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

REPLY BRIEF FOR PETITIONERS

JAMES N. BOUDREAU
GREENBERG TRAURIG, LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

MICHELE H. MALLOY
LITTLER MENDELSON, P.C.
Three Parkway
1601 Cherry Street
Suite 1400
Philadelphia, PA 19102

STEPHEN A. MILLER
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103

RONALD J. MANN
Counsel of Record
435 W. 116th Street
New York, NY 10027
(212) 854-1570
rmann@law.columbia.edu

CHRISTINA M. MICHAEL
MITTS LAW, LLC
Two Logan Square
Twelfth Floor
Eighteenth and Arch Streets
Philadelphia, PA 19103

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The opening brief on the merits presented a simple and direct understanding of Article III: that a "Case" within the Constitution's grant of the judicial Power requires a plaintiff with a personal stake in the dispute. Because the only plaintiff in this case has conceded throughout the litigation that she has no further personal stake in her dispute with petitioners, the court of appeals erred in requiring the case to proceed. In this Court, respondent focuses her presentation on arguments and issues that were not raised in the brief in opposition and were conceded in the courts below. To the extent she does address the merits, respondent's arguments can be squared

neither with the Court's existing doctrine nor any coherent vision of Article III.

ARGUMENT

I. This Case Is Moot Because It Has No Plaintiff.

We start with the question presented in the petition, whether the vitiation of the interest of the only plaintiff in a collective action renders that action moot. On that question, respondent's counsel not only defend the analysis of the court below (Resp. Br. 47-51), but also interject three new reasons why the case might not be moot: under the *Sosna* doctrine (Resp. Br. 32-44); because of a special rule for mootness under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq*. (the "FLSA") (Resp. Br. 21-30); or because respondent has a continuing personal stake (Resp. Br. 44-47). After addressing the analysis of the court of appeals, we discuss the three new points in turn.

A. The Possibility of Future Collective Process Cannot Sustain a "Case" That Has No Interested Plaintiff.

The federal judicial Power is limited to "Cases" and "Controversies" among parties with a personal stake. Pet. Br. 10-29. The Court's conclusion that the dispute in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), remained justiciable turned on the Court's conclusion that the offer in that case did not provide complete compensation to the named plaintiffs. Pet. Br. 20-22. The Court's conclusion that the dispute in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), remained justiciable turned on the district court's ruling on class certi-

fication *before* the vitiation of the plaintiff's interest in the dispute. Pet. Br. 22-25. Because the plaintiff in this case has conceded that she lost any interest in the case even before the filing of any motion regarding collective process, neither *Roper* nor *Geraghty* supports the decision of the court of appeals.[1] *See* DRI Amicus Br. 14-18.

Respondent argues (Resp. Br. 47-51) that a case is not moot under *Geraghty* "[s]o long as the action might still be able to proceed as a class action" (Resp. Br. 48). Because the district court had not yet ruled on the propriety of collective process when respondent lost any continuing interest in the dispute, the possibility of collective process had not yet been foreclosed when respondent lost her personal stake. Thus, respondent boldly contends, *Geraghty* in fact supports the decision of the court below. Resp. Br. 47-48. But that argument ignores the opinion of the *Geraghty* Court, which requires dismissal of this case because respondent lost her stake in the dispute before any decision on the propriety of collective process. *See* Pet. Br. 24-25 (discussing *Geraghty*, 445 U.S. at 407 n.11, and the emphasis of the *Roper* and *Geraghty* Courts on ensuring appellate review of trial court decisions on class certification); DRI Amicus Br. 25-27.

