No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

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

BRIEF FOR RESPONDENT

NEAL KUMAR KATYAL
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9000

ADINA H. ROSENBAUM
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

STEPHEN I. VLADECK
4801 Massachusetts Ave.
Washington, DC 20016
(202) 274-4000

GARY F. LYNCH
Counsel of Record
CARLSON LYNCH LTD
36 N. Jefferson Street
P.O. Box 7635
New Castle, PA 16107
(724) 656-1555
glynch@carlsonlynch.com

GERALD D. WELLS, III
FARUQI & FARUQI, LLP
101 Greenwood Avenue
Jenkintown, PA 19046
(215) 277-5770

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Can defendants, in a case brought as a collective action under section 16(b) of the Fair Labor Standards Act, render the case moot by making an offer of judgment that is not accepted and that offers relief only to the representative plaintiff?

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BRIEF FOR RESPONDENT

INTRODUCTION

Three-quarters of a century ago, Congress in section 16(b) of the Fair Labor Standards Act (FLSA) "stated its policy that [FLSA] plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 170 (1989). Congress thus provided that an employee whose minimum wage or overtime compensation rights have been violated can bring an action against his employer "for and in behalf of himself * * * and other employees similarly situated." 29 U.S.C. §216(b). This Court has explained that, through that provision, Congress provided "affirmative permission

for employees to proceed on behalf of those similarly situated." *Hoffmann-La Roche*, 493 U.S. at 170. This case concerns whether, despite this affirmative legislative choice, an employer can moot a collective action by making an offer of judgment to the employee who filed the collective action—and doing so (1) before additional plaintiffs have had notice and the opportunity to opt in to the action, (2) in a manner that offers relief only to *that* employee, and (3) under circumstances that led that employee to reject the offer.

STATEMENT

A. Collective Actions Under the FLSA

1. "Congress enacted the FLSA in 1938 with the goal of 'protect[ing] all covered workers from substandard wages and oppressive working hours.'" *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012) (citation omitted). The "prime purpose" of the FLSA "was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 n.18 (1945).

To help further its goals, Congress provided in the Act that an employee or multiple employees could bring an action "in behalf of himself or themselves and other employees similarly situated"—thereby creating a collective action. Fair Labor Standards Act of 1938, 52 Stat. 1069. They could also "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated"—thereby creating a representative action. *Id.* The statute has evolved over time, including the

elimination of the "representative action" in 1947. But Congress has never altered the original "similarly situated" language. Rather, Congress has intentionally preserved the authority for employees to bring "collective actions." *Hoffman-La Roche*, 493 U.S. at 173.

2. This Court has made clear that "[t]he broad remedial goal of the statute should be enforced to the full extent of its terms." *Id.* To that end, courts have developed extensive processes for managing collective actions, generally employing a two-step approach. *See* 7B C. Wright et al., *Federal Practice and Procedure* § 1807 (3d ed. 2012). Under the first step, the district court makes a preliminary determination whether the named plaintiff is similarly situated to the other employees on whose behalf the case was brought. If so, the district court "conditionally certifies" the class and exercises its discretion to facilitate notice, as this Court approved in *Hoffmann-La Roche*, 493 U.S. at 169-71. At the second stage, which is usually triggered when the defendant moves to "decertify" the collective action, the court determines whether the employees who have opted in are in fact similarly situated to the named plaintiff. *See, e.g.*, Pet. App. 8-12 (describing two-step certification process); *Sandoz* v. *Cingular Wireless LLC*, 553 F.3d 913, 915 n.2 (5th Cir. 2008) (same).

B. The Collective Action Complaint, Rule 68 Offer, and District Court Proceedings

1. In 2007, Laura Symczyk worked as a Registered Nurse for defendants Genesis HealthCare Corporation and ElderCare Resources Corporation. While working for Petitioners, Respondent was regularly required to perform compensable work during unpaid "meal breaks." JA 23.

On December 4, 2009, she filed this case. The first line of her complaint called it a "COLLECTIVE ACTION COMPLAINT." JA 21. It alleged that Petitioners violated the FLSA by automatically deducting thirty minutes from each employee's work time for meal breaks, regardless of whether the employee actually received an uninterrupted break for meals. JA 21-31. The complaint's first page stated that "Plaintiff, Laura Symczyk, on behalf of herself and others similarly situated alleges as follows." JA 21. Elsewhere, the complaint noted that it was being filed "on behalf of 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." JA 23. It explained that such employees included nurses, secretaries, housekeepers, custodians, clerks, porters, medical underwriters, respiratory therapists, administrative assistants, nurses' aides, and others. *Id*.

2. Just 76 days later, on February 18, 2010, the defendants served Respondent with an offer of judgment under Federal Rule of Civil Procedure 68, asking that judgment be entered in her favor on the complaint "and all causes of action alleged therein" for $7,500, "exclusive of attorneys' fees and costs accrued to date." JA 55. The offer stated that "[t]his amount represents the total amount Defendants shall be obligated to pay on account of any liability claimed" in the complaint. *Id*.

Although the complaint had been brought on behalf of both Respondent and similarly situated employees (a class the complaint estimated to contain several thousand people, JA 27), Petitioners made clear that the amount offered was based only on the amount

Respondent could personally recover for the violation of her individual FLSA rights, not on the total that could be recovered in the case. JA 78-79. The offer further stated that there was no concession of liability. JA 55-56 ("This Offer of Judgment * * * is not to be construed as an admission that Defendants are liable in this action or that Plaintiff has suffered any damage.").

The letter accompanying the offer also specified that "[i]n accordance with Federal Rule of Civil Procedure 68, if Plaintiff has not accepted this Offer of Judgment in writing within ten (10) days after service, this Offer of Judgment shall be deemed withdrawn * * * ." JA 79. Respondent did not respond to the offer. Accordingly, the offer was considered withdrawn, and the parties proceeded with the case.

3. On March 10, 2010, following a pretrial conference, the court entered an order providing that the parties would have an initial ninety-day discovery period, after which Respondent would move for conditional certification of the collective action. JA 62. The order further specified that the court would allow an additional six-month discovery period after it ruled on the certification motion, "to commence at the close of any Court-ordered opt-in window." *Id*.

4. Less than two weeks later, on March 23, 2010, the defendants moved to dismiss for lack of subject-matter jurisdiction based on their now-defunct Rule 68 offer. JA 64. Although the case had been filed as a collective action and the defendants offered relief only to Respondent, and although Respondent had not accepted the offer and had not received any relief,

the district court agreed and dismissed the case with prejudice. Pet. App. 43, 45.[1]

The upshot is that this case was dismissed a half-year after it had been filed and before any additional plaintiffs had the opportunity to opt in. That dismissal, in turn, was based on nothing more than a lapsed Rule 68 offer that itself had been made just over two months after the case was filed.

C. The Court of Appeals' Decision

1. The Third Circuit reversed, in a unanimous opinion by Judge Scirica. The court accepted that "[a]n 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." Pet. App. 14 (quoting *Weiss* v. *Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004)). It held, however, that an offer to the named plaintiff in a collective action, made before the plaintiff moves for collective certification or other plaintiffs opt in, does not moot a case. Pet. App. 3.

2. The court explained that although Rule 68 was "designed 'to encourage settlement and avoid litigation,'" Pet. App. 14 (quoting *Marek* v. *Chesny*, 473 U.S. 1, 5 (1985)), in the class or collective action context, it "can be manipulated to frustrate rather than to serve these salutary ends." Pet. App. 15. The court noted that, in *Weiss*, 385 F.3d 337, it had

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[1] During briefing on the motion to dismiss, the district court signed a stipulated order that allowed Respondent to amend her complaint to include state-law claims. JA 88-89. After the district court concluded that the Rule 68 offer had rendered the FLSA claim moot, it declined to exercise supplemental jurisdiction over the state-law claims and dismissed them. Pet. App. 46.

resolved this tension between Rule 68 and Rule 23 class actions by applying the "relation back doctrine" and holding that "'[a]bsent undue delay in filing a motion for class certification * * * the appropriate course is to relate the certification motion back to the filing of the class complaint.'" Pet. App. 16 (quoting *Weiss*, 385 F.3d at 348).

The Third Circuit traced the "relation back" doctrine to *Sosna* v. *Iowa*, 419 U.S. 393 (1975), where 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. "By invoking the relation back doctrine," it explained, "a court preserves its authority to rule on a named plaintiff's attempt to represent a class by treating a Rule 23 motion as though it had been filed contemporaneously with the filing of the class complaint." Pet. App. 19.

3. The court then considered whether the relation back doctrine applies in §216(b) actions. The court concluded that it does, pointing out that the only other court of appeals to address the question—the Fifth Circuit—had reached the same conclusion. Pet. App. 24-25. The court recognized the differences between Rule 23 class actions and FLSA collective actions, noting that in an FLSA collective action each

party plaintiff must affirmatively opt in. The court 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." Pet. App. 25. The court explained that, like a Rule 23 class action, an 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." Pet. App. 26 (quoting *Weiss*, 385 F.3d at 347).

