tender-back rule "would surely be a component of any federal common law of releases." *Id.* at 260-261.

Judge Posner opined that "[n]ot even plaintiffs are helped in the long run by a rule allowing them to have their cake and eat it, for a defendant will not pay as much for a release that the plaintiff can challenge without having to repay the money as the price of maintaining the challenge." *Id.* at 261. He explained that "a premise of a free-market system is that both

sides of the market, buyers as well as sellers, tend to gain from freedom of contract." *Id.*

While *Fleming* predated this Court's decision in *Oubre*, the court understood that the tender-back rule must yield if federal statutory provisions abrogate the common-law principle of ratification or the tender-back rule, as the ADEA does. *Id.* Thus, in a more recent case decided long after *Oubre*, the Seventh Circuit applied the tender-back rule to a plaintiff's release of Title VII and Equal Pay Act claims—the very claims McClellan is asserting—because "no statute abrogates the tender back requirement for releases of claims under Title VII and the Equal Pay Act." *Lawson v. JC Penney Corp.*, 580 Fed. Appx. 492, 494 (7th Cir. 2014).

The Second Circuit reached the same conclusion in *Tung v. Texaco, Inc.*, 150 F.3d 206 (2d Cir. 1998). Decided six months after this Court issued *Oubre*, the court held that Tung's failure to tender back consideration received for a release required dismissal of Tung's Title VII claim but not his ADEA claim. *Id.* at 208-209.

B. The Sixth Circuit decision charts a different course.

Prior to the Sixth Circuit decision, no court of appeals decision disagreed with *Fleming* and *Tung*. Even in the Sixth Circuit, three unpublished decisions agreed that the tender-back rule applied to federal

claims other than ADEA claims.[1] But the Sixth Circuit decision created a split of authority, holding that a plaintiff is not required to tender back consideration received for a release before bringing Title VII or Equal Pay Act claims. A10.

The Sixth Circuit decision relied on *Hogue v. Southern R.R. Co.*, 390 U.S. 516 (1968), and *Oubre*. From *Hogue*, a case decided under the Federal Employers Liability Act ("FELA"), the court gleaned that the tender-back rule was incongruous with the FELA. A12-14. The court further held that, while *Oubre* was limited to the OWBPA and the ADEA, "it offers some guidance for other cases involving federal remedial statutes." A14. Thus, the court held that "the reasoning in *Hogue* and *Oubre* is clearly relevant to claims brought under Title VII and the [Equal Pay Act]." A18. Midwest addresses *Hogue* and *Oubre* in Part I.C.

According to the Sixth Circuit decision, "[o]nly the Eighth Circuit has a published, post-*Oubre* case that explicitly discusses the application of the tender-back rule to Title VII claims." A20. The court was wrong on two counts. First, the court ignored *Tung*. Second, *Richardson v. Suggs*, 448 F.3d 1046 (8th Cir. 2006),

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[1] *See Halvorson v. Boy Scouts of America*, No. 99-5021, 2000 WL 571933 at *3 (6th Cir. May 3, 2000) (holding that Halvorson's failure to tender back consideration ratified the release of ADA, FMLA, and ERISA claims but not his ADEA claim); *Bittinger v. Tecumseh Prods. Co.*, No. 98-1933, 1999 WL 1204883 at *1 (6th Cir. Dec. 8, 1999), *aff'g*, 83 F. Supp. 2d 851 (E.D. Mich. 1998) (tender back required for ERISA and Labor Management Relations Act claims); *Samms v. Quanex Corp.*, No. 95-2173, 1996 WL 599821 at *3 (6th Cir. Oct. 17, 1996) (ERISA claim).

stands for the proposition that the tender-back rule does not apply to a *prospective* waiver of Title VII claims because Title VII claims cannot be prospectively waived. *Id.* at 1053-1055 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974)). *Richardson* did not involve a release of an existing claim and is inapposite here.

The Sixth Circuit decision expressly rejected *Fleming*. A21-22. The court stated that "*Fleming* 'was decided without the aid of *Oubre*'s policy underpinnings to the effect that releases of claims under remedial statutes like the ADEA and Title VII frustrate the purposes of those statutes.'" A22 (quoting *Richardson*, 448 F.3d at 1057). But Judge Posner was fully aware that the outcome of that case would have been different for an ADEA claim.

Sixth Circuit Judge Thapar dissented from the majority's refusal to apply the tender-back rule. Looking to the OWBPA, he opined that "Congress knows how to displace the common law." A29. "Tellingly, Congress *did not* include a similar release-agreement provision in Title VII or the Equal Pay Act." A30. On this basis, Judge Thapar saw "no reason to conclude that Title VII or the Equal Pay Act displaced these doctrines and would apply them in McClellan's case." A30-31.

C. *Oubre* and *Hogue* do not support the Sixth Circuit decision.

The Sixth Circuit decision relied on *Oubre* and *Hogue*, but neither supports the decision. In *Oubre*, the defendant, Entergy, tried to enforce a release that did not comply with the OWBPA's requirements. *Oubre*, 522 U.S. at 424-425. Entergy argued that Oubre's failure to tender back consideration ratified the noncompliant release. *Id.* at 425. This Court disagreed.

First, the Court held that the common-law contract principles Entergy cited "do not consider the question raised by statutory standards for releases and a statutory declaration making nonconforming releases ineffective." *Id.* at 426. The Court effectively held that the OWBPA speaks directly to the subject of the common law and therefore abrogates the very common-law principles on which Entergy relied. *Id.* at 427 ("The OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law.").

