No. 11-1059

In the Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION, ET AL.,
PETITIONERS

v.

LAURA SYMCZYK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether an action brought as a collective action under 29 U.S.C. 216(b) becomes moot when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's individual damage claims.

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INTEREST OF THE UNITED STATES

This case presents the question whether a defendant unilaterally moots a collective action brought by a plaintiff on behalf of herself and other similarly situated employees under 29 U.S.C. 216(b) for alleged violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, if it offers, before another plaintiff joins the action, to consent to a judgment that—if entered by the court—would fully satisfy the named plaintiff's individual damage claim. The United States has a significant interest in the resolution of that question. The Secretary of Labor is responsible for administering and enforcing the FLSA by, *inter alia*, bringing civil enforcement actions on behalf of employees, 29 U.S.C. 216(c), 217, which private enforcement actions supplement. The

Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d), and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq*. Both statutes are enforced in part through private actions that may proceed as collective actions under Section 216(b). 29 U.S.C. 216(b), 626(b). The United States is also the Nation's largest employer and is a potential defendant in actions governed by Section 216(b).

STATEMENT

1. Congress enacted the FLSA to protect workers, particularly non-unionized workers, by establishing federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified through contract. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 & n.18 (1945). Section 16(b) of the FLSA, 29 U.S.C. 216(b) —referred to here as Section 216(b)—establishes liability for FLSA violations and gives employees a private right of "action to recover [that] liability." *Ibid.*

Section 216(b) gives an employee a statutory "right * * * to bring an action" on his own behalf and "on behalf of any [similarly situated] employee." 29 U.S.C. 216(b). More specifically, Section 216(b) provides that "any one or more employees" may "maintain[] against any employer" an action to recover FLSA liability "for and in behalf of himself or themselves and any other employees similarly situated." *Ibid.* An action brought on behalf of other similarly situated employees is known as a "collective action." See *Hoffman-La Roche, Inc.* v. *Sperling*, 493 U.S. 165, 169-170 (1989).

Unlike a "class action" certified under Rule 23, which binds either all members of the certified class or those who do not opt out, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2558 & n.11 (2011), a collective action binds

only those employees who affirmatively opt in as plaintiffs. Section 216(b) specifies that "[n]o 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." 29 U.S.C. 216(b). The action is "considered to be commenced" for that employee for statute-of-limitations purposes on the "date on which [his] written consent is filed in the court." 29 U.S.C. 256(b); see 29 U.S.C. 255(a).

"Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated * * * grant[s] the [trial] court the requisite procedural authority to manage the process of joining multiple parties." *Hoffman-La Roche*, 493 U.S. at 170. Accordingly, "once an [FLSA] action is filed, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-171. The court may supervise "discovery of the names and addresses" of similarly situated employees and exercise its discretion "to implement 29 U.S.C. § 216(b) * * * by facilitating notice to potential plaintiffs" and "setting cutoff dates" for opt-in plaintiffs. *Id.* at 169-170, 172.

Courts and commentators have borrowed class-action terminology to describe the process of joining co-plaintiffs under Section 216(b). *Kelley* v. *Alamo*, 964 F.2d 747, 748 n.1 (8th Cir. 1992). Federal courts typically follow a two-step joinder process, which is commonly labeled "certification." See *Comer* v. *Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-547 (6th Cir. 2006); Pet. App. 8-12 & n.5. At step one, if the named plaintiff makes a sufficient preliminary showing that other employees are "similarly situated," the court may exercise its discre-

tion to "conditionally certify" the collective action, *i.e.*, allow discovery of the names and addresses of potential opt-in plaintiffs and mailing of court-approved notice. *Id.* at 8-9, 12-13. At step two, after opt-in consents have been filed and further discovery has been completed, the court determines whether each opt-in plaintiff is "similarly situated" to the named plaintiff. *Id.* at 10-11; see, *e.g.*, *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260-1262 (11th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009); *Comer*, 454 F.3d at 546-547.

2. a. Respondent was employed in 2007 as a registered nurse at a facility owned by petitioners. J.A. 22-23, 118-119. Respondent alleges that petitioners unlawfully and willfully denied minimum and overtime wages to respondent and similarly situated employees, J.A. 29-30, 126-127, by automatically deducting 30 minutes per shift for meal breaks of non-FLSA-exempt employees, even when they performed compensable work during the nominal breaks, J.A. 23-24, 119-120.

