No. 18-928

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

## BRIEF IN OPPOSITION

William F. Piper
*Counsel of Record*
WILLIAM F. PIPER, PLC
1611 West Centre Avenue,
Suite 209
Portage, MI 49024
(269) 321-5008
wpiper@wpiperlaw.com

## QUESTIONS PRESENTED

At common law, courts sometimes required a plaintiff suing to rescind a contract to "tender back" any consideration she received before proceeding with the suit. The questions presented are:

1. Whether a plaintiff who brings claims under Title VII and the Equal Pay Act and contends that her prior release of those claims was invalid must comply with this tender-back rule.

2. Whether, if the tender-back rule applies to Title VII and Equal Pay Act claims, state rather than federal law defines the content of the rule.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

Cases

**Statutes**

**Rules and Regulations**



**Other Authorities**

## STATEMENT OF THE CASE

### A. Factual background

In 2008, respondent Jena McClellan was hired by petitioner Midwest Machining, a manufacturer of parts for complex tools and machines. Pet. App. A3. She was quickly promoted from telemarketing to sales. *Id.* Ms. McClellan worked at Midwest for the next six years and received excellent performance reviews. *Id.* For example, her final evaluation reported that she led her division "with the most sales." Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. 2, ECF No. 31-2.[1]

Midwest classified its salespeople into "inside" and "outside" divisions. Pet. App. A5. The twenty people who worked in inside sales during Ms. McClellan's tenure were all women; the three who worked in outside sales were all men. *Id.* Although the two positions required "equal skill, effort and responsibility," the outside salesmen were paid substantially more. *Id.* (citation omitted).

In August 2015, Ms. McClellan informed Midwest that she was pregnant. Pet. App. A3. In the following weeks, Ms. McClellan's supervisor repeatedly made negative remarks about her pregnancy, "commenting sardonically and jealously about her perfect life" and complaining about her prenatal appointments. *Id.* (citation omitted).

In November 2015, Philip Allor, Midwest's president, abruptly called Ms. McClellan into his office and

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[1] Because this case was decided on Midwest's motion for summary judgment, this Court "must assume the facts to be as alleged by [Ms. McClellan]." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998); *see* Pet. App. A9.

fired her. Pet. App. A42. She was "blindsided." *Id.* (citation omitted). Mr. Allor presented her with a written severance agreement and demanded that she sign it on the spot. *Id.* A43. He gave her "no time to think," declaring: "If you want any severance, then you need to sign it *now*." *Id.* (citation and brackets omitted). Mr. Allor's tone was raised and Ms. McClellan felt "bullied." *Id.* (citation omitted). He rushed through the document, "forcefully" rejecting Ms. McClellan's one attempt to question a provision related to her unused vacation time. *Id.* A42-A43. After that, Ms. McClellan "felt she could not ask any further questions." *Id.* A43. Mr. Allor "insisted, many times," that she sign the agreement, and she "did not feel free to leave" until she did so. *Id.* (citation and brackets omitted). "[F]eeling no other option," Ms. McClellan signed. *Id.*

Most of the agreement consisted of boilerplate severance terms like nondisclosure, noncompete, and nondisparagement clauses. Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. 1, ECF No. 31-1. It also included a release specifying that the agreement satisfied "any and all past, current and future claims by either party." *Id.* Ms. McClellan "did not understand that the 'claims' . . . meant discrimination complaints." Pet. App. A4 (citation omitted). Rather, she "assumed it referred to any unpaid wages or benefits." *Id.* In exchange for signing the agreement, Ms. McClellan received $4,000 in severance pay. *Id.* A43.

### B. Procedural background

1. Ms. McClellan filed a charge with the Equal Employment Opportunity Commission (EEOC), which issued a right-to-sue letter. Pet. App. A4. In November 2016, she met with an attorney, who realized that her

claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, would expire within days. Pet. App. A5. The attorney "immediately" drafted and filed a complaint alleging pregnancy discrimination in violation of Title VII, as well as a violation of the Equal Pay Act (EPA), 29 U.S.C. § 206(d). Pet. App. A5 (citation omitted).[2]

2. After receiving the complaint, Midwest's counsel told Ms. McClellan's attorney about the release in the severance agreement. Pet. App. A6. At her attorney's direction, Ms. McClellan immediately sent Midwest a check for $4,000, explaining that she was "tendering back" the severance payment "even though [she] d[id] not believe the law required [her] to do so." Def.'s Mot. for Summ. J. Ex. 2, ECF No. 16-4. She made this tender just three weeks after filing suit, before any responsive pleading was due. Pet. App. A6. A week later, Midwest returned the check uncashed, asserting that there was "no legal basis for rescinding the severance agreement." *Id.* (citation omitted).

