No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,

Petitioners,

v.

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,

Respondent.

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

Respondent's Brief in Opposition

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QUESTION PRESENTED

Laura Symczyk brought this action on behalf of herself and all other similarly situated individuals under § 216(b) of the Fair Labor Standards Act. Before Ms. Symczyk moved for conditional certification of the collective action, the defendants made a Rule 68 offer that provided complete relief on her individual claims. The question presented is:

Did defendants' Rule 68 offer to Ms. Symczyk render the entire collective action moot, or will a later-filed motion for conditional certification relate back to the filing of the complaint if it is made without undue delay?

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INTRODUCTION

In the decision below, the Third Circuit applied the relation back doctrine to ensure that Federal Rule of Civil Procedure 68 is not used to "pick[] off" successive plaintiffs in a Fair Labor Standards Act (FLSA) collective action. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). It held that when a defendant, prior to the named plaintiff's motion for conditional certification, makes a Rule 68 offer that would have the possible effect of mooting the collective action, a later-filed motion for certification relates back to the filing of the complaint as long as the motion is made without undue delay.

Petitioners contend that the Third Circuit's decision reflects only the "idiosyncratic policy intuitions of individual judges" who failed to "draw coherent guidance" from this Court's case law. Pet. 14. Petitioners' rhetoric notwithstanding, the lower court engaged in a well-reasoned application of this Court's precedents. And although petitioners attempt to depict disarray among the lower courts, the only other court of appeals decision to address the applicability of the relation back doctrine to FLSA cases agrees with the decision below. Similarly, the circuit courts are not split over whether an unaccepted Rule 68 offer tendered before the named plaintiff moves for class certification renders a class action moot. Moreover, even if they were, this case would not be an appropriate vehicle for resolving that split. Certiorari is unwarranted, and the petition should be denied.

STATEMENT OF THE CASE

Laura Symczyk filed this case as a collective action under Section 216(b) of the FLSA, 29 U.S.C. § 216(b), alleging the petitioners violated the FLSA by implementing a policy under which they deducted thirty minutes from each employee's work time every shift for

meal breaks, regardless of whether the employee actually received an uninterrupted break for meals. Pet. App. 3. The complaint identified similarly situated individuals as including "all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks." *Id.* at 32. Such employees included secretaries, housekeepers, custodians, clerks, porters, registered nurses, respiratory therapists, administrative assistants, nurses' aides, and others. *Id.* at 32 n.1.

Two months after the complaint was filed, the defendants served Ms. Symczyk with a Rule 68 offer of judgment for $7,500 plus attorneys' fees, costs, and expenses. *Id.* at 4. Ms. Symczyk did not respond. A few weeks later, the district court entered an order providing for an initial 90-day discovery period after which Ms. Symczyk would move for "conditional certification" of the collective action. *Id.* at 4-5.[1]

The defendants then moved to dismiss for lack of subject matter jurisdiction, arguing that by offering Ms. Symczyk an amount greater than her potential recovery for her unpaid wages, the Rule 68 offer rendered the

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[1] As the court of appeals explained, although § 216(b)'s text does not refer to "certification," "[m]any courts and commenters . . . have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases" under § 216(b). Pet App. 11-12. (quoting *Kelley v. Alamo*, 964 F.2d 747, 748 n.1 (8th Cir. 1992)). "As a result, courts commonly refer to a plaintiff's satisfaction of her burden at the [initial] notice stage [of the collective action] as resulting in 'conditional certification,' . . . or 'provisional certification[.]'" *Id.* (internal citations omitted). This brief will follow this common practice, as did both the district court and court of appeals.

case moot. *Id.* at 33. The district court "tentatively" agreed and dismissed the action. *Id.* at 43, 45.

The Third Circuit reversed. The court explained that "an offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." *Id.* at 14 (citation omitted). It recognized, however, that "conventional mootness principles do not fit neatly within the representative action paradigm." *Id.* In particular, the court noted that the Supreme Court had expressed concern over defendants' ability to manipulate Rule 68 to "pick[] off" plaintiffs in a representative action, quoting *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980), in which this Court stated that "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained" would "frustrate the objectives of class actions" and "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." Pet. App. 15.