Second, the Court held that "[t]he statutory command is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements." *Id.* at 426-427. In other places in the opinion, the Court held that the release "can have *no effect* on [Oubre's] ADEA claim unless it complies with the OWBPA" and that the noncompliant release "is *unenforceable* against her insofar as it purports to waive or release her ADEA claim." *Id.* at 427-428 (emphases added). This language is similar to

saying the noncompliant release is *void* as opposed to merely *voidable*. This distinction is important: When a contract is *void*, it cannot be ratified; but when a contract is merely *voidable*, the person claiming duress can ratify the contract. *See* REST. (2D) OF CONTRACTS, § 7; 1 WILLISTON ON CONTRACTS (4th ed.), § 1:20.

Notably, the noncompliant release in *Oubre* was not, technically, *void*. Instead, the release was *unenforceable*—but only as to Oubre's ADEA claim. *Oubre*, 522 U.S. at 527-528 ("The text of the OWBPA forecloses the employer's defense, notwithstanding how general contract principles would apply to non-ADEA claims."). So while the noncompliant release was ineffective to release Oubre's ADEA claim, it could nevertheless be effective with respect to non-ADEA claims, like McClellan's.

The Sixth Circuit's reliance on *Oubre* was misplaced because, unlike the ADEA at issue in *Oubre*, Title VII and the Equal Pay Act do not abrogate the tender-back rule. In fact, because *Oubre* suggests that the rule applies to non-ADEA claims, *Oubre* actually opposes the Sixth Circuit decision.

The Sixth Circuit's reliance on *Hogue* was also misplaced. Hogue, an employee of Southern Railway, injured his knee in the course of his employment. Southern's doctor assured him and Southern that he had suffered only a bruised knee, not a permanent injury. On this basis, Hogue and Southern entered an agreement under which Hogue released his claims against Southern in exchange for $105. Hogue alleged

that he later learned that he had suffered a more significant injury. *Hogue*, 390 U.S. at 517. Hogue then sued for damages under the FELA.

This Court held that the release was *void*, not merely *voidable*. The Court discussed two common-law bases for finding a release *void*. The first is fraud in the execution. *Id.* at 518. The second is a mutual mistake about the extent of a releasing party's injury. *Id.* This type of mistake is precisely what Hogue had pleaded. Because the release was *void*, it could not be ratified, so the failure to tender back consideration made no difference. *See id. See also* REST. (2D) OF CONTRACTS, § 7; 1 WILLISTON ON CONTRACTS (4th ed.), § 1:20.

Hogue stands for the proposition that the tender-back rule does not apply to a release that is *void*. But, because McClellan's claim of duress renders the Severance Agreement merely *voidable*, the Sixth Circuit's reliance on *Hogue* was misplaced. *See* REST. (2D) OF CONTRACTS, § 175; 28 WILLISTON ON CONTRACTS (4th ed.), § 71:8; *Barnette v. Wells Fargo Nevada Nat'l Bank of San Francisco*, 270 U.S. 438, 444 (1926).

II. State law determines the applicability of the tender-back rule for Title VII and Equal Pay Act claims.

Midwest's initial motion in the district court asked the court to dismiss McClellan's claims because Michigan law strictly requires a party to tender back consideration received for a release as a condition precedent to suing on the released claims. *See Stefanac v.*

Cranbrook Educ. Comm., 458 N.W.2d 56, 60 (Mich. 1990). The district court denied the motion, holding that federal common law, not state law, governs. A57. The Sixth Circuit agreed, holding that reliance on Michigan law was misplaced. A23 n.1, 26. The district court and the Sixth Circuit were wrong in this regard.

In determining the basic contract principles at issue here, state law should apply. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 741-742 (2004) (Scalia, J., concurring/dissenting in part). In *Makins v. Dist. of Columbia*, 277 F.3d 544 (D.C. Cir. 2002), the court addressed the validity of a settlement agreement resolving a Title VII claim. The court held that "[t]he power of the federal courts to formulate law in this area, and the need for national uniformity, are doubtful at best, as Judge Easterbrook forcefully demonstrated in *Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 474-78 (7th Cir. 1986)." *Id.* at 547-548. Ultimately, the court held that, "[a]side from cases in which a settlement agreement is sought to be enforced against the United States, or in which there is a statute conferring lawmaking power on federal courts, we adopt local law in determining whether a settlement agreement should be enforced." *Id.* at 548 (internal citations omitted) (citing *United States v. Beebe*, 180 U.S. 343, 352 (1901); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957)).

Thus, the D.C. Circuit joined "[t]he Seventh, Eighth, Tenth, and Eleventh Circuits, and perhaps the Third, Fourth, and Ninth" in "look[ing] to state law in

determining if a valid and enforceable settlement agreement exists." *Id.*[2] The Sixth Circuit's insistence on applying federal common law to determine the validity of McClellan's release opens the circuit split on this issue.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

GREGORY N. LONGWORTH
Counsel of Record
CYNTHIA M. FILIPOVICH
CLARK HILL PLC
200 Ottawa Ave. NW, Suite 500
Grand Rapids, MI 49503
(616) 608-1100
glongworth@clarkhill.com

Attorneys for Petitioner

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[2] *Makins* cited *Pohl v. United Airlines, Inc.*, 213 F.3d 336, 338 (7th Cir. 2000); *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 623 (8th Cir. 2001); *United States v. McCall*, 235 F.3d 1211, 1213 (10th Cir. 2000); *Hayes v. Nat'l Serv. Indus.*, 196 F.3d 1252, 1254 & n.2 (11th Cir. 1999); *Tiernan v. Devoe*, 923 F.2d 1024, 1032-1033 (3d Cir. 1991); *Auvil v. Grafton Homes, Inc.*, 92 F.3d 226, 230 (4th Cir. 1996); and *Mallot & Peterson v. Director, Office of Workers' Comp. Programs*, 98 F.3d 1170, 1173 (9th Cir. 1996).