3. Midwest filed a motion for summary judgment, arguing that Ms. McClellan's claims were barred because she had validly released them. Pet. App. A6. It also argued that even if the release were invalid, her claims would be barred because she had failed to satisfy a Michigan-law requirement that a plaintiff tender back the consideration received for an invalid release before filing suit. *Id.* The district court denied Midwest's motion without prejudice. *Id.* A52-A59.

The court explained that an employee's release or settlement of federal discrimination claims is valid

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[2] The complaint also asserted state law claims that are not at issue here. Pet. App. A5.

only if "the employee's consent to the settlement was voluntary and knowing." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974); *see* Pet. App. A54-A55. Here, the court determined that it could not "conclude the release was valid under federal law" without further discovery. Pet. App. A54. And in response to Midwest's tender-back argument, the court explained that Midwest's "reliance on Michigan law [wa]s misplaced" because "federal law" determines whether and how the tender-back rule applies to Title VII and EPA claims. *Id.* A57. The court therefore declined to resolve the tender-back issue. *Id.* A57-A58.

4. After limited discovery on the validity of the release, Midwest renewed its motion for summary judgment. Pet. App. A40. The district court rejected Midwest's argument that the release was valid, explaining that a jury could find that Ms. McClellan did not waive her claims knowingly or voluntarily. *Id.* A43-A44. The court emphasized the "menacing" circumstances under which she was forced to sign the release, the "small sum" she received, and that "she did not understand the broad scope of the agreement." *Id.* A42, A44.

The court nonetheless granted summary judgment based on the tender-back rule. Pet. App. A45-A49. It held that the tender-back rule applies to Title VII and EPA claims. *Id.* A48-A49. And because it assumed that the rule requires a plaintiff to return the consideration *before* filing suit, it concluded that Ms. McClellan's tender was inadequate. *Id.*

5. The Sixth Circuit reversed and remanded for further proceedings, relying on two alternative grounds. Pet. App. A1-A27.

a. The Sixth Circuit first held, in accord with an amicus brief from the EEOC, that the tender-back rule does not apply to Title VII and EPA claims. Pet. App A9-A23; *see id.* A15. It explained that this Court has twice held that the tender-back rule does not apply to claims brought under other federal employment statutes. In *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968) (per curiam), the Court concluded that the rule did not apply to claims brought under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, because it would be "wholly incongruous with the general policy of the Act to give railroad employees a right to recover" for injuries negligently inflicted by their employers. 390 U.S. at 518 (citation omitted).

More recently, in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), the Court held that the tender-back rule does not apply to claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.* As in *Hogue*, the Court concluded that the rule "would frustrate the statute's practical operation." 522 U.S. at 427. The Court emphasized that "a discharged employee likely will have spent the moneys received and will lack the means to tender their return" at the outset of litigation. *Id.* It thus explained that the tender-back rule would thwart the statutory scheme by blocking meritorious suits and encouraging employers to obtain invalid releases. *Id.*

The Sixth Circuit concluded that "the language and reasoning of *Oubre* and *Hogue* apply equally to claims brought under Title VII and the EPA." Pet. App. A22. The court emphasized that employees with claims under those statutes "confront the same economic realities" as employees with claims under FELA and the ADEA. *Id.* A20. And the court added

that by deterring meritorious claims, the tender-back rule would undermine statutory schemes that rely on "private individuals" to enforce prohibitions on discrimination in employment. *Id.* A19-A20. The court thus held that "the tender-back doctrine does not apply to claims brought under Title VII and the EPA." *Id.* A23. Instead, the court instructed that the sum paid for an invalid release of Title VII and EPA claims should "be deducted from any award" to the plaintiff. *Id.* (quoting *Hogue*, 390 U.S. at 518).

b. In the alternative, the Sixth Circuit held that even if the tender-back rule applied, Ms. McClellan had satisfied the rule by attempting to return the $4,000 just three weeks after she filed suit. Pet. App. A25-A27. The court explained that, unlike Michigan law, "federal law does not require that the tender back be before, or contemporaneous with, the filing of the original complaint." *Id.* A26 (citation omitted).

c. Judge Thapar concurred in part and dissented in part. Pet. App. A28-A38. He would have held that the tender-back rule applies to Title VII and EPA claims. *Id.* A30-A31. But he declined to decide whether Ms. McClellan's tender satisfied the rule, and he thus agreed with the majority that the case should be remanded to the district court. *Id.* A37-A38.