The Third Circuit explained that, in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), it had resolved the tension between Rule 68 and class actions by applying the "relation back doctrine." Pet. App. 15-16. In *Weiss*, the defendants in a putative class action made a Rule 68 offer that provided complete relief on the plaintiff's individual claims before he moved for class certification. The Court concluded that the case was not moot, holding that "[a]bsent undue delay in filing a motion for class certification . . . where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to

the filing of the class complaint." *Id.* (quoting *Weiss*, 385 F.3d at 348).

The court below traced the "relation back doctrine" applied in *Weiss* to *Sosna v. Iowa*, 419 U.S. 393 (1975), in which this Court explained that under circumstances in which "the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion," certification may "'relate back' to the filing of the complaint" when the issue otherwise "would evade review." *Id.* at 402 n.11. The Third Circuit noted that the relation back principle "has evolved to account for calculated attempts by some defendants to short-circuit the class action process and to prevent a putative representative from reaching the certification stage." Pet. App. 18. The "rationale underpinning the relation back doctrine," it explained, "serves to shield from dismissal on mootness grounds those claims vulnerable to being 'picked off' by defendants attempting to forestall class formation." *Id.*

Having reviewed its precedent applying the relation back doctrine in class actions and explained the grounding of that precedent in Supreme Court case law, the Third Circuit turned to whether the relation back doctrine applies in § 216(b) collective actions. The court concluded that it does, noting that the only other court of appeals to address the question—the Fifth Circuit—had reached the same conclusion. *Id.* at 24. The Third Circuit recognized the differences between Rule 23 class actions and § 216(b) collective actions, noting in particular that FLSA collective actions require each party plaintiff to affirmatively opt in. It determined, however, that "[a]lthough the opt-in mechanism transforms the manner in which a named plaintiff acquires a personal stake

in representing the interests of others, it does not present a compelling justification for limiting the relation back doctrine to the Rule 23 setting." *Id.* at 25. Like a Rule 23 class action, the court explained, a FLSA collective action is "'acutely susceptible to mootness' while the action [is] in its early stages and the court ha[s] yet to determine whether to facilitate notice to prospective plaintiffs." *Id.* at 26 (quoting *Weiss*, 385 F.3d at 347). Under such circumstances, it noted, the "relation back doctrine helps ensure the use of Rule 68 does not prevent a collective action from playing out according to the directives of § 216(b)[.]" *Id.* at 28.

Accordingly, the court held that "[a]bsent undue delay, when a FLSA plaintiff moves for 'certification' of a collective action, the appropriate course—particularly when a defendant makes a Rule 68 offer to the plaintiff that would have the possible effect of mooting the claim for collective relief asserted under § 216(b)—is for the district court to relate the motion back to the filing of the initial complaint." *Id.* The court remanded the case to the district court, noting that should Ms. Symczyk move for conditional certification on remand, the district court should consider whether the motion was made without undue delay, and if it finds it was, should relate the motion back to the date of the filing of the complaint. *Id.* at 28-29.

The defendants filed a motion for rehearing en banc, which was denied. *Id.* at 47-48.

REASONS FOR DENYING THE WRIT

In *Sosna v. Iowa*, 419 U.S. 393 (1975), this Court held that a certified class action does not become moot just because the named plaintiff's individual claims become moot. The Court further explained that "[t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11. "In such instances," the Court continued, "whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *Id.*

In light of this "relation back" approach, the timing of class certification "is not crucial" to the mootness inquiry. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980); *see also id.* at 399 (recognizing case may not be moot where the claims are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires"). Where the relation back doctrine applies, the fact that "the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the court] of jurisdiction." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

Below, the Third Circuit recognized that the relation back doctrine properly applies when defendants attempt to moot entire collective actions by making offers of judgment only on the named plaintiff's individual claims before she has moved for certification. Moreover, it recognized that although there are differences between FLSA collective actions and Rule 23 class actions, those

differences are not relevant to the relation back analysis. The Third Circuit correctly applied the relation back doctrine, and review of the decision below is unwarranted.