In December 2009, respondent filed a complaint on behalf of herself and all "similarly situated" persons, *i.e.*, persons petitioners employed in the past three years whose pay was subject to an automatic-meal-break deduction even when they performed compensable work. J.A. 21, 26-27, 43; see J.A. 115-116, 122-123.

On February 18, 2010, petitioners simultaneously answered the complaint (J.A. 44-53) and served upon respondent, pursuant to Rule 68, an offer of judgment (J.A. 80-81). Rule 68 governs a particular type of settlement offer made by defendants that, in certain circumstances, has particular legal consequences. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 350, 354 n.13 (1981). A valid Rule 68 settlement offer must, *inter alia*, offer to allow entry of judgment for the plaintiff on

specified terms, Fed. R. Civ. P. 68(a), and may "not implicitly or explicitly provide that the judgment *not* include costs." *Marek* v. *Chesny*, 473 U.S. 1, 6 (1985). By operation of Rule 68(a), a valid offer will necessarily consent to a judgment including accrued "costs," *ibid.*, which includes attorney's fees if the underlying statute treats them as a component of "costs." *Id.* at 7-9. If the plaintiff accepts a valid Rule 68 offer within 14 days of its service and a party "file[s] the offer and notice of acceptance" with proof of service, the district court clerk must enter judgment accordingly. Fed. R. Civ. P. 68(a). If the plaintiff does not accept the offer and later prevails but obtains a judgment no more favorable than the unaccepted offer, Rule 68 specifies that the prevailing plaintiff must pay the "costs" incurred after the offer was made, including any attorney's fees properly labeled as "costs." Fed. R. Civ. P. 68(d); see *Marek*, 473 U.S. at 10-11. Rule 68 further provides that "[a]n unaccepted offer is considered withdrawn" and that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68(b).

Petitioner's Rule 68 offer would have allowed the entry of a $7500 consent judgment for respondent, exclusive of attorney's fees and costs. J.A. 80-81. Consistent with Section 216(b)'s direction that the court in an FLSA "action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action," 29 U.S.C. 216(b), petitioners stated in a cover letter (J.A. 77-79) that their offer included "such reasonable attorneys' fees, costs, and expenses to which [respondent] is entitled by law." J.A. 77; see J.A. 79. By its terms, the offer was to "remain open until it expires by operation of law, unless otherwise withdrawn by [pe-

titioners]." J.A. 81. Petitioners' letter added that if respondent did not timely accept their Rule 68 offer, the offer "shall be deemed withdrawn." J.A. 79.

Respondent did not timely respond (by March 4, 2010) to petitioner's settlement offer. Pet. App. 4.

b. On March 10, 2010, the district court (which was unaware of the settlement offer, Pet. App. 43) issued an order allowing 90 days for discovery, after which respondent could move for "conditional certification," J.A. 62. Within two weeks, petitioners filed a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. J.A. 64-86. Petitioners argued that they had offered respondent complete relief on her individual damages claim, fees, and costs; that respondent "effectively reject[ed] the Offer" by failing to respond; and that the entire collective action had become moot because, having rejected the offer, respondent "no longer has a personal stake or legally cognizable interest in the outcome of this action." J.A. 65-67; see J.A. 70-72.

c. The district court did not enter judgment for respondent on her individual damages claim as petitioners had offered. The court instead issued an opinion (Pet. App. 30-44) "tentatively conclud[ing]" that petitioners' "Rule 68 offer of judgment moots this collective action." *Id.* at 43. The court's final order stated that "[respondent's] FLSA claim is dismissed with prejudice for the reasons stated in [the court's prior opinion]," and directed that the case be closed. *Id.* at 45-46.

Respondent appealed the order "dismissing Plaintiff's [respondent's] FLSA claim and directing the Clerk to close th[e] case." Dist. Ct. Doc. 38 (notice of appeal).