Respondent similarly contends that *Geraghty*'s discussion of the limits on the Article III power applies only to cases that were moot even before they were filed. Thus, she argues, no vitiation of a plaintiff's

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[1] Although the Solicitor General recommends affirmance on other grounds (*see* Point II, *infra*), he generally supports our analysis on the merits, SG Br. 25-32; *see* SG Br. 13 n.1 (discussing the earlier presentation of a similar position).

stake in a collective action can make a case moot so long as the plaintiff had a justiciable stake at the moment of filing. Resp. Br. 49-50. That contention is even harder to reconcile with *Geraghty*'s delineation of the outer boundary of justiciability in this context as requiring a personal stake not only at the time of filing, but through and including the time of the trial court's ruling on the propriety of collective proceedings. *See* Pet. Br. 13; DRI Amicus Br. 8.[2]

B. A Dispute Is Not Capable of Repetition That Evades Review When the Complaint Seeks Only Retrospective Relief.

The principal argument respondent presents in support of the decision below is that the possibility that collective process eventually might be appropriate renders irrelevant the presence or absence of an interested plaintiff before judicial resolution of that question. *See* Resp. Br. 32-44. The argument takes a set of cases designed for "exceptional situations" (*City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)), wrenches them from their context and justification, and posits a doctrinal rule of startling sweep. Among other things, it would mean that no defendant facing a collective action could resolve a case before certification, even if it is willing to pay complete relief to all existing plaintiffs.

Not surprisingly, the decisions of this Court provide scant support for that view. The doctrine first articulated in *Sosna v. Iowa*, 419 U.S. 393 (1975), serves a narrow purpose that has no application here:

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[2] *See also*, *e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 461-62 (2007).

to ensure that the doctrine of mootness does not prevent the adjudication of disputes that by their very nature are likely to dissipate before the judicial process would have an opportunity to provide the sought-after relief. Because the doctrine is limited to cases in which plaintiffs seek prospective relief, it does not apply in cases, like this one, seeking retrospective monetary relief.

The facts of the cases make this clear. *Sosna*, for example, presented a constitutional challenge to a one-year residency requirement. *Sosna*, 419 U.S. at 395. Similarly, in *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991), and *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court considered challenges of pretrial detainees to the period of detention after a warrantless arrest; no individual plaintiff would remain in that class for a time sufficient for judicial attention. *See also*, *e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (case not moot where it "would be entirely unreasonable to expect * * * complete judicial review [of campaign advertisements] in time for [plaintiff] to air its ads"); *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (concluding that "the rapidity" of the challenged process brought the case within the *Sosna* rule). *Compare Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (rejecting application of *Sosna* because plaintiff "has not shown * * * that the time between parole revocation and expiration of sentence is always so short as to evade review").

The plaintiffs in the cases applying *Sosna* in the context of collective actions lost any personal stake in the dispute without obtaining the relief that they sought (a cessation of the allegedly unlawful

conduct).[3] A constitutional rule that such disputes could not proceed, even on a collective basis, would have meant that no potential plaintiff or group of plaintiffs could hope to obtain the sought-for relief, and that the defendants could continue to engage in the challenged conduct with impunity, screened from any need to comply without regard to the legality of their conduct. Unwilling to accept that result, the Court in *Sosna*, *Gerstein*, *Swisher*, and *Riverside* concluded that Article III's "Case" requirement in those exceptional circumstances permits further adjudication despite the lack of a continuing personal stake on the part of the existing plaintiffs.[4]

But that rule has nothing to do with this case. What matters is the nature of the dispute itself, not the defendant's reaction to it. Thus, for example, there is nothing "inherently transitory" about a dispute involving past underpayments under the FLSA. More generally, when the defendant offers complete relief, the proceeding is not one in which mootness leaves a plaintiff unable to obtain relief. To put it directly, this is not a dispute in which a defendant's recalcitrance "evaded review," for the simple reason that petitioners offered to provide complete relief.

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[3] *See Sosna*, 419 U.S. at 395 (injunctive relief against state residency requirement); *Gerstein*, 420 U.S. at 106-07 (probable cause hearing); *Swisher*, 438 U.S. at 206 (injunction against juvenile court proceedings alleged to violate the Double Jeopardy Clause); *Riverside*, 500 U.S. at 47 (prompt probable cause hearings).