I. The Circuits Are Not Split Over Whether the Relation Back Doctrine Applies in FLSA Cases.

Petitioners argue that the lower courts are in "disarray," with the court of appeals taking "diametrically opposed approaches to the extension of *Roper* and *Geraghty* to FLSA cases." Pet. 14, 15. As the Third Circuit pointed out, however, the only other court of appeals to address the issue here—whether the relation back doctrine applies when defendants in a FLSA action make an unaccepted Rule 68 offer to the representative plaintiff before she moves for conditional certification—reached the same conclusion as the court below. Pet. App. 24-25; *see Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008).

In *Sandoz*, like in this case, the plaintiff filed a case styled as a collective action under § 216(b) of the FLSA; the defendants served the plaintiff with a Rule 68 offer that satisfied her individual claims before she had moved for conditional certification or other plaintiffs had opted in; and the plaintiff did not respond to the offer. *Id.* at 914. Like in this case, the court of appeals held that the relation back doctrine applied and the offer did not moot the case. *Id.* at 920-21.

The Fifth Circuit conducted its analysis in two stages. First, it considered whether the plaintiff in the FLSA action represented only herself or whether she also represented other similarly situated employees. Detailing the history of § 216(b), discussing the differences between § 216(b) collective actions (under which

plaintiffs must opt in) and Rule 23 class actions (under which plaintiffs are bound unless they opt out), and relying on the Eleventh Circuit's decision in *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240 (11th Cir. 2003), the court concluded that "in a FLSA collective action the plaintiff represents only him- or herself until similarly situated employees opt in." *Sandoz*, 553 F.3d at 919. Thus, according to the Fifth Circuit, when the defendant made its offer of judgment, the plaintiff "represented only herself, and the offer of judgment fully satisfied her claims." *Id.*

The Fifth Circuit recognized that "if [its] analysis stopped there, Sandoz's case would be moot." *Id.* However, the court's analysis did not stop there. Instead, the court went on to consider the relation back doctrine. The court explained that "the mootness principles described above would provide an incentive for employers to use Rule 68 as a sword, 'picking off' representative plaintiffs, and avoiding ever having to face a collective action," but that "[l]uckily . . . the relation back doctrine provides a mechanism to avoid this anomaly." Citing *Sosna*, 419 U.S. at 402 n.11, the court observed that "the 'relation back principle' ensures that plaintiffs can reach the certification stage.'" *Sandoz*, 553 F.3d at 919.

The Fifth Circuit noted that the cases it cited about the dangers of allowing defendants to pick off class representatives arose in the Rule 23 class action context rather than in the FLSA § 216(b) context. *Id.* at 920. However, although it had found the differences between Rule 23 class actions and FLSA collective actions to be relevant in determining whether a plaintiff in a collective action represented similarly-situated employees before they opted in, it did not consider those differences relevant for determining whether the relation back doctrine

applied. "The status of a case as being an 'opt in' or 'opt out' class action," it explained, "has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment." *Id.* "[E]ach type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit." *Id.* Thus, it held, "when a FLSA plaintiff files a timely motion for certification of a collective action, the motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment." *Id.* at 920-21. The court remanded to determine whether Sandoz had timely sought certification of her collective action.

As the Third Circuit noted, *Sandoz* is the only other court of appeals decision "to address the applicability of the relation back doctrine in the FLSA context." Pet. App. 24. And *Sandoz* agrees with the decision below that the relation back doctrine applies in FLSA cases. Nonetheless, citing *Cameron-Grant*, 347 F.3d 1240, and *Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119 (9th Cir. 2009), petitioners assert a circuit split over "the extension of *Roper* and *Geraghty* to FLSA cases." Pet. 22. Neither *Cameron-Grant* nor *Smith*, however, addressed, or even implicated, the relation back doctrine that served as the basis for the decision below.