Judge Thapar also sua sponte raised the question whether courts should apply state law rather than federal law to determine whether a plaintiff has satisfied the tender-back rule. Pet. App. A31-A32. But he did not resolve that question because "neither party" had asked the Sixth Circuit to apply state law. *Id.* A32.

## REASONS FOR DENYING THE WRIT

Midwest asks this Court to resolve two questions: whether the tender-back rule applies to Title VII and EPA claims and, if so, whether state or federal law defines the content of the rule. Because the Sixth Circuit held, in the alternative, that Ms. McClellan satisfied any federal tender-back requirement that might apply, its judgment would stand unless the Court granted certiorari and adopted Midwest's position on both questions. But neither merits this Court's review.

### I. The question whether the tender-back rule applies to Title VII and EPA claims does not warrant review.

Midwest principally contends that the Sixth Circuit's holding that the tender-back rule does not apply to Title VII claims conflicts with decisions from the Second and Seventh Circuits. Pet. 5-9. But the Second Circuit has never decided that question, and the Seventh Circuit precedent on which Midwest relies has been undercut by this Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998). Moreover, even if this seldom-litigated issue otherwise called for this Court's review, this case would be the wrong vehicle for considering it. Among other things, the Sixth Circuit's alternative holding independently supports the judgment below. And the Sixth Circuit correctly applied this Court's precedents in holding that the tender-back rule does not apply to Title VII and EPA claims.

### A. Midwest's alleged circuit conflict does not merit this Court's attention.

Midwest's first question presented asks this Court to decide two separate issues: whether the tender-back rule applies to claims under (1) Title VII and (2) the EPA. Pet. i. Neither of those issues is the subject of any circuit conflict warranting this Court's intervention.

1. Midwest asserts that the Sixth Circuit's decision creates a circuit split on the applicability of the tender-back rule to Title VII claims. Pet. 5-9. But the only other court of appeals that has seriously considered that question in the two decades since *Oubre* is the Eighth Circuit. And like the Sixth Circuit, it concluded that "the reasoning the Court used in *Oubre* is equally applicable to Title VII." *Richardson v. Sugg*, 448 F.3d 1046, 1056 (8th Cir. 2006).[3]

Midwest asserts that the Second Circuit reached the opposite conclusion in *Tung v. Texaco Inc.*, 150 F.3d 206 (1998). In fact, *Tung* did not even address the question whether the tender-back rule applies to Title VII claims. It analyzed the plaintiff's Title VII claims in just two sentences, explaining that it was affirming "substantially for the reasons stated in the district court's Opinion." *Id.* at 208. The court then endorsed only the district court's holding that the plaintiff's "waiver of his right to sue under Title VII was knowing and voluntary." *Id.* It did not mention—much less

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[3] Midwest notes that *Richardson* involved an invalid prospective waiver of Title VII claims, not an invalid release of an existing claim. Pet. 8-9. But the Eighth Circuit's conclusion that *Oubre*'s reasoning extends to Title VII was not limited to prospective waivers. *Richardson*, 448 F.3d at 1056.

adopt—the district court's brief discussion of the tender-back rule. *Id.*; *see Tung v. Texaco Inc.*, 32 F. Supp. 2d 115, 118 (S.D.N.Y. 1997).

Midwest also relies on Judge Posner's opinion for the Seventh Circuit in *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259 (1994), which held that some version of the tender-back rule applies to Title VII claims. *Id.* at 261-62. But *Fleming* reached that conclusion without the benefit of briefing on the issue, *id.* at 260—and, more importantly, without the benefit of this Court's subsequent decision in *Oubre*. *Fleming* thus simply assumed that the tender-back rule applies in the Title VII context and did not consider whether it "would frustrate the statute's practical operation." *Oubre*, 522 U.S. at 427.