4. The Third Circuit remanded the case to the district court. It noted that, should Respondent 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. Pet. App. 28-29. On remand, Respondent moved for conditional certification. JA 10. Before ruling on the motion, the district court stayed all proceedings in the case in light of this Court's grant of certiorari. JA 12.

SUMMARY OF ARGUMENT

1. As an initial matter, this case is not moot because an unaccepted offer of judgment does not moot a case. Respondent effectively rejected Petitioners' offer of judgment when she did not accept it within the short time period specified under the terms of Fed. R. Civ. P. 68(b). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox* v. *SEIU*, 132 S. Ct. 2277, 2287 (2012) (quotation marks omitted) (quoting *City of Erie* v. *Pap's A.M.*,

529 U.S. 277, 287 (2000)). Here, the offer of judgment *proposed* that the district court grant Respondent certain relief, but the court never did so. Instead, the court dismissed her claims as moot, and Respondent did not receive even a single penny of remuneration. Given these facts, the conclusion that Petitioners' Rule 68 offer mooted this suit would convert Petitioners' unaccepted offer into a "heads we win, tails you lose" proposition.

Even if a complete offer of judgment could otherwise moot an individual claim, Petitioners' offer was incomplete. Respondent sued on behalf of those employees to whom she is similarly situated, as authorized by 29 U.S.C. §216(b). But Petitioners' Rule 68 offer provided nothing whatsoever for those additional potential claimants. Courts cannot force a plaintiff to accept a suboptimal settlement, and an offer of complete individual relief in the collective action context does not fully satisfy the non-individual demands of the complaint. *See, e.g.*, *Deposit Guar. National Bank* v. *Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring). Without an offer of relief to the similarly situated employees on whose behalf Respondent sought to proceed, Petitioners' Rule 68 offer did not in fact render it "impossible for a court to grant any effectual relief."

This conclusion is all the more compelling in suits arising under the FLSA, where courts must typically approve settlements for both individual and collective actions. Thus, even if Petitioners' Rule 68 offer had also encompassed the claims of those similarly situated employees on whose behalf Respondent sought to proceed, it could not have automatically mooted Respondent's §216(b) claim because the court

must make an independent judgment of whether the relief offered to the prevailing party is effectual.

2. This Court has recognized that, in addition to their own claims, the lead plaintiffs in class actions have a distinct personal stake in pursuing certification under certain circumstances, *see United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388 (1980), and that otherwise allowing defendants to use offers of judgment to "pick[] off" named plaintiffs before they could obtain a ruling on class certification would be "contrary to sound judicial administration," *Roper*, 445 U.S. at 339. Petitioners offer no coherent reason to reach a contrary result in suits under §216(b). Indeed, Congress expressly included a collective-action device in §216(b) to facilitate the efficient resolution of claims. That legislative choice would be thwarted by Petitioners' construction of Rule 68.

Furthermore, as Judge Scirica's opinion for the court below concluded, the relation back doctrine prevents this case from being moot. In *Sosna*, this Court recognized that where a named plaintiff's claims become moot before the district court can "reasonably be expected to rule on a certification motion," the claims of as-yet uncertified class members may relate back to the filing of the complaint and thereby preserve live class action controversies. 419 U.S. at 402 n.11. Thus, 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). The relation-back doctrine applies here, where the defendants made their Rule 68 offer

before the certification process could reasonably have been completed.

To be sure, collective and class actions use different procedures to determine the composition of the certified class. But that difference has no bearing on whether a properly completed certification process relates back. In collective actions, as in class actions, once the certification process is complete, there is a class of individuals whose interests are sufficient to create an Article III case or controversy even if the named plaintiff's claim has become moot. And in collective actions, as in class actions, there will be circumstances in which the named plaintiff's claim will become moot before the court can reasonably expect to complete the certification process.

Petitioners attempt to distinguish this case from *Roper* by contending that there were issues of costs present in the latter. But Petitioners' offer in this case similarly failed to extinguish Respondent's continuing interest in obtaining costs. Moreover, if the collective action were successful, plaintiff may have received an incentive award. *See Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012).

District courts possess a wide variety of tools to manage collective actions under the FLSA. At bottom, Petitioners raise policy concerns, but the proper forum to address those concerns is Congress, which enacted §216(b) in 1938—and which has adhered to this understanding of collective actions ever since. The Court should not adopt a new rule of mootness that would constitutionalize this area of the law.

ARGUMENT

I. AN FLSA ACTION CANNOT BE RENDERED MOOT BY AN UNACCEPTED RULE 68 OFFER

A. An Unaccepted Offer of Judgment Does Not Render a Case Moot

There was only one offer of judgment in this case, and Respondent rejected it. As the district court put it, "[d]efendants contend, and Symczyk does not contest, that Symczyk 'never responded, effectively rejecting the Offer.'" Pet. App. 32 (citation omitted). Thus, Petitioners' position is that simply by making their offer of judgment, they mooted Respondent's claims, even though judgment was never entered on the terms offered and Respondent did not receive any of the offered relief.

Such a result would turn mootness doctrine on its head. This Court reaffirmed just last Term that "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 132 S. Ct. at 2287 (citation and internal quotation marks omitted). Here, the court could still have granted Respondent "effectual relief." Indeed, it could still grant her all the relief she sought. The offer *proposed* that the district court grant her relief, but the court never did; instead, it dismissed her claims as moot, and Respondent still has not received either a judgment or a single penny of relief.

Petitioners' mootness argument, if accepted, would create a paradox: By leaving Respondent without a penny in compensation while simultaneously failing to resolve her legal dispute with Petitioners, mooting the case would return both parties to the *status quo*

ante. Respondent would still have the same personal stake she had in the case to begin with, and the case would essentially be "unmooted." Petitioners' mere offer does not come close to satisfying their "burden of coming forward with the subsequent events that have produced th[e] alleged result" that this case is now moot. *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993).

Moreover, under Petitioners' theory, Respondent would not even have been able to *accept* the offer of judgment. According to Petitioners, once they made the offer, the case was moot and the federal judiciary had no jurisdiction. *See* JA 69-70. But if the court lacked jurisdiction, it could not have entered judgment in Respondent's favor, even if she had accepted the offer. Thus, Petitioners' position is that Respondent's claim was rendered moot because she was given a meaningless offer of something that she could never receive.

Even if a plaintiff could accept an offer under Petitioners' theory, their rule would present future plaintiffs with a Catch-22: Accepting a Rule 68 offer would mean giving up any hope of class-wide relief, but the only alternative would be dismissal. And in situations in which the amount of possible relief was unclear because discovery was necessary to determine the possible relief, plaintiffs would feel pressured to accept offers that were not complete out of fear that the district court would later determine that the offer had been a complete offer and dismiss the case.

This Court has never permitted a rejected Rule 68 offer to moot such an action. Petitioners have cited *Roper*, 445 U.S. at 332-33, for the proposition that an offer of judgment can moot a claim. Pet. 9. But in

Roper, the Court *entered* judgment in favor of the plaintiffs and tendered them relief, so the Court never reached the question of whether an offer of complete relief without judgment and tender of relief can moot a case. Indeed, in the collective action context, an offer of complete individual relief never fully satisfies the non-individual demands of the complaint, and a court cannot force a plaintiff to accept a suboptimal settlement. As then-Justice Rehnquist explained in his *Roper* concurrence:

> The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i. e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.

445 U.S. at 341 (Rehnquist, J., concurring). This case is far stronger than *Roper*, where "the District Court entered judgment in [plaintiffs'] favor, over [plaintiffs'] objection, and dismissed the action. The bank deposited the amount tendered into the registry of the court." *Id.* at 330 (majority opinion). Here,

Petitioners have not tendered, and Respondent has not received, so much as a penny.[2]

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[2] Petitioners claim (Pet. Br. at 4 n.3, 14 n.13) that Respondent conceded this issue. Respondent nowhere agreed that a *withdrawn* offer could moot a case, and Petitioners (at 4 n.3) use Respondent's statement that "[a]n offer of complete relief will generally moot the plaintiff's claim" to prove far too much. Respondent's language is by its terms general. It cannot mean that every offer moots every case, and it says nothing about offers that have expired or been withdrawn, or about whether FLSA cases can be mooted. To the contrary, Respondent specifically argued that the Rule 68 offer required a fairness review by the district court. *See infra* at 17-19. Petitioners also cite the framing of the question presented in the Brief in Opposition, but although that statement stated that the offer of judgment provided for complete relief on her individual claims, it did not agree that the offer mooted those claims, or that a rejected offer of judgment ever moots claims. And even if it had, that language again described only Petitioners' offer, not the fact that it had been withdrawn. Moreover, this Court has noted that "it is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993).