In both *Cameron-Grant* and *Smith*, the plaintiffs filed actions that were styled as collective actions under FLSA § 216(b), and then moved for conditional certification or notification of the collective action, which was denied. After the motions were denied, the plaintiffs settled or dismissed their claims. They then appealed the denial of their motions. In considering whether they had jurisdiction to hear the appeals, both courts considered

the differences between Rule 23 class actions and FLSA collection actions and held that because FLSA claims are "opt in" instead of "opt out," the named plaintiffs had no right to represent other plaintiffs after they settled their individual claims. Because the plaintiffs did not have a right to represent other plaintiffs, the courts held that they had no continuing personal claims in the case and that the actions were moot.

In other words, both *Cameron-Grant* and *Smith* considered the question the Fifth Circuit addressed in the first part of *Sandoz*: whether a representative plaintiff in a FLSA collective action represents only herself or if she represents/is entitled to represent other plaintiffs before they opt in. Both agreed with *Sandoz* that, given how § 216(b) operates, the plaintiff did not represent other plaintiffs at that juncture. Indeed, *Smith* cites *Sandoz* with approval, *see Smith*, 570 F.3d at 1122, 1123, and *Sandoz* stated that it found *Cameron-Grant* "persuasive." *Sandoz*, 553 F.3d at 919. Both *Cameron-Grant* and *Smith* ended the analysis at the point where *Sandoz* stated "[i]f our analysis stopped there, Sandoz's case would be moot," *id.*, and both declared the plaintiffs' cases moot.

Thus, the difference between *Sandoz* and *Cameron-Grant/Smith* is that *Sandoz* proceeded to discuss the relation back doctrine, whereas *Cameron-Grant* and *Smith* did not. *Cameron-Grant*'s and *Smith*'s failure to address the relation back doctrine does not indicate their disapproval of that doctrine in FLSA cases or otherwise create a circuit split, however, because relevant factual and procedural differences distinguish this case and *Sandoz* from *Cameron-Grant* and *Smith*. Here and in *Sandoz*, the defendants sought to render the cases moot through Rule 68 offers of judgment, which the plaintiffs did not

accept. If such unilateral actions by the defendants rendered the collective actions moot, defendants could pick off successive representative plaintiffs, causing the issue of certification to "evade review." *Sosna*, 419 U.S. at 402 n.11. Under such circumstances, the relation back doctrine properly applies. In contrast, in *Cameron-Grant* and *Smith*, the plaintiffs *voluntarily* settled and dismissed their claims. Thus, the certification issue did not evade review because of unilateral actions by the defendant, but because of voluntary actions by the plaintiff. Whether the relation back doctrine applies under those circumstances, which do not implicate the "picking off" problem, is a much harder argument for the plaintiff and is not a question presented by this case. Indeed, the Third Circuit itself does not apply the relation back doctrine when the plaintiffs voluntarily settle their claims. *See Weiss*, 385 F.3d at 337 (discussing *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992)).[2]

In short, *Cameron-Grant* and *Smith* addressed the first part of the *Sandoz* analysis—whether § 216(b) plaintiffs represent/are entitled to represent other employees before they opt in—and agreed with *Sandoz*. The decision below addressed the second part of the

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[2] In *Cameron-Grant*, the Eleventh Circuit noted that it had previously concluded that "the rule in *Geraghty* . . . applies when the named plaintiff settles his claim," not only when his claim is extinguished involuntarily. 347 F.3d at 1247 (citing *Love v. Turlington*, 733 F.2d 1562, 1565 (11th Cir. 1984)). However, *Cameron-Grant* was not addressing whether the voluntariness of the extinction of the claim mattered to the relation back doctrine—that is, to the second part of the *Sandoz* analysis. Rather, it was stating that voluntariness did not matter to whether the plaintiff had a personal stake in the right to represent the class. *Id.* at 1246-47.

Sandoz analysis—the relation back doctrine—and also agreed with *Sandoz*. And the court below would not have applied the relation back doctrine under the circumstances presented in *Cameron-Grant* and *Smith*. There is no circuit split here.