Midwest contends that the Seventh Circuit reaffirmed *Fleming* in its post-*Oubre* decision in *Lawson v. J.C. Penney Corp.*, 580 Fed. Appx. 492 (2014). Pet. 7. But the unpublished decision in *Lawson*, where the plaintiff was pro se, neither cited *Oubre* nor engaged with this Court's analysis—likely because the tender-back issue was not briefed and served merely as a cursory alternative holding in a decision that primarily held that the underlying waiver was valid. 580 Fed. Appx. at 492, 494.[4]

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[4] Although Midwest does not cite it, the Seventh Circuit also applied *Fleming* in another post-*Oubre* case, *Hampton v. Ford Motor Co.*, 561 F.3d 709, 717 (2009). Like *Lawson*, however, *Hampton* did not grapple with *Oubre*—presumably because the plaintiff did not cite *Oubre* or otherwise challenge the application of the tender-back rule. Appellant's Reply Br. at 7 (No. 08-1346) (2008 WL 3843637). And like *Lawson*, *Hampton* only addressed the tender-back rule as an alternative holding, having already found that the plaintiff's waiver was valid. 561 F.3d at 717.

The Seventh Circuit thus has never decided whether *Fleming* can be reconciled with *Oubre*. If the court confronts that question in a future case, it may well abandon *Fleming*. Both of the other courts of appeals that have considered the issue since *Oubre* have emphasized that *Oubre* "cast[s] serious doubt on the Seventh Circuit's approach." Pet. App. A22; *see also Richardson*, 448 F.3d at 1057. Unless the Seventh Circuit reaffirms that *Fleming* remains good law despite *Oubre*, any tension created by that decision does not warrant this Court's review.

2. Midwest does not contend that there is any circuit conflict on the applicability of the tender-back rule to EPA claims. It cites only one other decision even addressing that question—the Seventh Circuit's unpublished decision in *Lawson*. Pet. 7. But that decision could not create a circuit conflict because it lacks precedential effect. *See* 7th Cir. R. 32.1(b). And although Midwest invites this Court to consider the EPA and Title VII together, they present distinct issues. For example, releases of EPA claims are subject to special restrictions that may independently preclude application of the tender-back rule—but that issue has not been considered by any court of appeals.[5]

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[5] The EPA is part of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, and is subject to the FLSA's procedures. 29 U.S.C. § 206(d); *see Ososky v. Wick*, 704 F.2d 1264, 1265 (D.C. Cir. 1983). FLSA claims cannot be waived unless the release is "negotiated or supervised by the Department of Labor" or entered in a "stipulated judgment" after a court has "scrutiniz[ed] the settlement for fairness." *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982); *see Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603, 607 (6th Cir. 2013) (holding that these limits apply to EPA claims).

### B. The question presented rarely arises.

Only three courts of appeals have addressed the question presented—and it appears that the question has generated just five circuit-court opinions in the more than half a century since Title VII and the EPA were enacted. Particularly in the absence of any square conflict, a question that arises so infrequently does not merit this Court's review.

It is not surprising that the tender-back issue is rarely litigated. Most employees who release their discrimination claims never challenge the validity of the release. EEOC, *Understanding Waivers of Discrimination Claims in Employee Severance Agreements* (2009), https://perma.cc/7GCB-CL8P. And when an employee does bring a suit, the tender-back rule affects the result only if the employee's waiver was defective. If the employee validly released her claims, a court need not even consider whether she tendered back. Her claims are barred regardless.

Moreover, easily accessible guides provide straightforward instructions for obtaining waivers that will stand up in court. They advise employers to "use clear language" specifically identifying the claims at issue, to give employees "a reasonable amount of time to consider the release," and to allow employees an "opportunity to consult separate counsel." Bryan Cave LLP, *Five Key Considerations When Drafting a Release* (July 2, 2014), https://perma.cc/9NV4-5K44. The tender-

back rule matters here only because Midwest disregarded that advice.[6]

### C. This case is not an appropriate vehicle for deciding the question presented.

Even if the applicability of the tender-back rule to Title VII and EPA claims warranted this Court's review, this case would not be an appropriate vehicle for considering it. That is true for three independent reasons.

1. The Sixth Circuit's alternative holding means that resolving the first question presented would not affect the outcome of this case unless the Court were also to adopt Midwest's position on the second. The Sixth Circuit held that even "[a]ssuming *arguendo*" that the tender-back rule applied, Ms. McClellan's tender—which she made just three weeks after filing suit—satisfied the rule. Pet. App. A25-A27. The court explained that "federal law does not require that the tender back be before, or contemporaneous with, the filing of the original complaint." *Id.* A26 (citation omitted).