[4] The willingness of the four *Geraghty* dissenters to join the mootness analysis in *Sosna* and *Gerstein* underscores the implausibility of reading those cases as constructing a comprehensive exception to mootness for collective actions.

That analysis resolves any case in which a plaintiff seeks purely retrospective relief.[5] Because such a case can become moot only upon the defendants' willingness to provide the sought-after relief, a decision not to adjudicate such cases in federal court would never deprive a plaintiff, or any class of plaintiffs, of an opportunity for complete relief. Accordingly, this case does not present the exceptional circumstances that justify application of the *Sosna* doctrine. *See* SG Br. 30-32 (advancing a similar argument).

C. The FLSA Does Not Compel Continued Litigation After an Offer of Complete Relief.

Respondent also argues (Resp. Br. 21-30) that dismissal would "thwart Congress's affirmative choice in the FLSA to enable collective actions." Respondent ignores the problem that, whatever Congress's intention, the system for litigation established by the FLSA is necessarily confined within the bounds set by Article III. It is far too late in the day to suggest that Congress has an unconstrained power to require the federal courts to adjudicate matters outside the judicial Power. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992); *id*. at 580-81 (Kennedy, J., concurring).

In truth, though, this case presents no such constitutional question. Respondent's argument for a

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[5] Respondent's inability to seek injunctive or declaratory relief reflects Congress's determination in Section 216(b) that those forms of prospective relief are not available for cases (like this one) alleging violations of Sections 206 and 207 of the FLSA.

special FLSA mootness exception rests on the unsupportable premise that Congress intended to create a special procedure for collective adjudication immune from the ordinary constraints of the judicial Power. Although respondent dramatizes the importance of collective relief to effective enforcement of the FLSA, the relevant historical facts are undisputed. First, the FLSA before 1947 permitted "representative" actions.[6] Second, Congress in 1947 "respond[ed] to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome" by truncating the availability of representative actions.[7] Third, the congressional response, reflected in the existing text of Section 216(b), permits an action on behalf of the identified plaintiff "and other employees similarly situated," subject to the constraint that individual claimants can become parties to cases under Section 216(b) only by filing written consent with the court.

Nothing in that history suggests a special concern that collective process be *more* readily inclusive in this context than in any of the myriad contexts in which collective relief is available under Federal Rule of Civil Procedure 23. Indeed, the explicit statement in Section 216(b) that unjoined hypothetical claimants are not parties until they affirmatively opt in to the litigation documents a patent intention to make the collective process *less* readily inclusive than the customary process available under Rule 23. Pet. Br. 26-28. Because Section 216(b) speaks directly to the

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[6] Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069; *see Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989); Chamber of Commerce Amicus Br. 12-13.

[7] *Hoffman-La Roche Inc.*, 493 U.S. at 173 (discussing the Portal-to-Portal Act of 1947, ch. 52, §§ 5(a), 6, 7, 61 Stat. 84, 87-88); *see* Chamber of Commerce Amicus Br. 13.

aspect of collectivity that is relevant here – the interests of hypothetical unjoined claimants – it strongly undermines any suggestion that Congress implicitly intended to give the interests of those claimants more relevance here than they would have in litigation under Rule 23.[8] The Court has no reason to consider the possibility that Congress transgressed constitutional boundaries in compelling adjudication of a plaintiff-less case such as this one.[9]

Finally, we feel compelled to respond to the pervasively hyperbolic suggestion (*e.g.*, Resp. Br. 26-30) that dismissal of this case would deal a fatal blow either to collective actions under the FLSA or to class actions more broadly. The willingness of defendants to provide comprehensively complete offers of relief is likely limited to a tightly confined subset of cases: those in which the plaintiffs seek no equitable relief; in which the plaintiffs' entitlement to damages is purely retrospective; in which the amount of damages can be indisputably calculated as a relatively small amount; and in which the number of expected plaintiffs is relatively small. In cases that lack any of those characteristics, a rational defendant would

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[8] Indeed, the statutory proviso provides an even stronger basis for holding that the loss of respondent's personal stake made this case moot than the arguments discussed above about the traditional context of litigation under Rule 23. *See* Pet. Br. 26-29.