II. The Circuits Are Not Split Over Whether an Unaccepted Rule 68 Offer Tendered Before the Named Plaintiff Moves for Class Certification Renders a Class Action Moot.

Petitioners assert a secondary conflict over whether courts lose jurisdiction over class actions "when the plaintiff's claim is mooted before the filing of a motion to certify a collective proceeding." Pet. 22. Yet every court of appeals to consider whether an unaccepted Rule 68 offer that was made prior to a motion for class certification necessarily moots a collective proceeding has agreed that it does not. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Sandoz*, 553 F.3d 913; *Weiss*, 385 F.3d 337. Petitioners' claimed circuit split ignores relevant differences in the procedural postures of the cases cited and in the questions addressed by those cases.

For example, in support of their claim of a split with the Fourth Circuit, petitioners cite *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011). *Rhodes,* however, does not speak to whether an unaccepted Rule 68 offer tendered before a motion for class certification renders a class action moot, but to whether *voluntary* dismissal of individual claims moots a class action when the claims are dismissed after the denial of class certification. In *Rhodes*, after the district court denied a motion for class certification, the plaintiffs dismissed their claims and then sought to appeal the denial

of class certification. *Id.* at 99. The court of appeals noted that the Supreme Court had allowed such appeals when the plaintiffs' claims were involuntarily dismissed, but that it had not yet considered "whether Article III standing requirements are satisfied when a putative class representative who has voluntarily settled or dismissed his or her claims thereafter appeals denial of class certification." *Id.*; *see Geraghty*, 445 U.S. at 403 & n.10 (holding that a named plaintiff can appeal the denial of a motion for class certification when his claim has expired, but declining to express a view on whether he could appeal if he voluntarily settled his claim). The Fourth Circuit concluded that, given the voluntary nature of the dismissal, it lacked jurisdiction. *Rhodes* may have added to disagreement among the circuits over the question of whether a voluntary settlement or dismissal of the named plaintiff's claims prior to class certification renders the class action moot. That question, however, is not presented here.

Likewise, petitioners rely on a statement from *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826-27 (8th Cir. 2008) that "voluntary settlements reached by the named plaintiffs [in a class action render] the entire case . . . moot," even when a motion for class certification is pending. Pet. 20. But, as in *Rhodes*, that statement speaks only to the effect of *voluntary* settlements, not to the effect of unaccepted Rule 68 offers. In *Anderson*, as in *Rhodes*, after the district court denied class certification, the named plaintiffs settled the case and then sought to appeal the denial of class certification. 515 F.3d at 824. The Eighth Circuit noted that cases are not necessarily moot where judgment is entered on the named plaintiffs' claims over their objection, but held that "the voluntary settlement reached by the named

plaintiffs" led it to conclude that the case was moot. *Id.* at 827.[3]

The only case relied on by petitioners in support of its claim of a conflict that did not involve a voluntary settlement or dismissal is *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). In *Damasco*, the plaintiff filed a putative class action in state court. The defendant offered plaintiff his full request for relief and then removed the case to federal court, where the plaintiff moved for class certification. The defendant then moved to dismiss, contending that its offer mooted the case. The Seventh Circuit agreed. The court noted that it had "long held that a defendant cannot moot a case by making an offer *after* a plaintiff moves to certify a class, observing that '[o]therwise the defendant could delay the action indefinitely by paying off each class representative in succession,'" *Id.* at 895 (quoting *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003)). And it recognized that other circuits had held that, "absent undue delay, a plaintiff may move to certify a class and avoid mootness even after being offered complete relief." *Id.* at 895-96 (citing *Pitts*, *Lucero*, *Sandoz*, and *Weiss*). It declined to hold that a complete offer of

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[3] Before addressing the effect of the settlement, *Anderson* noted in dicta that plaintiffs' claims against one defendant "likely . . . were moot" even before the court ruled on the class certification motion when the plaintiffs "received and accepted" payment of their claims from the defendant. The court recognized that class certification "may be deemed to 'relate back' to the filing of the complaint in limited circumstances, when the underlying merits of any given plaintiff's case would 'evade review' by a declaration of mootness." 515 F.3d at 826 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). However, it did not believe the claims in the case before it evaded review.

judgment made prior to a motion for class certification does not moot a case, however, finding that such a holding was "unnecessary" because plaintiffs could avoid the "buy-off problem" by moving to certify a class at the same time they filed their complaints. *Id.* at 896.