Midwest does not directly challenge that alternative holding, which independently supports the judgment below. Instead, Midwest separately argues that the Sixth Circuit erred in applying federal rather than Michigan law. Pet. 12-14. But that means this Court's resolution of the first question presented would be an advisory opinion unless the Court also

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[6] In fact, employment attorneys have highlighted Midwest's conduct in this case as a paradigmatic example of what not to do. Bradley Arant Boult Cummings LLP, *Tender Me This: Sixth Circuit Holds Employees Don't Have to Give Severance Money Back Before Filing Title VII or EPA Lawsuit*, Lexology (Aug. 21, 2018), https://perma.cc/97BW-PPF4.

granted certiorari on that separate question. And, as explained below, that question—which Midwest failed to raise in the Sixth Circuit—plainly does not warrant this Court's review. *See infra* Part II.

2. Ms. McClellan's prompt tender also means that this case does not implicate Midwest's asserted circuit conflict. Midwest does not cite any decision holding that a Title VII or EPA claim was barred where, as here, the plaintiff tendered back the consideration within a few weeks of filing suit. In *Fleming*, for example, the Seventh Circuit emphasized that "neither tender nor offer was made," and suggested that the outcome could have been different if the plaintiff had offered to return the consideration at any point—even on appeal. 27 F.3d at 261-62. Thus, as the Sixth Circuit emphasized, Ms. McClellan "would be allowed to proceed" with her suit "even under *Fleming*'s framework." Pet. App. A26 n.2.

3. Finally, this case is interlocutory. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). Here, the Sixth Circuit did not enter a final judgment, but merely remanded for further proceedings. Pet. App. A27. If Midwest prevails on remand, the tender-back issue will be moot. And if it does not, it can raise that issue, along with any other claims it may have, in a single petition following a final judgment. Midwest provides no reason for this Court to depart from its ordinary practice by granting review in this interlocutory posture.

### D. The tender-back rule does not apply to Title VII and EPA claims.

The Sixth Circuit correctly rejected Midwest's argument that Title VII and the EPA incorporate a tender-back rule from the common law. Midwest relies on the assumption that "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). But as this Court has explained, that assumption justifies the incorporation of a common law rule into a statute only if two requirements are met. First, the relevant rule must have been "well established" when the statute was enacted. *Id.*; *see Pasquantino v. United States*, 544 U.S. 349, 360 (2005). Second, the rule must be "consistent with Congress' intent." *Astoria*, 501 U.S. at 110 (citation omitted). Neither requirement is met here.

1. Under the common law when the EPA and Title VII were enacted in 1963 and 1964, respectively, it was not clearly established that a plaintiff suing to rescind a defective agreement was required to tender back consideration at the outset of the suit. To the contrary, many courts followed the same rule the Sixth Circuit applied here: rather than requiring a plaintiff to tender back monetary consideration to pursue her claim, the amount would "be deducted from any award determined to be due" if she ultimately prevailed. Pet. App. A23 (quoting *Hogue v. S. Ry. Co.*, 390 U.S. 516, 518 (1968) (per curiam)); *see, e.g.*, *Potucek v. Cordeleria Lourdes*, 310 F.2d 527, 532 & n.20 (10th Cir. 1962); *Stilwell v. Hertz Drivurself Stations*, 174 F.2d 714, 717 & n.12 (3d Cir. 1949); *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp. 827, 831 (E.D. Pa. 1961); *Woods v. City of Hobbs*, 408 P.2d 508, 510-11 (N.M. 1965).

Leading authorities from both before and after the enactments of Title VII and the EPA reflect this setoff approach, rather than a tender-back requirement. The Restatement (First) of Contracts explained that the tender-back rule does not apply if the consideration received by the plaintiff was "merely money paid, the amount of which can be credited in partial cancellation of the injured party's claim." Restatement (First) of Contracts § 480(2)(c) (1932); *see* Restatement (Second) of Contracts § 384(1)(b) & cmt. b (1981).[7] Prominent treatises likewise recognize that "[t]he plaintiff need not tender back what he got . . . if he has offsetting money claims against the defendant in excess of the money he is obliged to restore." Dan B. Dobbs, *Law of Remedies* § 4.8 (1973). And although Judge Thapar assumed that the tender-back rule was clearly established, he relied primarily on decisions that long predated the enactments of Title VII and the EPA, and he appears to have overlooked intervening changes in the legal landscape. Pet. App. A33-A35; *see* 5 Arthur Linton Corbin, *Corbin on Contracts* § 1116 (1964); Restatement (Second) of Contracts § 384 cmt. b.