In any event, this Court has held that a respondent can seek affirmance of a ruling below on any ground raised below. *See*, *e.g.*, *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see also* Eugene Gressman et al., *Supreme Court Practice*, § 6.35, at 489 (9th ed. 2007). And the defects of the offer are a "predicate to an intelligent resolution" of the question presented and are fairly included within it. *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see also Jones* v. *United States*, 527 U.S. 373, 397 n.12 (1999) (opinion of Thomas, J.).

While the defects in Petitioners' offer should have been pointed out in the Brief in Opposition, the issues here are jurisdictional and the Court can appropriately consider them. Indeed, if Petitioners were correct about both waiver and mootness, it would suggest that a party could waive (to its detriment) the existence of subject-matter jurisdiction. [Continued]

The terms of Rule 68 itself confirm that a rejected offer cannot moot a case. Rule 68 states that "[a]n unaccepted offer is considered withdrawn." Fed. R. Civ. P. 68(b). Thus, Rule 68 makes clear that an unaccepted offer is not deemed accepted and treated as though the plaintiff had received the offered relief, even when she had not. Rather, it is deemed withdrawn and has no further role in the case except in a later proceeding to determine costs. Accordingly, by Rule 68's own terms, Petitioners' unaccepted offer was taken off the table, leaving Respondent with a claim that was still very much live.

B. Treating a Rejected Offer of Judgment as Though It Had Been Accepted and Judgment Entered on Its Terms Is Particularly Inappropriate in FLSA Cases

Treating an unaccepted Rule 68 offer as though it had been accepted is particularly inappropriate here, because this case arises in the FLSA context. Under the FLSA, *courts* must approve FLSA settlements (both for individual or collective actions); mere agreement of the parties is not conclusive. *See, e.g.*, *Lynn's Food Stores, Inc.* v. *United States*, 679 F.2d 1350, 1353 (11th Cir. 1982). The genesis of that rule lies in this Court's recognition, soon after the FLSA was enacted, that parties cannot waive FLSA rights, because "to allow waiver of statutory wages by agreement would nullify the purposes of the Act."

However, as the Court explained just last Term, "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. Subject-matter jurisdiction can never be waived *or forfeited*." *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 648 (2012) (emphasis added) (internal citation omitted).

Brooklyn Savings, 324 U.S. at 707. Because the FLSA is designed to prevent employees and employers from bargaining for inadequate wages and hours, Congress adopted "federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency." *Id.* at 706; *see also D.A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108, 113-15 & n.8 (1946).

To effectuate this nonwaiver doctrine, district courts must engage in fairness review before approving settlement of FLSA disputes. Under this approach, "federal supervision replaces private bargaining." *Walton* v. *United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) (Easterbrook, J.).[3] But no fairness review happened here, despite Respondent's requests to the district court (JA 110-12) and Third Circuit (JA 208-11).

The fairness review requirement suggests that Rule 68 offers are inapplicable to the §216(b) collective action context. By its plain language, Rule 68 circumscribes district court discretion. When a plaintiff accepts a defendant's Rule 68 offer to "allow judgment on specified terms," the clerk "*must* then

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[3] Fairness review is not tantamount to minimalist scrutiny. District courts conduct exhaustive analysis, often borrowing analogously from a six-factor settlement test for class actions under Rule 23(e), *see, e.g.*, *Collins* v. *Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 722 (E.D. La. 2008), to determine whether the outcome is fair and consistent with the "substantive labor rights underlying the claims," *id.* at 719. No similar process occurred here.

The only other process for private resolution of FLSA claims is 29 U.S.C. §216(c), which allows the Secretary of the Department of Labor to "supervise" a private settlement between an employee or group of employees and their employer. That process did not occur here, either.

enter judgment." Fed. R. Civ. P. 68(a) (emphasis added). That lack of discretion is at odds with the statutory purposes of the FLSA and this Court's nonwaiver doctrine. If parties can use Rule 68 agreements to short-circuit judicial scrutiny of FLSA settlements, they will achieve precisely what Congress sought to prevent: private contracting on wages and overtime. *Brooklyn Savings*, 324 U.S. at 706-07. Here, for example, under the rubric of Rule 68, Respondent would have to waive both her FLSA claim and her ability to pursue her §216(b) collective action in order to accept Petitioners' offer. Under Petitioners' view, this private offer and acceptance would occur absent any court or agency involvement—the very scenario this Court's nonwaiver doctrine is designed to prevent.

Such a result would also run headlong into the plain language of the Rules Enabling Act, which provides that the Federal Rules of Civil Procedure, including Rule 68, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). As construed by Petitioners, Rule 68 would operate to "abridge" or "modify" the statutory right to judicial monitoring of settlement agreements. *See Rubery* v. *Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178, 181 (W.D.N.Y. 2007) (expressing concern that "a Rule 68 offer may be wielded as a strategic weapon to frustrate the FLSA's very object").

Petitioners argued below that because they made a Rule 68 offer of judgment, rather than an offer of settlement, district court review was unnecessary. JA 419-20. But that is a distinction without a difference; as this Court repeatedly has noted, Rule 68 is nothing more than a procedural device to formalize settlement offers. *See, e.g., Marek*, 473 U.S.

at 5 (stating that Rule 68 is designed to "encourage settlement"); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 350 (1981). Forgoing fairness review of Rule 68 offers provides employees and employers a license to strike private bargains, even though the FLSA "is designed to prevent consenting adults from transacting about minimum wages and overtime pay." *Walton*, 786 F.2d at 306. These concerns, which are always weighty, are at their apogee in the context of a collective action,[4] since a court reviewing an agreement may consider greater interests than those of the individual plaintiff. Because no fairness review occurred here, Petitioners' Rule 68 offer has no legal effect, and Respondent's suit is not moot.

II. AN OFFER OF JUDGMENT THAT OFFERS RELIEF ONLY WITH REGARD TO A REPRESENTATIVE PLAINTIFF'S INDIVIDUAL CLAIMS DOES NOT MOOT AN FLSA COLLECTIVE ACTION

Even if an unaccepted offer of judgment could moot an individual action, it would not moot this case—which was brought not just on behalf of Respondent, but as a collective action. Article III does not compel courts to dismiss collective actions as moot where the defendant has sought to pick off the named plaintiff through a Rule 68 offer of judgment that offers no relief to the similarly situated employees on whose behalf the case was brought. *See Roper*, 445 U.S. at 339 (explaining that allowing defendants to use offers

[4] Indeed, even in the Rule 23 context, where Congress has not required court or executive agency approval of settlements, many courts have refused to apply Rule 68. *See, e.g., Schaake* v. *Risk Management Alternatives, Inc.*, 203 F.R.D. 108, 111 (S.D.N.Y. 2001) ("[I]t has long been recognized that Rule 68 Offers of Judgment have no applicability" to class actions).

of judgment to "pic[k] off" named plaintiffs before a ruling on class certification could be obtained would be "contrary to sound judicial administration").

Mootness doctrine is grounded in Article III's "case-or-controversy limitation on federal judicial authority," *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000), which requires that an individual possess a personal stake in the litigation to bring suit. At the same time, the Court has recognized the "flexible character of the Art. III mootness doctrine." *Geraghty*, 445 U.S. at 400.

Petitioners argue that because they offered Respondent relief before other plaintiffs had an opportunity to opt in, no one had a personal stake when their Rule 68 offer was made, and this case became moot. But under certain circumstances, the fact "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction." *McLaughlin*, 500 U.S. at 52.

Such circumstances exist here. First, §216(b) authorizes Respondent to maintain this case on behalf of herself *and* similarly situated employees. The Rule 68 offer did not resolve the collective action allegations in the complaint and therefore did not moot the case. Moreover, even if §216(b), standing alone, were insufficient to bring into the case the interests of the similarly situated employees on whose behalf the case was filed, this Court's jurisprudence clearly permits the use of the relation-back doctrine to relate the completed certification and opt-in process back to the filing of the collective-action complaint. And, finally, Respondent maintains a personal interest in the case proceeding as a collective action.

A. Rule 68 Should Not Be Read To Thwart Congress's Affirmative Choice in the FLSA To Enable Collective Actions

In enacting §216(b), Congress made an explicit affirmative choice in favor of collective actions. Yet Petitioners' brief quite tellingly eschews deep analysis of the FLSA. Because of §216(b), this Court need not break any new ground in this case—with respect to either Rule 68 or mootness. Rather, §216(b)'s text and history confirm Judge Scirica's decision below to apply to collective actions this Court's decisions holding that class actions are not moot even when the named plaintiff's claims become moot before class certification.