[9] For the same reason, there is no merit to respondent's contention (Resp. Br. 30-32) that her allegation in the complaint that the case is brought on behalf of others "similarly situated" controls the question whether those hypothetical unjoined claimants have an interest in the case. Because Section 216(b) states that those individuals are not parties to the case, no allegation in respondent's complaint can oblige a court to treat them as parties.

have nothing to gain by providing complete relief on a case-by-case basis. *See* ACA Int'l Amicus Br. 7-13.

More generally, the continuing viability of collective process in the face of the common-sense approach we articulate is evident from the continuing frequency of collective litigation even in circuits like the Seventh Circuit that have long adhered to the rule we advocate here. It well might be that the position we advocate will lead to speedier relief in isolated or small-dollar cases that do not warrant the costs of protracted litigation, but we see nothing offensive to congressional intent or sensible policy in a world in which the price of resolution is a prompt offer of indisputably complete relief.

Because respondent offers no substantial argument to support a special exception to mootness doctrine for cases arising under the FLSA, the Court has no occasion to consider whether the Constitution would tolerate such an exception.

D. Respondent Correctly Conceded That She Has No Continuing Personal Stake in the Dispute with Petitioners.

Finally, respondent argues (Resp. Br. 44-47) that she has a continuing personal interest in the litigation, which brings the case under the rule of *Roper*.[10] Two problems confound that argument.

1. The most obvious is that respondent has conceded the adequacy of the offer at all stages of the litigation up to this point. Starting with respondent's brief opposing petitioners' motion to dismiss the case

[10] The Solicitor General presents a similar argument. SG Br. 26-27.

in the district court, respondent acknowledged that "[a]n offer of complete relief will generally moot the plaintiffs [*sic*] claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." J.A. 93. Respondent (at Resp. Br. 15 n.2) characterizes this as only a "general" statement rather than an overt concession. But respondent agreed that an offer such as this one "generally" would moot the case. Respondent offered no description of circumstances in which such an offer would not vitiate the interest of its recipient, and gave the district court no reason to doubt mootness except for the single reason adjudicated below: that the interests of hypothetical unjoined claimants should "relate back" to the filing of the complaint and thus prevent immediate dismissal. *See* J.A. 93-110 (respondent's constitutional argument to the district court).

Most importantly, it is apparent that the district court understood this as a concession. That court explained in its order: "[Respondent] does not take issue with [petitioner]s' assertion that the damages offered exceed any amount of unpaid wages sought; thus, the only legal question the Court must address is whether the rejected Rule 68 offer renders this case moot." Pet. App. 34. If respondent had any concerns about the adequacy of the offer, surely it should have raised those concerns two years ago when the case was in the district court.

The record in the court of appeals is similar. Respondent conceded that "[a]n offer of complete relief will generally moot the plaintiffs [*sic*] claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." J.A. 193. Respondent again did not suggest that the offer afforded relief less than "complete" in any way, but rather relied

entirely on the doctrine of "relation back." J.A. 194-208 (subpart II(A) and Parts III-IV of respondent's brief). Like the district court, the court of appeals understood that "[respondent] did not dispute the adequacy of [petitioner]s' offer." Pet. App. 4.

Finally, respondent conceded the adequacy of the offer in her brief in opposition to the petition, which phrased the question presented by the case as involving an offer of judgment that "provided complete relief on [respondent's] individual claims," Br. in Opp. i. As in her filings in the courts below, respondent did not suggest any doubts about the adequacy of the offer made to her more than two years earlier.