*Oubre* further undermines any contention that the tender-back rule was clearly established. Like Midwest, the employer in that case argued that the tender-back rule was a settled feature of the common law. 522 U.S. at 425-26. Although the Court rejected the employer's position on other grounds, it went out of its way to cite authorities that contradicted the employer's claim about the common law, observing

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[7] The cited provision of the Restatement (First) relates to the avoidance of a contract due to fraud or misrepresentation. The same setoff rule applies to avoidance based on duress. *See* Restatement (First) of Contracts § 499(1).

that the tender-back rule "may not be as unified as the employer asserts." *Id.* at 426.

Further, there was no version of a tender-back rule that could have applied to claims arising under Title VII at the time of its enactment, because the statute originally authorized only equitable relief. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 252-53 (1994). As this Court recognized in *Oubre*, the tender-back requirement never existed in equity. 522 U.S. at 426; *see* Restatement (Second) of Contracts § 384 cmt. b.[8] Thus, even if the tender-back rule had been clearly established for plaintiffs seeking legal relief, Congress could not have intended to incorporate it in a statute allowing only equitable remedies.

2. Even if the tender-back rule had been clearly established, the Sixth Circuit correctly applied *Oubre* and *Hogue* to hold that the rule is not incorporated into Title VII and the EPA because it would not be "consistent with Congress' intent" in enacting those statutes, *Astoria*, 501 U.S. at 110 (citation omitted).

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[8] Judge Thapar described courts in equity as having applied a flexible version of the tender-back rule, "asking only whether the plaintiff tendered back within a *reasonable time*." Pet. App. A34-A35. But that reasonable-time requirement was not a feature of the tender-back rule, which requires a plaintiff to tender in order to bring or maintain a suit. *See* Restatement (Second) of Contracts § 384 cmt. b. Instead, it was a feature of a distinct ratification doctrine providing that a party may be deemed to have ratified an invalid contract if, for example, she failed to return the consideration within a reasonable time after discovering the invalidity. *See id.* That ratification doctrine is not at issue here because Ms. McClellan attempted to return her severance payment as soon as she learned that her agreement purported to release her discrimination claims. Pet. App. A6; *see* Restatement (Second) of Contracts § 380 cmt. b.

a. The Sixth Circuit correctly concluded that the tender-back rule would frustrate the proper operation of Title VII and the EPA. The court emphasized that, as in *Oubre* and *Hogue*, the tender-back rule would deter meritorious Title VII and EPA claims because employees may have spent their severance payments on basic living expenses, and would therefore be unable to return them at the outset of litigation. Pet. App. A18-A20, A22-A23; *see Oubre*, 522 U.S. at 427; *Hogue*, 390 U.S. at 518. By deterring employees from bringing valid claims, the tender-back rule would also disrupt Congress's broader enforcement scheme. Title VII and the EPA rely on private suits not just to compensate individual victims of discrimination, but also to "vindicate[] the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 45 (1974).

Moreover, as the Sixth Circuit recognized, a tender-back requirement would inject thorny practical problems into Title VII and EPA litigation. Pet. App. A16-A17. A typical severance payment compensates the employee not just for the release of discrimination claims, but also for other matters such as "waivers for other violations of law or contract" and "vacation and sick time." *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1544 (3d Cir. 1997). It will often be "unclear and debatable" what portion of the sum was paid to the employee for the challenged release. *Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 784 (3d Cir. 2007). If a tender-back rule were to apply, plaintiffs would have two options, both problematic. They could tender back the entire amount of their severance, including unrelated sums to which they were indisputably entitled (such as payment for unused

vacation). Or they could guess at the amount attributable to their releases, leading to messy threshold disputes about whether partial tenders were sufficient.

b. Midwest asserts that Congress cannot depart from the common law unless it explicitly abrogates the relevant common law principle. Pet. 4. But this Court has specifically rejected the suggestion that a "clear statement" is required. *Astoria*, 501 U.S. at 108. "Rules of plain statement and strict construction" apply only to protect a few "weighty and constant values." *Id.* Background common law principles like the tender-back rule do not implicate such values, and give way whenever "a statutory purpose to the contrary is evident." *Id.* (citation omitted).