1. Congress Expressly Included a Collective Action Device in §216(b) To Facilitate the Efficient Resolution of Claims

Congress had a wide variety of enforcement mechanisms from which to choose when it designed the FLSA. Ultimately, Congress selected the collective action as the best means to promote the efficient resolution of workers' claims and to facilitate workers' ability to present their claims in court. *Every* enacted version of the FLSA has included a collective-action device. Congress has amended FLSA over a dozen times, but has declined to disturb the "similarly situated" phrase. Rather, Congress has employed it in other legislation. *See* 29 U.S.C. §626(b) (ADEA). As this Court has underscored, "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche*, 493 U.S. at 170. Even after *Hoffmann-La Roche*'s strong endorsement of the district court's discretion to manage collective-action

procedures, Congress did not see fit to alter the "similarly situated" language.

Collective actions "allow employees to redress violations that otherwise could not be remedied." Br. for the Sec'y of Labor and EEOC as Amicus Curiae at 7, *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012). "Because the Department of Labor has limited resources, it can enforce the FLSA only in a fraction of cases involving violations. Collective actions are a necessary complement to the Department's enforcement * * * ." *Id.*; *see also* Douglas D. Scherer & Robert Belton, Symposium, *Introduction: Class and Collective Actions in Employment Law*, 10 Emp. Rts. & Emp. Pol'y J. 351, 351 (2006) ("Collective actions are crucial for effective enforcement of the FLSA."). Although some employees bring their claims individually, many others cannot bring their claims at all. Their potential remedy is too small, or they cannot find representation, or they fear employer retaliation if they act on their own, or they do not understand their rights well enough to file an action on their own behalf.

Although a §216(b) collective action is not identical to a Rule 23 class action,[5] the two forms share many features. At the time of the FLSA's enactment, the term "similarly situated" was strongly associated with the class action. *E.g.*, *Saxton* v. *W.S. Askew Co.*, 35 F. Supp. 519, 521 (N.D. Ga. 1940). Congress intended §216(b)'s collective-action mechanism to serve the key purposes of class actions—efficiency,

[5] The Advisory Committee expressly stated in 1966 that Rule 23's standards were not meant to alter the treatment of §216(b). Fed. R. Civ. P. 23 advisory committee's note ("The present provisions of [§216(b)] are not intended to be affected by Rule 23, as amended.").

the easing of burdens on litigants, and the facilitation of suits that redress legal injuries of relatively small pecuniary value. *Compare Hoffmann-La Roche*, 493 U.S. at 170 (discussing the "lower individual costs" and "efficient resolution" resulting from §216(b)'s system), *with Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) (plurality opinion) (recognizing that Rule 23 is "designed to further procedural fairness and efficiency"). It was that similarity which led *Hoffmann-La Roche* to incorporate Rule 23's notice principles into the §216(b) context—even though Rule 23 mentions notice and §216(b) does not. 493 U.S. at 169-70. In reaching this conclusion, the Court grounded its analysis in the purposes of §216(b). Writing for the Court, Justice Kennedy explained that a collective action provides FLSA plaintiffs with "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Id.* at 170. Collective actions also benefit the judicial system, offering a means for the "efficient resolution *in one proceeding* of common issues of law and fact arising from the same alleged discriminatory activity." *Id.* (emphasis added).

The statute's history confirms the Court's reading. In weighing how to enforce FLSA rights, Congress believed that a collective-action mechanism was crucial. On the one hand, requiring each individual to bring a claim would place too great a burden upon employees. On the other, defending hundreds or even thousands of individual lawsuits would place too great a burden upon employers and courts. For example, Chairman of the House Committee on Labor William Connery, who introduced the House bill, was concerned with the "multifariousness" of potential lawsuits, asking an expert what would happen if "a thousand men" brought suit. *Joint*

Hearings Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor on S. 2475 and H.R. 7200, 75th Cong., at 461 (1937). *See also id.* at 69 (statement of Rep. Albert Thomas) ("[I]t is going to put an undue burden on the dockets of the Federal court"). Witnesses, including then-Assistant Attorney General Robert Jackson, testified in response that these were exactly the problems that the collective-action device addressed. *See, e.g.*, *id*. at 70 ("[I]f you had a hundred employees in one factory, and you take an assignment of all of their claims, the very purpose of this was to avoid a multiplicity of actions and to see that a single action was brought.").

The story did not change when, in 1947, Congress eliminated "representative actions" as part of the Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (1947). Congress made that amendment to prevent unauthorized agents, who never possessed any FLSA rights themselves, from bringing suits on behalf of thousands of employees. At the same time, the 1947 amendments reaffirmed the ability of *employees* to bring collective actions on behalf of themselves or similarly situated coworkers. As Representative Samuel Hobbs explained, "The only thing we are after by that provision is the unauthorized suing for people who do not want it done." 93 Cong. Rec. 1,560 (1947).

To paraphrase Justice Brandeis, the most important thing Congress did in 1947 was what it did *not* do: abolish the collective action. To the contrary, Congress took great care to reaffirm the availability of a collective action as a means of enforcing FLSA rights. The committee reports stated that "[c]ollective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves

and other employees similarly situated *may continue* to be brought in accordance with the existing provisions of the Act." H.R. Rep. No. 80-326, at 13 (1947) (Conf. Rep.) (emphasis added); S. Rep. No. 80-37, at 48; S. Rep. No. 80-48, at 49; *see also* 93 Cong. Rec. 2289 (1947) (statement of Senator Patrick McCarran) (noting that the bill "would have the effect of eliminating representative actions, while maintaining authority for collective actions").

The persistence of the FLSA's "similarly situated" language signals Congress's unwavering commitment, for three-quarters of a century, to the collective-action device—both before and since *Hoffmann-La Roche*. The approach has endured despite the many changes to other portions of §216(b) and to Rule 23's stipulations for class actions. If such a longstanding policy is to be substantially modified, it should be by the legislature, rather than through judicial creation of a quasi-constitutional barrier under the rubric of mootness.

2. Petitioners' Rule Would Defeat the Legislative Purpose for Collective Actions Established by §216(b)

The text, structure, and legislative history of §216(b) make clear that Congress intended the collective-action device to promote efficient resolution of claims. Petitioners' attempt to pick off Respondent's claims undercuts Congress's carefully crafted system. They seek to manipulate Rule 68 to deny similarly situated employees a genuine chance to opt in to the suit—even though that is precisely the approach that Congress provided. This Court soundly rejected the tactic of picking off named plaintiffs prior to a decision on class certification in *Roper*, and the case for doing so is even stronger in the §216(b) context.

After all, the FLSA was meant to protect those employees whose bargaining power vis-à-vis their employers was weakest; such employees have a special need for the bargaining advantages of large-scale litigation. Efficiency considerations may also be heightened, because claims for lost wages may be relatively small, and the costs of litigation may be prohibitive for the individual. And whereas class actions proceed under a federal rule, §216(b) reflects an express, carefully considered, and continually calibrated legislative provision for collective suits.

The time-intensive nature of the opt-in process further underscores the importance of affording prospective plaintiffs a sufficient opportunity to join a suit. Although district courts have discretion to facilitate notice to possible plaintiffs, §216(b) itself does not mention notice. When available, notice is essential to realizing the efficiency goals of collective actions by making others cognizant of litigation. *See Hoffmann-La Roche*, 493 U.S. at 172 ("Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action."). Pick-offs would prove particularly troublesome for collective actions under §216(b) because it takes time for a lead plaintiff to provide other employees with notice of the suit and for prospective plaintiffs to opt in.

The FLSA's statute of limitations would further make a "picking off" strategy particularly effective at insulating defendants from a collective action in an FLSA suit. Under the FLSA, the statute of limitations for a named plaintiff runs until the complaint is filed. 29 U.S.C. §256(a). For putative opt-in plaintiffs, however, the statute of limitations

continues to run until the new plaintiff files a written consent to join. *Id*. §256(b). Because of these provisions, a strategy of "picking off" successive individual plaintiffs would be particularly effective at insulating defendants from a collective action in an FLSA suit. With each successive mooting of a named plaintiff, the universe of potential plaintiffs who can opt in to the suit shrinks through the operation of the statute of limitations. As one court has put it:

> [D]efendants can bleed value out of a large pool of outstanding FLSA claims in a way they cannot with a comparable group of Rule 23 claims. "Picking off" §216(b) plaintiffs delays the point at which any collective action can be provisionally certified. This stalls notification to potential "similarly situated" parties. The longer it takes for an FLSA class to mature, the lower members' damages will be once they opt in, given the two-year limitations period.

Nash v. *CVS Caremark Corp.,* 683 F. Supp. 2d 195, 200 (D.R.I. 2010) (internal citation omitted).