2. Nor does respondent suggest any colorable reason for doubting the adequacy of the offer. First, respondent argues (Resp. Br. 44-46) that petitioners did not offer to compensate her for her costs and attorney's fees, pointing out that the letter transmitting the offer contemplated the payment of attorney's fees in an amount determined by the court.[11] The language of the offer belies that argument; it contemplated compensation for all "reasonable attorneys' fees, costs, and expenses to which [respondent] is entitled by law, as the Court may determine." J.A. 77. To be sure, the offer did not specify the precise dollar

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[11] Respondent claims (Resp. Br. 45 n.10) that it is "unclear how Petitioners calculated" the amount due to respondent. The calculations, set forth in considerable detail at J.A. 78-86, were designed to pay respondent her regular hourly or overtime rate (as applicable) for all of the break time charged during her entire period of employment, as well as all of her attorney's fees, costs, and other expenses. Again, it is far too late for respondent to characterize that offer as "surely inadequate" (Resp. Br. 45 n.10).

amount of costs and fees to be awarded, but that is not the relevant question. The relevant question is whether the offer, if accepted, would have provided respondent an amount no less than the greatest amount she could have recovered through pursuit of the litigation. Because the offer promised all of the costs and fees that a court would provide her, it met that standard.[12]

There is for the same reason no substance to respondent's contention (Resp. Br. 46-47) that the possibility of some future incentive award gives her a continuing economic interest in the dispute. This contention is misleading; as respondent's counsel surely know, the FLSA does not authorize incentive awards. The relevant portion of Section 216(b) specifies the available relief as "a reasonable attorney's fee

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[12] The generous rules for fees and costs under the FLSA make it likely that the offer would have resulted in payment of all of the expenses respondent had incurred in the litigation. *See generally* Chamber of Commerce Amicus Br. 7-8. Lower courts repeatedly have held that "costs" recoverable under the FLSA go well beyond the standard contemplated by Fed. R. Civ. P. 54(d) and 28 U.S.C. 1920. *E.g.*, *Calderon v. Witvoet*, 112 F.3d 275 (CA7 1997) (FLSA contemplates recovery of all expenses that normally would appear on an attorney's bill, even if not recoverable under Section 1920); *Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (CA4 1988) (FLSA costs are broader than costs under Rule 54 of Section 1920); *Colunga v. Young*, 722 F. Supp. 1479, 1488 (W.D. Mich. 1989) (explaining that the "remedial and thus more broadly interpreted cost-shifting aspect" of FLSA permits recovery of travel and telephone costs not reimbursable under Rule 54 of Section 1920), *aff'd*, 914 F.2d 255 (CA6 1990). We do not suggest that it is *impossible* that respondent might have incurred some minor unidentified expense that would not be recoverable under the FLSA. We do think, however, that it was incumbent on her, if she harbored such a concern, to present it two years ago when the case was in the district court.

* * * and costs of the action." Respondent cites no case reading that provision to permit a court to impose an incentive award.[13] Again, because the relevant baseline for determining the adequacy of the offer is the relief that a court could order, the absence of an incentive award from petitioners' offer is irrelevant.

Because petitioners offered respondent more than she reasonably could have expected to recover even if she had completely prevailed in the litigation, the claim that she retained a continuing economic interest in the litigation because of inadequacies in the offer would be groundless even if she had not conceded the issue in the courts below and in this Court.

II. Respondent's Refusal to Accept Petitioners' Offer of Complete Relief Affords No Basis for Affirming the Decision of the Court of Appeals.

Respondent's presentation focuses on a separate question, not previously disputed in this litigation: whether her individual interest was vitiated when she failed to accept petitioners' offer of complete relief. Respondent presents two related arguments on that question. First, she suggests that because she did not accept petitioners' offer, the offer had no effect on her stake in continuing the litigation. Resp. Br. 12-16; *see* SG Br. 10-15 (parallel argument that the trial court should have responded to the unac-

[13] The only case to which she refers involves a voluntary settlement in which a defendant agreed to pay an incentive award. *See Espenscheid v. DirectSAT USA, LLC*, 688 F.3d 872, 877 (CA7 2012). That decision sheds no light on the type of judgment a court might enter in a contested proceeding under the FLSA.

cepted offer by entering judgment in favor of respondent). Second, she suggests that Federal Rule of Civil Procedure 68 does not apply at all to FLSA cases. Resp. Br. 16-19; *see* SG Br. 15-18 (parallel argument that courts in FLSA cases should rule on the propriety of collective process before processing unaccepted Rule 68 offers). Those arguments are neither properly presented nor meritorious.