Accordingly, neither *Oubre* nor *Hogue* relied on explicit statutory language as the reason to reject the tender-back rule. *Oubre* held that the tender-back rule does not apply to ADEA claims because the rule "would frustrate the statute's practical operation." 522 U.S. at 427. To be sure, the Court also relied on a provision creating "prerequisites for knowing and voluntary waivers" of ADEA rights, including required disclosures and waiting periods. *Id.* But that provision does not mention the tender-back rule, and thus does not contain the explicit language Midwest demands. *See* 29 U.S.C. § 626(f). Similarly, *Hogue* relied on "the general policy of [FELA]," not on any specific provision. 390 U.S. at 518. In fact, the Court expressly declined to rest its holding on the FELA provision restricting waivers. *Id.* at 517-18 & n.*; *see* Pet. App. A12-A13.

Midwest also attempts to explain away *Oubre* and *Hogue* based on the distinction between "void" and "voidable" releases. The tender-back rule applies only if a contract is voidable rather than void, because a

void contract cannot be enforced under any circumstances. Restatement (Second) of Contracts § 7 & cmt. a. Midwest asserts that *Oubre* rested on the premise that the ADEA releases at issue there were equivalent to void contracts. Pet. 10-11. But the Court did not even discuss—let alone rely on—the void/voidable distinction. And the Justices who considered that issue concluded that the release at issue was "voidable, rather than void." 522 U.S. at 433 (Breyer, J., concurring).

Similarly, Midwest claims that *Hogue* relied on the notion that the challenged release was void. Pet. 12. In fact, the Court concluded that the case presented "no occasion to decide" whether the release was "void." *Hogue*, 390 U.S. at 517-18. Like *Oubre*, *Hogue* rested on the tender-back doctrine's incompatibility with the statutory scheme. *Id.* at 518.[9]

## II. Midwest's assertion that state law defines the tender-back rule does not warrant review.

Midwest separately asks this Court to decide the choice-of-law question that Judge Thapar sua sponte identified but declined to resolve: whether, if the tender-back rule applies, courts should look to federal or state law "to determine whether [the plaintiff] has . . . tendered back." Pet. App. A31. That question is not properly presented here because Midwest abandoned it in the court of appeals. And in any event, no circuit has endorsed Midwest's contention that state law controls, and that contention is incorrect.

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[9] Midwest's reimagining of *Hogue* also rests on the premise that a contract based on a mutual mistake is void rather than voidable. Pet. 12. That premise is mistaken. *See* Restatement (First) of Contracts § 502; Restatement (Second) of Contracts § 152(1).

1. This Court has repeatedly held that a question is not properly presented where, as here, it "was not raised in the Court of Appeals." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *see*, *e.g.*, *Rita v. United States*, 551 U.S. 338, 360 (2007). In the district court, Midwest initially asserted that Ms. McClellan had failed to satisfy the tender-back rule under Michigan law. Pet. App. A57. But Midwest abandoned that issue before the Sixth Circuit, which simply assumed that federal law applied. *Id.* A25-A27. Judge Thapar thus emphasized that both parties had asked the court "to evaluate the [tender-back] doctrine[] under federal common law" and that "neither party" had asked it "to reconsider whether federal common law should apply." *Id.* A32.

2. In any event, Midwest does not cite any decision endorsing its forfeited claim that state law determines whether a Title VII or EPA plaintiff has satisfied the tender-back rule. That question arises only if a court first concludes that the tender-back rule applies. But the Seventh Circuit, the only court of appeals to reach that conclusion, expressly declined to decide whether federal or state law should define the requirements of the rule because it would have made "no practical difference in th[e] case." *Fleming*, 27 F.3d at 260.

In an attempt to paper over the absence of a conflict, Midwest asserts that several courts of appeals look to state law to "determin[e] if a valid and enforceable settlement agreement exists." Pet. 13-14 (citation omitted). But none of those cases establish any disagreement on the question presented here. Indeed, none of them relate in any way to the tender-back rule—or to any other procedural requirement for bringing or maintaining a federal claim in federal

court. Instead, all but two concern the same discrete issue: whether an attorney had authority to settle claims on behalf of her client.[10]

3. Finally, if the tender-back rule applies to Title VII and EPA claims at all, federal law should determine the rule's requirements. Midwest's argument that state law should govern is both contrary to precedent and wrong as a matter of first principles.