In addition to depriving employees of the ability to join a collective action, as Congress intended, the outcome urged by Petitioners would upend the district court's ability to manage §216(b) collective-action proceedings. This Court has recognized the many benefits of district court involvement in §216(b)'s notice and certification process. Those benefits include ensuring that notice "is timely, accurate, and informative," "settling disputes about the content of the notice before it is distributed," countering "the potential for misuse of the class device," and "setting cutoff dates to expedite disposition of the action." *Hoffmann-La Roche*, 493 U.S. at 171-72. Lower courts, in turn, have established processes for

"managing collective actions in an orderly fashion," *id*. at 173, and accordingly have set forth schedules for discovery and certification motions, *see, e.g.*, JA 62 (district court scheduling order).

If defendants can unilaterally moot collective actions early in the case, however, plaintiffs will rush to provide (inevitably haphazard) notice to the other similarly situated employees they can identify—likely before the district court has the chance to become involved. Defendants will then race to make offers of judgment before other plaintiffs have filed consent forms. And district courts will be deprived of the ability "'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Hoffmann-LaRoche*, 493 U.S. at 173 (citation omitted).[6] Here, for example, the district court set a precertification discovery schedule of ninety days, but the Rule 68 offer was allowed to displace that schedule. The purpose of Rule 68, after all, is to encourage settlement, not to afford defendants an end-run around discovery. For that reason,

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[6] Moreover, under Petitioners' view, future plaintiffs will have every reason to front-load their allegations of similarly situated coworkers—and to thereby include allegations that fall below the pleading standards that this Court has understood Rule 8 to incorporate. Indeed, given this Court's insistence on allegations that are "plausible"—and the underlying justifications for such a rule articulated in both *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007)—it would seem entirely backward to sanction a regime in which plaintiffs must seek to preempt potential pick-offs through potentially overbroad (and under-substantiated) allegations in their original complaint. And it is often unfeasible for plaintiffs to file their motion for class certification alongside a complaint. *E.g.*, *Weiss*, 385 F.3d at 347–48; *Schaake*, 203 F.R.D. at 112; Fed. R. Civ. P. 23(c)(1) advisory committee notes (2003).

Respondent argued below that a Rule 68 offer cannot moot a case at least until discovery has taken place. JA 184, 208-11.

The threat of a Rule 68 pick-off is particularly problematic in FLSA suits because disagreements over the meaning of terms such as "similarly situated" complicate pre-certification discovery. *See Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008); *Acevedo* v. *Ace Coffee Bar, Inc.*, 248 F.R.D. 550, 554 (N.D. Ill. 2008) ("Collective actions under Section 216(b) necessitate a broader scope of discovery in order to identify similarly situated employees who may wish to opt-in to the suit."). The threat of such pick-offs encourages a "race to the courthouse" that serves neither litigants nor the courts.

To be sure, Rule 68 settlements can at times promote efficiency. But a Rule 68 pick-off that prematurely cuts off a suit altogether is antithetical to that goal. Rather than settling all claims in one suit, employers who seek to pick-off potential lead plaintiffs may have to settle many different claims individually. That is far less efficient, particularly for courts.

If there is any doubt about this danger, the facts of this case serve as a vivid reminder. *See supra*, at 4-6. Petitioners' theory would ensure that a plaintiff "effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained." *Roper*, 445 U.S. at 339; *see also id.* (stating that "[r]equiring multiple plaintiffs to bring separate actions * * * obviously would frustrate the objectives of class actions" and "would invite waste of judicial resources by

stimulating successive suits brought by others claiming aggrievement").

Congress created the FLSA three-quarters of a century ago. And although legislators have continued to modify the Act over the years, Congress has abstained from altering §216(b)'s provision for "similarly situated" individuals. That language forms the heart of the collective-action device. Petitioners' rule, which would enable a plaintiff to be picked off just a few weeks after filing a lawsuit, would subvert the §216(b) mechanism altogether.

B. Claims of As-Yet Uncertified Class Members Relate Back to the Filing of the Complaint and Thereby Avoid Mootness

It would be antithetical to the text, purpose, and history of §216(b) to allow a Rule 68 offer to moot a collective action. Because Petitioners' offer of judgment did not offer relief—or even the possibility of relief—to similarly situated putative opt-in plaintiffs, the case is not moot.

1. The Plaintiff's Allegations in the Complaint Control the Mootness Inquiry

The complaint in this case was called a "COLLECTIVE ACTION COMPLANT." JA 21. The $7500 offer, however, was derived solely from Respondent's individual harm. JA 77-79. Complete relief on all causes of action alleged in the complaint would necessarily have included compensation for all similarly situated employees on whose behalf the complaint was brought, a class estimated to contain thousands of people. JA 27.

Petitioners argue that because other employees must opt in to become party plaintiffs, the similarly situated employees are only "hypothetical claimants" whose claims cannot be taken into account in determining mootness. But the point of Respondent's argument is that these claimants are *not* hypothetical and that Congress has given her the chance to prove it. Respondent has alleged that this case is a collective action, brought not only on her own behalf, but on behalf of other similarly situated employees. If this case is a collective action, then, whether or not Respondent's individual claims are moot, the federal courts have jurisdiction. Thus, even if Respondent's claims would be moot if this case were an individual action, the federal courts maintain jurisdiction to reach the opt-in and certification stages as part of their jurisdiction to determine their jurisdiction. *See United States* v. *Ruiz*, 536 U.S. 622, 628 (2002); *see also Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 644 (2006) (noting that a federal court always has "authority to determine its own jurisdiction to deal further with the case").

This Court, just last Term in *Knox* v. *SEIU*, recognized that the allegations of a complaint control the mootness inquiry. In that case, the defendant, a labor union, claimed that it had provided all the relief the plaintiffs were due by sending each member of the class a dollar in the mail. This Court rejected that argument, saying it was the plaintiff's *allegations* that control the inquiry. 132 S. Ct. at 2287-88 (finding the case not moot because "Petitioners *argue* that the notice that the SEIU sent was improper" and because "petitioners *allege* that the union has refused to accept refund requests by fax" (emphasis added)).

In the class action context, a similar principle has been applied. For example, then-Justice Rehnquist found *Roper* not moot because "the defendant has not offered all that has been requested in the complaint (*i. e.*, relief for the class)." *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring).[7] And in the §216(b) context, *Hoffmann-La Roche* acknowledged that putative plaintiffs' claims are not merely hypothetical, and it permitted discovery into the names and addresses of similarly situated employees on whose behalf a collective action was brought. It recognized that information about those employees was "relevant to the *subject matter* of the action" even before they opted in. 493 U.S. at 170 (emphasis added). In other words, from the time a collective action is filed, the collective action allegations are part of the "subject matter of the action." *Id*.

What was true in *Knox* and *Roper*, which involved judge-made class actions, is far truer here, where Congress has expressed a clear policy preference that FLSA actions be undertaken collectively under §216(b).

2. Under This Court's Jurisprudence, the Completed Certification and Opt-in Process Relate Back to the Filing of the Collective Action Complaint

Notwithstanding the collective action allegations in Respondent's complaint, Petitioners maintain that this case is moot because the certification process has

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[7] The majority in *Roper* similarly looked to *allegations*, allowing the named plaintiffs' assertions of an economic interest to satisfy the personal-stake requirement, even in the face of evidence that the named plaintiffs retained no actual economic interest. *See* 445 U.S. at 334 n.6; *id.* at 336.

not yet happened. But when a controversy with a named plaintiff becomes moot before there was a reasonable opportunity for the certification process to run its course, "the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52. Here, the completed certification and opt-in process relate back to the filing of the collective action complaint. Accordingly, this case is not moot.

This Court first discussed the relation back of certification in *Sosna* v. *Iowa*, 419 U.S. 393 (1975), a class action challenge to Iowa's one-year residency requirement for bringing divorce proceedings in its state courts. Although the named plaintiff had lived in Iowa for more than one year by the time the case reached this Court, then-Justice Rehnquist's opinion for the Court held the case not moot due to its class action status. *Id*. at 402. The Court 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 the years since *Sosna*, this Court has applied the relation-back doctrine to preserve jurisdiction over claims that 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.'" *McLaughlin*, 500 U.S. at 52 (quoting *Geraghty*, 445

U.S. at 399). For example, in *McLaughlin*, the Court applied the relation-back doctrine to a case challenging the manner in which a county provided probable cause determinations to people arrested without a warrant, holding that the case was not moot even though the named plaintiffs had all received probable cause determinations or been released by the time the class was certified. *Id*.

Likewise, in *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978), a class challenge to a rule allowing the State to file exceptions to proposed findings made by masters of the juvenile court, the Court applied the relation-back doctrine to hold that the case was not moot even though the State had either withdrawn its exceptions or completed the adjudicatory process with regard to all the named plaintiffs before the district court certified the case. *See also Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975) (holding that a class action challenging various aspects of pre-trial detention in Florida was not moot even though it was not clear whether the named plaintiffs' claims had been mooted before any unnamed class members formally became part of the proceedings).