A. The Question Whether an Offer of Complete Relief Vitiates the Plaintiff's Stake in a "Case" Does Not Warrant This Court's Attention.

1. As the Court reiterated just last year, arguments not called to the attention of the Court in the opposition to the petition for certiorari are "normally considered waived" under this Court's Rule 15.2. *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011). The brief in opposition did not suggest that respondent would interpose this defense of the judgment below. Rather, the sole suggested justification for the judgment below was the "relation back" doctrine discussed above. *See* Br. in Opp. 6-15.

2. Moreover, respondent conceded that point in the courts below. Both courts included in their opinions a close paraphrase of her concession that an "offer of complete relief generally will moot the plaintiffs [*sic*] claim." *See* Pet. App. 14 (court of appeals), 35 (district court).[14] This Court frequently has em-

[14] Respondent did argue in the district court and the court of appeals that the trial court should engage in fairness review before dealing with the Rule 68 offer. J.A. 110-112 (district court), 208-11 (court of appeals). That is quite different from

phasized the importance of "lower court opinions to guide our analysis," underscoring this Court's role as "a court of final review and not first view," *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)); *see Baldwin v. Reese*, 541 U.S. 27, 34 (2004). Because respondent withheld this argument from the courts below, the case comes to this Court with neither a factual record to illuminate the relevant practical considerations nor opinions providing a first look at the problem.

Even if respondent had raised the question in her brief in opposition, we would see little justification for plenary consideration. To be sure, there is some tension in the lower courts as to whether the appropriate response to an unaccepted offer of complete relief is to dismiss the case entirely (the approach of the trial court) or instead to enter judgment in favor of the plaintiff in accordance with the offer. *Compare*, *e.g.*, *Weiss v. Regal Collections*, 385 F.3d 337, 340 (CA3 2004) (followed by the court below), *with*, *e.g.*, *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (CA2 2005) ("better" approach is to enter a default judgment in favor of the plaintiff).

But that tension is limited to a procedural technicality. It seems unlikely that any defendant that made a Rule 68 offer including complete relief would object to entry of judgment in favor of the plaintiff in accordance with the offer and litigate the issue to this Court. For example, our clients have advised us that they readily would have consented to such a

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the arguments that she now presents – that an unaccepted offer has no effect at all and that Rule 68 does not apply in FLSA cases.

judgment; indeed, they would consent to such a judgment at this time, so long as it disposed of the entire litigation. The Court's normal reliance on adversary presentation to support its deliberations strongly suggests waiting for a case in which opposing parties disagree.

It makes no sense for this Court to reverse the trial court for its failure to take a step that respondent has never requested. Moreover, pace the Solicitor General (SG Br. 18-20), that problem has no logical relationship to the question presented: if the trial court had issued a judgment in favor of respondent, the question immediately would have arisen whether she could rely on the interests of others to justify continued litigation.

Belated consideration of that issue would encourage crafty attorneys to sandbag district courts – using challenges to a trial court's procedures like hole cards to be concealed through years of litigation and multiple stages of review. At the same time, this Court's willingness to overlook such behavior would evince an unwonted disrespect for the district court's efforts to resolve the questions presented to it. Neither respondent nor the Solicitor General suggests any substantial reason for departing from customary process in this instance.[15]

3. For similar reasons, we see no basis for the suggestion of the Solicitor General (SG Br. 19-20) that the Court should dismiss the writ of certiorari as

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[15] Respondent overreaches when she contends (Resp. Br. 15 n.2) that the issues are "jurisdictional." The Court's jurisdiction over this matter under 28 U.S.C. 1254(1) is unquestioned, as was that of the courts below under 28 U.S.C. 1291 and 28 U.S.C. 1331.

improvidently granted. There is no doubt that the question on which the Court granted review was presented and decided below. Nor is this a case in which the record suggests any uncertainty about the factual predicate for that question. At worst, this is a case in which respondent and the Solicitor General have responded to this Court's decision to grant review by manufacturing a plethora of new arguments – most of them never previously presented to or considered by any appellate court – that respondent's counsel might have chosen to present to the court below.