In *Hogue*, this Court specifically held that "whether a tender back of the consideration [i]s a prerequisite to the bringing of the suit [under FELA] is to be determined by federal rather than state law." 390 U.S. at 517. That aspect of *Hogue* is consistent with this Court's general assumption that when Congress incorporates a common law principle into a federal statute, it incorporates "the general common law" rather than "the law of any particular State." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 542 (1999) (citation omitted). Midwest provides no reason why a different rule would apply under Title VII and the EPA.

Further, when the tender-back rule applies, it is a procedural requirement that a would-be plaintiff must

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[10] *See Makins v. District of Columbia*, 277 F.3d 544, 546-47 (D.C. Cir. 2002); *Pohl v. United Airlines, Inc.*, 213 F.3d 336, 338 (7th Cir. 2000); *Hayes v. Nat'l Serv. Indus.*, 196 F.3d 1252, 1254 & n.2 (11th Cir. 1999); *Mallot & Peterson v. Dir., Office of Workers' Comp. Programs*, 98 F.3d 1170, 1173 (9th Cir. 1996); *Auvil v. Grafton Homes, Inc.*, 92 F.3d 226, 230 (4th Cir. 1996); *Tiernan v. Devoe*, 923 F.2d 1024, 1032-33 (3d Cir. 1991). Midwest's remaining cases involve the interpretation of a settlement agreement, *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 623 (8th Cir. 2001), and a question about offer and acceptance, *United States v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000).

satisfy to bring or maintain a suit. Federal statutes and rules already establish comprehensive procedural requirements for bringing and maintaining suit in federal court. In particular, a plaintiff's prior release of a claim is a defense that enters the litigation only if the defendant "affirmatively state[s]" it in the answer. Fed. R. Civ. P. 8(c). It would be anomalous if state law could require federal litigants to anticipate an affirmative defense by tendering back before federal law even requires that the defense be pleaded.

It would be particularly incongruous to allow state law to inject such procedural requirements into Title VII, which "sets out a detailed, multi-step procedure" for bringing suit. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649 (2015). The statute "'specifies with precision' the prerequisites that a plaintiff must satisfy before filing suit." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (citation omitted).[11] The additional requirements imposed by state tender-back rules would disrupt that carefully crafted scheme.

Moreover, applying state law would subject Title VII and EPA plaintiffs to very different procedural requirements depending on the state in which they happened to sue. States vary widely in the strictness or leniency with which they apply the tender-back rule to general contract claims, if they apply the rule at all. *See* 27 Richard A. Lord, *Williston on Contracts* § 69:51 & nn. 20-23 (4th ed. 2003). At one extreme,

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[11] An employee seeking to bring a Title VII claim must first file a charge with the EEOC within 180 days. 42 U.S.C. § 2000e-5(e)(1). The EEOC conducts an investigation and attempts to remedy any discrimination it finds. *Id.* § 2000e-5(b), (f)(1). After the EEOC process ends, the employee receives a right-to-sue letter and has ninety days to bring suit. *Id.* § 2000e-5(f)(1).

Michigan's rule is particularly strict. Decades after Title VII and the EPA were enacted, the Michigan Supreme Court held that plaintiffs must tender before bringing suit. *Stefanac v. Cranbrook Educ. Cmty.*, 458 N.W.2d 56, 58 (1990). At the other extreme, New York has, by statute, abolished the tender-back requirement altogether. N.Y. C.P.L.R. § 3004.

Applying state law also would be inconsistent with this Court's instruction that federal courts should not apply state procedural rules that would frustrate federal statutory schemes. For example, in *Felder v. Casey*, 487 U.S. 131 (1988), this Court held that federal courts hearing suits under 42 U.S.C. § 1983 may not apply state laws requiring plaintiffs to give notice before suing state and local governments. *Felder*, 487 U.S. at 138. The Court explained that those notice-of-claim statutes would "significantly inhibit the ability to bring federal actions" under Section 1983. *Id.* at 140 (citation omitted). State tender-back rules—particularly strict rules like Michigan's—would have exactly the same impermissible effect on Title VII and EPA claims.

## CONCLUSION

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

Respectfully submitted,

William F. Piper
*Counsel of Record*
WILLIAM F. PIPER, PLC
1611 West Centre Avenue,
Suite 209
Portage, MI 49024
(269) 321-5008
wpiper@wpiperlaw.com

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