Because certification may relate back to the filing of the class action complaint, the timing of certification "is not crucial" to the mootness inquiry. *Geraghty*, 445 U.S. at 398. 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," *McLaughlin*, 500 U.S. at 52, even though such unnamed members of a putative class are not parties to the litigation until after a class is certified. *See Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011).

As the Third Circuit correctly held, the relation-back doctrine properly applies here. If Rule 68 offers to named employees render collective actions moot, defendants could unilaterally moot collective actions as soon as they were filed, preventing the court from being able to "rule on a certification motion," *Sosna*, 419 U.S. at 402 n.11, thwarting the opt-in process, and precluding any appellate review of adverse decisions to that effect by the district court.

This case perfectly illustrates the problem. At the time of the offer, Respondent had not yet moved for conditional certification (as Petitioners note at 24), and for good reason: The district court had not yet set the schedule pursuant to which she would engage in discovery concerning the pool of potential opt-in plaintiffs (a period that was ultimately set for ninety days). Only after that ninety-day period was she to move for certification. Petitioners truncated that process by filing their Rule 68 offer. The failure to certify a class, contrary to Petitioners' intimations, had nothing to do with a lack of vigorous advocacy, and everything to do with respecting the rules laid down by the district court.[8] To permit a Rule 68 offer to terminate the whole case before it has even begun is tantamount to allowing defendants to "play ducks and drakes with the judiciary." *Baker* v. *Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting). If such an offer rendered the collective action moot, defendants could successively manipulate federal court jurisdiction, keeping the matter from ever being resolved as a collective action. Under these circumstances, the completion of the certification and opt-in process should relate back to the filing of the

[8] This case does not involve a dilatory plaintiff, where the result may be different. *See Espenscheid,* 688 F.3d at 874.

collective action complaint "to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52.

3. The Court of Appeals Correctly Applied the Sosna *Line of Cases to Collective Actions Under §216(b)*

Although the relation-back doctrine formed the basis for the Court of Appeals' decision, *see* Pet. App. 28, Petitioners address *Sosna* only in a footnote, contending that it has "no apparent independent relevance" because "the dispute here is not 'capable of repetition' between the same *parties*." Pet. Br. 19 n.15 (emphasis added). But the relation-back doctrine is appropriate in the collective-action context "where otherwise the *issue* would evade review." *Sosna*, 419 U.S. at 402 n.11 (emphasis added).

What preserved jurisdiction in *Sosna*, after all, was not that the dispute was capable of repetition between the *same* parties, but that *other* members of the class were subject to the residency requirement. *See Sosna*, 419 U.S. at 400 (noting that although the durational requirement might not be enforced again against the named plaintiff, it would be enforced against other class members). And cases applying the relation-back doctrine since *Sosna* have focused on whether the issue remains live for the other similarly situated people on whose behalf the case was brought, not on whether it remains live for the named plaintiff. *See, e.g.*, *McLaughlin*, 500 U.S. at 52; *Swisher*, 438 U.S. at 213 n.11; *Gerstein*, 420 U.S. at 110 n.11. Here, Respondent has alleged the existence of similarly situated plaintiffs. She should have an opportunity to demonstrate that fact, and not have her lawsuit pretermitted on the basis of Petitioners' novel interpretation of mootness doctrine.

Petitioners also argue (at 19) that the claims in this case are not "inherently transitory." As this Court recognized in *Roper*, however, pick-off concerns render collective actions transitory in effect. 445 U.S. at 339. If a Rule 68 offer can moot a named plaintiff's claims against her will, "a decision on class certification could, by tender to successive named plaintiffs, be made just as difficult to procure in a case" like this one as in cases with "inherently transitory" claims. *Zeidman* v. *J. Ray McDermott & Co.,* 651 F.2d 1030, 1050 (5th Cir. Unit A July 1981). Where the defendants can "pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage. This result is precisely what the relation back doctrine * * * condemns, and [there is] no difference when it is caused by the defendant's purposive acts rather than by the naturally transitory nature of the controversy." *Id*.

In a recent decision, *Pitts* v. *Terrible Herbst, Inc*., 653 F.3d 1081 (9th Cir. 2011), Judge Bybee, for a unanimous panel, reiterated this precise point, ruling that a timely motion for class certification made after the individual plaintiffs received a Rule 68 offer of judgment would relate back to the time the action was filed. As the Ninth Circuit explained, "a claim transitory by its very nature and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review." *Id.* at 1091. That is to say, this Court's mootness analysis does not turn on *why* a claim for collective relief is transitory; it merely turns on the fact that it *is* transitory, through no fault of the plaintiff's. In short, "this set of facts fits within a 'narrow class of cases' where a contrary rule would lead to the 'reality' that 'otherwise the issue would evade review,'" and,

accordingly, the Court's "precedents provide for the maintenance of this action." *Roper*, 445 U.S. at 341-42 (Rehnquist, J., concurring) (quoting *Sosna*, 419 U.S. at 402 n.11, and *Gerstein*, 420 U.S. at 110 n.11).

Petitioners also assert that, because this case concerns the FLSA and not Rule 23, the *Sosna* line of cases does not apply. There are, of course, differences between FLSA collective actions and Rule 23 class actions, but they do not affect the applicability of the relation-back doctrine.

To be sure, as Petitioners stress, similarly situated employees in FLSA collective actions must "opt in" by filing written consent with the court, and they are not bound by the judgment if they do not file such consent. *See* 29 U.S.C. §216(b). But the relation-back doctrine is not, at bottom, about whether employees who bring collective actions have the "power to bind those who do not appear." Pet. Br. 9. Rather, the relation-back doctrine is concerned with the people who *are* included in the class at the *end* of the certification process. Under relation back, those individuals who are part of the class when the certification process is complete are deemed to have been full participants in the case from the beginning.

Moreover, that people who are not part of the class are not bound by the results of the case is not a difference between collective and class actions: In both FLSA collective actions and Rule 23 class actions, individuals who are not included within the class at the end of the certification process are not bound by the case's result, whether they are not included because they are not similarly situated, or because they did not opt in (in an FLSA case), or because they opted out (in a Rule 23 class action).

Put differently, the main difference between collective and class actions arises from the procedures used to determine the composition of the certified class. That difference has important implications for civil practice, but it has no relevance to whether a properly *completed* certification process relates back. In collective actions, as in class actions, once the certification process is complete, there is a class of individuals whose interests are sufficient to create an Article III case or controversy even if the named plaintiff's claim is moot. And in collective actions, as in class actions, there will be circumstances in which the named plaintiff's claim will become moot before the court can reasonably expect to complete the certification process. *See Sandoz*, 553 F.3d at 920 ("The status of a case as being an 'opt in' or 'opt out' class action has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment."). Accordingly, in collective actions, as in class actions, the relation-back doctrine should apply to relate the completed certification process back to the filing of the complaint so that the process can be allowed to play out properly.

Congress's express authorization of collective actions under §216(b) militates only further in favor of a view of mootness at least as flexible as that recognized in the class action context. Class action suits proceed pursuant to rules promulgated under the Rules Enabling Act, *i.e.*, rules that "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Although Congress lacks the authority to authorize judicial resolution of cases falling outside of Article III's case-or-controversy requirement, *see, e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), Congress certainly has the power to relax prudential constraints on the judicial

power, *see, e.g.*, *Md. People's Counsel* v. *FERC*, 760 F.2d 318, 322 (D.C. Cir. 1985) (Scalia, J.), and to exercise at least some control over the parameters of a "case" or "controversy," *see FEC* v. *Akins*, 524 U.S. 11, 22-25 (1998).

As such, Congress's direct involvement renders the relation-back doctrine especially appropriate here, because allowing defendants unilaterally to deprive federal courts of jurisdiction over collective actions would directly thwart congressional policy. Applying the relation-back doctrine helps ensure that defendants will not be able to cut collective actions short, and that employees will be able to maintain cases on behalf of "themselves and other employees similarly situated" in the manner envisioned by Congress. *See Hoffmann-La Roche*, 493 U.S. at 173 ("The broad remedial goal of the statute should be enforced to the full extent of its terms.").

Finally, despite Petitioners' efforts to the contrary, it bears emphasizing that the line of cases beginning with *Sosna* sits comfortably within this Court's approach to mootness, which is to insist upon a personal stake requirement but to adapt that requirement to fit unusual situations. In particular, the Court has long recognized that cases are not moot when the defendant has voluntarily ceased the challenged conduct, *see, e.g.*, *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953), and when the challenged action is "capable of repetition, yet evading review." *See, e.g., S. Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

Both the "capable of repetition, yet evading review" and "voluntary cessation" exceptions to mootness show a concern with issues that arise repeatedly, but have a tendency to evade court review by becoming

moot prior to judicial resolution. Under the voluntary cessation doctrine, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "[I]f it did, the courts would be compelled to leave [t]he defendant * * * free to return to his old ways." *Id*. at 289 n.10 (citation and internal quotation marks omitted). Similarly, the "capable of repetition, yet evading review" exception usually applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis* v. *FEC*, 554 U.S. 724, 735 (2008) (internal quotation marks and citations omitted). The Court has recognized, however, that the exception may also apply where the controversy is capable of repetition, even when not between the parties to the original suit. *See Honig* v. *Doe*, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting) (describing a number of cases as "dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large without ever reaching us" (emphasis omitted)). As *Sosna* and its progeny make clear, claims for class relief fall into this latter category.