The Seventh Circuit recognized the possibility that its decision might have been different had the offer of judgment been made under Rule 68. It noted that some district courts in the Seventh Circuit have held that a Rule 68 offer of judgment does not moot a putative class action where the plaintiff seeks class certification within Rule 68's time frame for responding to the offer. *Id.* at 897. The court explained, however, that it "need not address the propriety of that approach here," because "[the defendant] made its offer while this suit was in state court, and Illinois procedure has no analog to Rule 68." *Id.*

Thus, although there is some tension between the analysis in *Damasco* and the analyses in *Pitts*, *Lucero*, *Sandoz*, and *Weiss,* the exact effects of a Rule 68 offer of judgment tendered prior to a motion for certification are still being worked out internally in the Seventh Circuit. Given the consistency among other circuits, *Damasco* does not make this case worthy of review.

III. This Case Does Not Present a Good Vehicle for Deciding Whether a Rule 68 Offer Tendered Before the Named Plaintiff Moves for Class Certification Renders a Class Action Moot.

Petitioners claim this case "is an ideal vehicle" for certiorari because the fact that it arises in the FLSA context puts a "range of issues before the Court." Pet. 22-23. Precisely because it arises in the context of a FLSA collective action, however, rather than in the con-

text of a Rule 23 class action, this case does not present a good vehicle for determining the effects of a Rule 68 offer on a putative class action. Petitioners emphasize their belief that even if an offer of judgment served prior to a motion for class certification did not render a class action moot, such a motion should render a FLSA action moot because of the differences between Rule 23 class actions and FLSA collective actions. Were the Court to agree with petitioners, despite the lack of a circuit split about the application of the relation back doctrine in FLSA cases, it would not reach the issue of whether a Rule 68 offer made prior to a motion for class certification moots a putative class action.

Moreover, cases that have considered whether a pre-certification offer of judgment that satisfies the named plaintiff's individual claims renders a representative action moot have generally involved Rule 23 class actions, not FLSA § 216(b) collective actions. If this court is interested in the effect of such a Rule 68 offer on a class action, it should await a case that arises in that context, which will enable the consideration of the interaction of Rules 68 and 23. *See, e.g.*, *Weiss*, 385 F.3d at 342 ("Whenever possible we should harmonize the rules.").

Petitioners focus on the differences between class actions and FLSA collective actions in arguing that the decision below is wrong. But although they are correct that Congress amended § 216(b) in 1947, it "left intact the 'similarly situated' language providing for collective actions, such as this one." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989); *see* Pet. App. 22. Petitioners also emphasize that in a collective action, plaintiffs who do not join the collective action are not bound by the result. *See* Pet. 10-11, 12-13. But in class actions as well, non-representative plaintiffs are not bound by

the case prior to class certification. Nonetheless, under appropriate circumstances, "the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *County of Riverside*, 500 U.S. at 52. The Third Circuit properly invoked the relation back doctrine here.

In the end, petitioners fall back on policy arguments, contending that the decision below rests on a "fundamentally wrongheaded distaste for settlement" and "buttresses the unfortunate tendency of the lower courts to foster excessive litigation." Pet. 23, 24 (internal quotation marks and citation omitted). Petitioners' arguments, however, reflect a disagreement with this Court, which has recognized that what "invite[s] waste of judicial resources" and is "contrary to sound judicial administration" is allowing defendants to "pick[] off" successive plaintiffs by making offers of judgment before class certification is obtained—rather than allowing courts to reach the question of class certification despite such offers of judgment. *Roper*, 445 U.S. at 339.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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