The new arguments change nothing about the landscape described in the petition: a pervasive confusion in the courts of appeals about the application of this Court's existing mootness cases to litigation seeking collective relief. The case before the Court provides an excellent opportunity for considering the problem; litigation of this matter has proceeded for more than two years since the sole plaintiff lost any continuing personal stake. The opinion of the court of appeals is typical of the analytical errors of the lower courts. Reversal of the decision below will guide the lower courts by finally terminating this litigation, while dismissal will allow this litigation to continue and the confusion of the lower courts to persist. The most sensible approach is to proceed to decision at this time.

B. An Offer of Complete Relief Vitiates the Plaintiff's Stake in the "Case."

Respondent's new contentions are meritless. Respondent does not accept the Solicitor General's view (SG Br. 13-15) that the trial court should have entered judgment in favor of the plaintiff. Rather, respondent contends (Resp. Br. 12-16) that because

an unaccepted offer is withdrawn it has no effect on justiciability.[16] The implications of respondent's understanding of Rule 68 are breathtaking: by simply filing suit and alleging a controversy, a single plaintiff could force a defendant to remain in litigation – class-sized litigation – indefinitely. That result would follow even if, as here, the record conclusively demonstrated the conceded absence of any actual controversy between the parties.

Respondent fails to identify anything that might remain for adjudication after the defendants have formally expressed their willingness to provide complete relief. The most direct approach would be to hold that there is no "Case" under Article III when the defendant chooses not to dispute the relief sought in the plaintiff's complaint.[17] In Judge Easterbrook's terms, "once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate." *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (CA7 1991); *see* DRI Amicus Br. 11.

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[16] Although we discuss above the tension among the courts of appeals about how to terminate the case after an unaccepted offer of complete relief, no court has adopted respondent's view that the district court must ignore the offer entirely.

[17] *Compare Vitek v. Jones*, 445 U.S. 480, 486-87 (1980) (suggesting that voluntary shift of conduct by defendant moots case if it removes "the reality of the controversy"); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) ("Our decisions have required that the dispute be definite and concrete, touching the legal relations of parties having adverse legal interests * * * ." (citations and internal quotation marks omitted)); *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (holding dispute moot where parties "continue to dispute the lawfulness of the [defendant's] procedures [but] that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights").

It is true, as respondent's counsel note (Resp. Br. 15), that respondent has not received a penny of the amount offered by petitioners. That is not, however, a problem to be laid at petitioners' door. Rather, it reflects a strategic choice of respondent, presumably reflecting the advice of her attorneys that she should not accept complete relief. Addressing a similar point, Judge Posner remarked:

> You cannot persist in suing after you've won. [The plaintiff's counsel] may have thought that he had something to gain by pressing on—additional attorney's fees. But if that is what he thought, he was mistaken. Once a party has won his suit and obtained the attorney's fees that were reasonably expended on winning, additional attorney's fees would not be *reasonably* incurred. So, by spurning the defendant's offer, [the plaintiff's counsel] shot both himself and his client in the foot.

Greisz v. Household Bank (Ill.), N.A., 176 F.3d 1012, 1015 (CA7 1999) (emphasis in original).

In sum, the Court need not worry that it overlooks any weighty constitutional question by proceeding directly to the question on which it granted review.