These exceptions reaffirm the flexibility of mootness doctrine. Petitioners' allusions to the contrary notwithstanding, "if mootness were simply 'standing set in a time frame,' the exception[s] to mootness * * * could not exist." *Laidlaw*, 528 U.S. at 190; *see also Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring) ("If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we

would have no more power to decide lawsuits which are 'moot' but which also raise questions which are capable of repetition but evading review than we would to decide cases which are 'moot' but raise no such questions.").[9]

Moreover, these exceptions reaffirm the general extent to which defendants should not be able to manipulate federal court jurisdiction to ensure that their actions are unreviewable. *Cf. Pap's A.M.*, 529 U.S. at 288 (noting that the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness"). Otherwise, courts' efforts would be wasted on cases that never reach judicial resolution. *See Laidlaw*, 528 U.S. at 191-92 (discussing "sunk costs" to the judicial system as a reason for the differences between standing and mootness). And the parties and public would never have "the legality of the practices settled." *W.T. Grant Co.*, 345 U.S. at 632.

Like the situations in which these exceptions apply, if Petitioners' offer rendered this case moot, defendants would be able to manipulate jurisdiction by violating the minimum-wage and overtime rights of their workforces, then making offers of judgment

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[9] *See also United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 & n.2 (1950). *Munsingwear* stands for the proposition that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not *in fairness* be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co*. v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (emphasis added). Such fairness concerns would be irrelevant if Article III inflexibly barred any subsequent exercise of the judicial power once a case became moot.

seriatim to any employees who brought collective actions, ensuring that they never have to face class-wide liability. They would "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Roper*, 445 U.S. at 339. And, even if the defendants had committed widespread violations, they could avoid having "the legality of the practices settled." *W.T. Grant Co.*, 345 U.S. at 632. In short, the considerations that underlie the "capable of repetition, yet evading review" and "voluntary cessation" mootness exceptions apply here as well, reinforcing the conclusion that Petitioners' Rule 68 offer did not moot the case.

Indeed, the relation-back doctrine can be understood as an application of the "capable of repetition, yet evading review" exception in the specific context of a pre-certification collective/class action. Like the exception, the relation-back doctrine focuses on whether the underlying issue will arise again, since "[t]he question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968). And like that exception, it looks to whether the issue will evade review if the case is declared moot. When translated into the collective action context, the doctrine requires that other similarly situated individuals be subject to the violation about which the named plaintiff complained, rather than requiring that the named plaintiff herself be expected to be subject to that same violation.

Simply put, the court of appeals' use of the relation-back doctrine in this case is not only

consistent with *Sosna* and its successors, but is entirely faithful to the core principles undergirding this Court's mootness jurisprudence—principles that compel the result reached by Judge Scirica's opinion below.

C. Respondent Has an Independent Personal Stake in Bringing a Collective Action

1. Even apart from the relation-back doctrine, this case is not moot because Respondent has a personal stake in the case's proceeding as a collective action. In *Roper*, 445 U.S. 326, the Court considered whether named plaintiffs could appeal the denial of class certification where the district court had entered judgment in their favor on a rejected offer of judgment and the defendants had deposited the amount tendered in the court's registry. Determining that resolution of the issue "require[d] consideration only of the private interest of the named plaintiffs," the Court held that "[n]either the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id*. at 332-33. The Court found such an interest in the named plaintiffs' "desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation." *Id*. at 334 n.6.

Likewise, Respondent has a continuing economic interest in this case. To begin with, Petitioners' Rule 68 offer of judgment was expressly "exclusive of attorneys' fees and costs accrued to date" and "represent[ed] the total amount Defendants shall be obligated to pay on account of any liability claimed herein." JA 80. Accordingly, the offer did not make her whole, and the district court should have

maintained its jurisdiction over the case. A separate letter accompanying the offer, however, stated that the offer was for "$7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and []expenses as determined by the Court." JA 79.[10] But even this version of the offer did *not* settle the scope of attorneys' fees, costs, and expenses, leaving those issues—in which Respondent unquestionably has a personal stake—for subsequent resolution by the district court. *Cf. Townsend* v. *Benjamin Enters.*, 679 F.3d 41, 58-60 (2d Cir. 2012) (rejecting a challenge to an award of attorney's fees that accrued after the rejection of a Rule 68 offer). The Petitioners' offer thus created two unresolved issues—(1) which writing represented the actual offer, and (2) how large the fees and costs would be if "determined by the Court"—each of which presents an independent reason why she continues to have an individual, personal stake.

Moreover, even apart from these unresolved questions, Respondent has a continuing interest in fees because Petitioners did not offer all of the fees Respondent could be awarded for the work already completed in the case. If Petitioners offered fees at all, they offered an amount of fees that would be determined by the district court. JA 77. A court considering fees in a case brought as a collective

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[10] It was and remains unclear how Petitioners calculated these fees and costs. Petitioners' offer for $7,500 was based on a calculation of unpaid wages and liquidated damages of $6,900. JA 78-79. If Petitioners intended the offer's residual $600 to cover the entirety of Respondent's fees, costs, and expenses, such a calculation is surely inadequate given the amount of the filing fee alone. *See* JA 1 (Docket Entry #1, indicating that Respondent paid a $350 filing fee).

action, but in which judgment was entered before the certification process took place, might not award full fees for all time already spent on the case, because the collective action allegations were not successful. *See, e.g., Barfield* v. *N.Y.C. Health & Hospitals Corp.*, 537 F.3d 132, 151-52 (2d Cir. 2008) (upholding the reduction of fees for failure to secure certification of a collective action). However, if that same case proceeded through certification and was successful on behalf of a class, the court might award full fees for that same time spent. In other words, the amount of fees awarded for time already spent on the case may be greater if the case proceeds as a collective action than if judgment were entered on the Rule 68 offer. Thus, as in *Roper*, Respondent has a continuing interest in "fees and expenses that have been incurred in this litigation." 445 U.S. at 334 n.6.

Moreover, the possibility of an incentive award gives Respondent yet another continuing economic interest in seeing this case proceed as a collective action. Courts have generally recognized that named plaintiffs can receive incentive awards at the conclusion of class action litigation to compensate them for their services to the class. *See, e.g.*, *Staton* v. *Boeing Co.*, 327 F.3d 938, 976-77 (9th Cir. 2003) (listing cases approving incentive awards in Rule 23 class actions). And as a unanimous Seventh Circuit opinion by Judge Posner recently explained, incentive awards for lead plaintiffs are equally appropriate under the FLSA given that named plaintiffs in FLSA collective actions and Rule 23 class representatives perform similar services and take on similar risks. *See Espenscheid,* 688 F.3d at 877 ("There is no relevant difference between the collective, consisting of opt-ins, and the class, consisting of class members minus the opt-outs" for incentive award purposes);

2 *Fair Labor Standards Act* 19-204-05 (Ellen C. Kearns et al. eds., 2d ed. 2010) ("[S]everal courts have approved significant incentive awards for class representatives in FLSA actions."). Respondent's potential entitlement to an incentive award provides her with a continuing personal stake beyond her individual damages. "The prospect of [an incentive] award is akin to a damages payment agreed in a settlement to be contingent on the outcome of the appeal; and the prospect of such a payment, though probabilistic rather than certain, suffices to confer standing." *Espenscheid*, 688 F.3d at 875 (internal citations omitted).[11]

2. Even if she did not have a continuing economic interest in the case, Respondent would still have a sufficient personal stake in the case for it to proceed. In *Geraghty*, this Court considered whether a prisoner who brought a class action challenge to the Parole Commission's parole release guidelines could appeal the denial of class certification after he was released from prison. The Court concluded that he could, holding that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." 445 U.S. at 404. Even if his individual claim on the merits has expired, a named plaintiff can retain "a 'personal stake' in

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[11] *See also Leigh* v. *Bottling Grp., LLC*, No. 10–0218, 2012 WL 460468, at *7 (D. Md. Feb. 10, 2012) (noting that the lead plaintiff spent hours gathering information and that "the policy underlying the FLSA * * * would appear to be served by providing a modest incentive to plaintiffs who take such initiative and assume such risk"); *Diaz* v. *Scores Holding Co.*, No. 07 Civ. 8718(THK), 2011 WL 6399468, at *3 (S.D.N.Y. July 11, 2011).

obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.*

Crucially, class certification in *Geraghty* had been *denied*, but the Court still deemed the case not moot. So long as the action might still be able to proceed as a class action (*e.g.*, if the denial of certification were reversed), the Court held, it presents a "dispute capable of judicial resolution." *Id.* at 403. In other words, the mere possibility that the denial of certification might be reversed was sufficient. And that holding was announced in a case where counsel for the plaintiff cheerfully admitted that his client could "obtain absolutely no additional personal relief." Oral Arg. Tr. at 25 (No. 78-572).

Here, Respondent retains a sufficient personal stake in this case proceeding as a collective action to allow it to continue. At all times in this case, Respondent sought to represent not only herself, but also other employees similarly situated, as authorized by §216(b). She has "continue[d] vigorously to advocate [her] right to have a class certified." *Geraghty,* 445 U.S. at 404. Indeed, although she personally would have benefited from accepting the Rule 68 offer, she did not accept it out of concern for the class obtaining relief. *See Roper*, 445 U.S. at 332 ("The factual context in which this question arises is important. At no time did the named plaintiffs accept the tender in settlement of the case."). Under these circumstances, "notwithstanding the rejected offer of judgment, the proposed [collective] action continues to involve 'sharply presented issues in a concrete factual setting' and 'self-interested parties vigorously advocating opposing positions,'" all of which is sufficient to satisfy Article III. *Lucero* v. *Bureau of*

Collection Recovery, Inc., 639 F.3d 1239, 1249 (10th Cir. 2011) (quoting *Geraghty*, 445 U.S. at 403).

Petitioners imply their disagreement with *Geraghty*, but they have not asked that it be overruled. And this case is, in fact, far easier than *Geraghty*. For although the *Geraghty* Court suggested that such a personal stake exists in the abstract, it certainly exists in cases such as this one—where Congress has expressly authorized individuals to proceed on behalf of others.

Petitioners (at 25) also claim that *Geraghty* "explicitly limited its decision to cases in which the trial court ruled on a certification motion *before* expiration of the plaintiff's claim." But *Geraghty* does not address a circumstance where, as here, a defendant precipitously sought to pick off a plaintiff before a class could be certified. And Petitioners' reading of *Geraghty*'s footnote 11 looks more plausible than it really is because they omit the first sentence of the following passage:

> The "relation back" principle, a traditional equitable doctrine applied to class certification claims in *Gerstein* v. *Pugh*, serves logically to distinguish this case from the one brought a day after the prisoner is released. *See* 1221 n.15. If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action.

445 U.S. at 404 n.11 (citation omitted). The language, when read as a whole, does not address a case (such as this one) in which a plaintiff undoubtedly had a personal stake when the complaint was filed. Rather, as the first sentence makes clear, the Court was

addressing a situation in which the plaintiff *never* had standing, even at the time she filed her complaint. Earlier language in the footnote confirms that the Court meant to rule out only "the extreme feared by the dissent": that plaintiffs who had never suffered "actual, concrete injury" would be granted standing. *Id.* Had Congress not abolished "representative actions" in 1947, *those* suits under the FLSA may have raised such concerns. But collective actions under the modern §216(b), where the original named plaintiff unquestionably had standing when she filed suit, are a different matter altogether.

Indeed, to read that one sentence in isolation, as Petitioners do, would render *Geraghty* inconsistent with cases decided both before and after it. *Gerstein* specifically noted that "the record does not indicate whether any of [the plaintiffs] were still in custody awaiting trial when the District Court certified the class." 420 U.S. at 110 n.11. And as *McLaughlin* explained, "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction." 500 U.S. at 52.

In any event, there is no relevant difference between when the case is on appeal from the denial of class certification and when the district court has not yet had the opportunity to rule on class certification in the first instance: In both situations, there is a class of similarly situated people who have had a case brought on their behalf and who have a live controversy with the defendants, but who are not yet part of a certified class. Accordingly, in both situations, the plaintiff retains "a 'personal stake' in obtaining class certification sufficient to assure that

Art. III values are not undermined." *Geraghty*, 445 U.S. at 404.

Indeed, *Geraghty* illuminates Respondent's fundamental position: First principles of mootness do not bar this action. *Geraghty* began with those first principles, stating that the case or controversy requirement "limits the business of federal courts to 'questions presented in an adversary context['] * * * and it defines the 'role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.'" *Id.* at 396 (quoting *Flast,* 392 U.S. at 95). *Geraghty* recognized that in cases such as this, where the merits are not yet at issue, interference with separation of powers is at its least likely. *See id.* at 404 n.11 ("The judicial process will not become a vehicle for concerned bystanders * * * because the issue on the merits will not be addressed until a class with an interest in the outcome has been certified." (citation and internal quotation marks omitted)). And *Geraghty* held that, consistent with those first principles, a case brought on behalf of a class can continue even if the named plaintiff's claim becomes moot before a class is certified.

D. Petitioners' Policy Concerns Should Be Addressed to Congress and Do Not Justify Constitutionalizing a Remedy

At bottom, Petitioners and their *amici* lodge a policy objection to the decision below. They fear that it will cause suits to linger and reduce business certainty. Pet. Br. 7; Chamber Br. 11-12. These concerns are both unfounded and irrelevant. They are unfounded because the FLSA has operated for three-quarters of a century without such problems.

The Fifth Circuit has expressly held that pre-certification offers of judgment do not moot class actions since 1981, and many other courts have followed suit, yet Petitioners offer nothing to suggest that these decisions have actually created such problems. Moreover, to the extent that §216(b) ever provokes the concerns that Petitioners and their *amici* evoke, there is an easy solution: Pursue statutory amendment of §216(b) either to do away with the "similarly situated" action or to impose any number of other legislative limits.

Congress has not seen fit to act, however, and for good reason. District courts wield a wide variety of tools that address Petitioners' policy concerns. For example, district courts possess broad discretion to manage cases—a "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also* 28 U.S.C. §1657(a). And in the context of §216(b) specifically, this Court has recognized that "the potential for misuse of the class device * * * may be countered by court-authorized notice." *Hoffmann-La Roche*, 493 U.S. at 171; *see also id.* (describing several tools that district courts use to manage complex collective actions).

District courts already exercise considerable discretion over whether a class will be conditionally certified at the pre-trial stage and whether a class will remain certified after discovery. This "two-tiered analysis," Pet. App. 8, gives district courts an effective method for weeding out cases that do not merit collective action. The district courts have regularly exercised this authority. *See, e.g.*, *Jonites* v. *Exelon Corp.*, 522 F.3d 721 (7th Cir. 2008) (upholding

summary judgment for defendants where plaintiffs were not "similarly situated" under §216(b)); *Anderson* v. *Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007) (similar). And they do all of this without constitutionalizing the question.

Far beyond the §216(b) procedural mechanisms endorsed in *Hoffman-La Roche* and other cases, district court judges can and do use local rules to ensure the timely and efficient management of collective action claims. *See, e.g.*, *Cichon* v. *Exelon Generation Co.*, 401 F.3d 803, 810 (7th Cir. 2005) (upholding district court's grant of summary judgment in a §216(b) case based in part on failure to comply with a local rule). Using this broad discretion, courts will look to their jurisdiction's local rules to determine whether a certification motion has been timely filed. *See, e.g.*, *In re Bicoastal Corp.*, 133 B.R. 252, 256 (Bankr. M.D. Fla. 1991).

Finally, even where courts manage their dockets without the benefit of a specific collective-action rule, they have used equitable doctrines such as laches to prevent undue delay in the filing of collective-action certification motions. *See, e.g.*, *id.*; *In re Fleet*, 76 B.R 1001, 1006 (Bankr. E.D. Pa. 1987). To the extent the Court is concerned about undue delay on the part of plaintiffs, it has a wide variety of options available well short of constitutionalizing a solution that will later be impossible for the political branches to alter. And if, notwithstanding these authorities, a problem exists, Petitioners have an obvious forum in which to pursue such remedies: Congress. After all, the legislature created this cause of action, and its concomitant preference for "collective" suits, in the first place.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

NEAL KUMAR KATYAL
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9000

ADINA H. ROSENBAUM
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

STEPHEN I. VLADECK
4801 Massachusetts Ave.
Washington, DC 20016
(202) 274-4000

GARY F. LYNCH
Counsel of Record
CARLSON LYNCH LTD
36 N. Jefferson Street
P.O. Box 7635
New Castle, PA 16107
(724) 656-1555
glynch@carlsonlynch.com

GERALD D. WELLS, III
FARUQI & FARUQI, LLP
101 Greenwood Avenue
Jenkintown, PA 19046
(215) 277-5770

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APPENDIX

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1. The Fair Labor Standards Act, 29 U.S.C. §216(b), provides, in relevant part:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

2. Federal Rule of Civil Procedure 68 provides:

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party

may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

* * *

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.