C. Rule 68 Applies to Cases Under the FLSA.

Respondent's related contention that Rule 68 is wholly inapplicable to cases brought under the FLSA (Resp. Br. 16-19) is even less persuasive. As with her argument that the FLSA creates an exception to standard mootness doctrine (addressed in Point I(C), *supra*), respondent identifies no language in the FLSA suggesting that Rule 68 should not apply.

Rather, respondent argues that trial courts cannot approve settlements in FLSA cases without first engaging in a comprehensive review of the fairness of the settlement, and reasons from that premise to the conclusion that the need for fairness review makes it inappropriate to allow an offer of complete relief to terminate a plaintiff's claim. But whatever the proper scope of fairness review,[18] its application to this factual setting would be bizarre; although respondent's presentation obscures the point, her argument necessarily implies the view that a private plaintiff does not have the authority to accept complete satisfaction of its claims. That the possible joinder of other claimants should preclude the sole existing party from accepting complete relief seems odd at best. It is, moreover, in direct tension with the provision in Section 216(b) that those hypothetical unjoined claimants are not parties until and unless they in fact join the litigation.

In any event, even under respondent's conception of the statute, the requirement of fairness review would have no logical relation to the appropriate treatment of an offer of complete relief. If the offer in fact provides complete relief, a question the trial court might adjudicate in cases of dispute, there would be no basis for any conclusion that the offer was unfair to the plaintiff. In this case, for example, given the evident generosity of the offer, coupled with respondent's concession to the trial court that the

[18] The far-reaching implications of the arguments of respondent and the Solicitor General about fairness review under the FLSA make those questions particularly ill-suited to disposition by this Court in a case of first instance, without an opportunity for factual development, briefing, or development by the courts below.

offer provided complete relief, on what basis could the court have justified refusing to permit acceptance of the offer?

In sum, whatever scrutiny might be appropriate for a case in which a plaintiff privately compromises her claims, the district court's power or obligation to review that settlement has no application to a case in which defendants offer complete relief with an offer of public judgment. Accordingly, even if the Court were inclined to accept respondent's understanding of the requirement of fairness review, it would provide no support for the decision of the court of appeals.[19]

CONCLUSION

The multifarious new arguments of respondent and the Solicitor General should not obscure the importance of the question the Court agreed to review here. The decision of the court of appeals

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[19] The Solicitor General presents a parallel though distinct argument (SG 15-18), that a court cannot enter judgment on a Rule 68 offer without first proceeding through the certification process. As the Solicitor General acknowledges (SG Br. 18-25), respondent has never presented that argument and no court previously has considered it. Accordingly, like respondent's newly discovered justifications for the decision below, it is not properly before the Court.

Moreover, the argument is meritless. The premise of the argument is that the FLSA reflects a special congressional intent that the interests of absent parties, those hypothetical and not yet located individuals alleged to be "similarly situated" to respondent, should be even more important than they are in the traditional Rule 23 context. But Congress's explicit declaration that those individuals are not "parties" until they affirmatively opt in to the litigation cannot be reconciled with the view that those interests are more important here than they would be in litigation under Rule 23. *See* subpoint I(C), *supra*.

mandated continued litigation of this case notwithstanding the absence of any plaintiff with a personal stake in the litigation. Only this Court can remind the courts of appeals of the inconsistency of that process with the Constitution's limitation of the judicial Power to "Cases."

The decision of the court of appeals should be reversed.

Respectfully submitted,

JAMES N. BOUDREAU
GREENBERG TRAURIG, LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

MICHELE H. MALLOY
LITTLER MENDELSON, P.C.
Three Parkway
1601 Cherry Street
Suite 1400
Philadelphia, PA 19102

STEPHEN A. MILLER
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103

RONALD J. MANN
Counsel of Record
435 W. 116th Street
New York, NY 10027
(212) 854-1570
rmann@law.columbia.edu

CHRISTINA M. MICHAEL
MITTS LAW, LLC
Two Logan Square
Twelfth Floor
Eighteenth and Arch Streets
Philadelphia, PA 19103

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