4. The court of appeals reversed the district court's judgment and remanded. Pet. App. 1-29. The court stated that, under circuit precedent, an unaccepted "of-

fer of complete relief will generally moot [a] plaintiff's claim," because the plaintiff will "retain[] no personal interest in the outcome of the litigation" once judgment is offered on "all the relief [the] plaintiff could potentially recover at trial." *Id.* at 14 (quoting *Weiss* v. *Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004)). However, the court reasoned that such "conventional mootness principles" do not "fit neatly" into the collective-action context, where the "named plaintiff purports to represent an interest that extends beyond his own." *Ibid.* (citation omitted). The court explained that Section 216(b) gives the named plaintiff the "right to act on behalf of similarly situated co-workers" and thus confers "a personal stake in representing the interests of others" if a co-plaintiff opts into the action. *Id.* at 22 n.11, 25. The court accordingly concluded that if another employee opts into the action, petitioners' offer of judgment addressing only respondent's individual claims "would no longer fully satisfy" all the claims in the action, and "the proffered rationale behind dismissing the complaint [as moot] would no longer be applicable." *Id.* at 29.

The court of appeals emphasized the potential for "Rule 68 [to] be manipulated" by defendants in collective actions. Pet. App. 15, 21-22, 27. The court explained that petitioners' position would permit the "undesirable strategic use of Rule 68" by defendants, who could terminate collective actions by "picking off" representative plaintiffs before other employees could opt in. *Id.* at 22, 24 (citation omitted). That result, the court concluded, would be inconsistent with the intended operation of Section 216(b) collective actions, *id.* at 25-26, 28, and would render a named plaintiff's claims "'acutely susceptible to mootness' while the action was in its early stages," before the trial court had determined whether

"to facilitate notice to prospective plaintiffs," *id.* at 26 (citation omitted). The court therefore applied a "relation back doctrine" to allow a "collective action [to] play[] out according to the directives of [Section] 216(b)" and to "prevent[] defendants from using Rule 68 to 'undercut the viability' of [such an action]." *Id.* at 26, 28.

The court of appeals directed that, on remand, if respondent moves for "conditional certification" and the district court concludes that that motion was "made without undue delay," then the motion will "relate * * * back to * * * the date on which [respondent] filed her initial complaint." Pet. App. 28-29. The court explained that, if "at least one other similarly situated employee opts in," then respondent's complaint should not be dismissed as moot because the "Rule 68 offer of judgment would no longer fully satisfy the claims of everyone in the collective action." *Id.* at 29. But if respondent's conditional-certification motion is held untimely or no one else opts in, petitioners' "Rule 68 offer to [respondent]—in full satisfaction of her individual claim—would moot the action." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly reversed the district court's judgment but its rationale was flawed.

I. Contrary to the court of appeals' view, a defendant's Rule 68 offer to accept an adverse judgment does not moot a plaintiff's claim, even if the judgment, if entered by the court, would have fully satisfied the claim. Such an offer imposes no obligation until it is accepted. And if a plaintiff does not agree to settle her damages claim, it remains live, because a federal court can continue to grant effectual relief.

A district court has discretion to enter judgment for the plaintiff when a defendant is willing to accept an ad-

verse judgment, even if the plaintiff objects to a judgment in her favor. That is the proper course when further litigation would serve no significant purpose. But in the context of a collective action, Section 216(b) limits the court's discretion to enter judgment for the named plaintiff over her objection. In light of the important statutory function served by collective actions, sound judicial administration requires that the collective-action process proceed unaffected by a defendant's attempt to "buy off" an unwilling named plaintiff.

The question whether an unaccepted settlement offer moots a named plaintiff's individual claim on the merits is within the scope of the question presented, is a necessary predicate to the intelligent resolution of that question, and has led to divergent results in the courts of appeals. This Court should therefore decide that question and affirm the judgment of the court of appeals on the ground that respondent's personal FLSA damages claim is not moot. That antecedent issue is so central to the proper Article III analysis that, if this Court were to decide not to examine it, the United States suggests that the Court consider dismissing the writ as improvidently granted.

II. If the Court disagrees with our submission and concludes that petitioners' unaccepted settlement offer moots respondent's personal claim, the collective action here may also be moot. Respondent, however, may have a sufficient economic interest in collective-action certification to warrant her ongoing role in the certification process. That question could be considered further by the district court on remand.

ARGUMENT

I. THIS CASE IS NOT MOOT BECAUSE RESPONDENT'S INDIVIDUAL FLSA CLAIM IS NOT MOOT

The court of appeals erroneously concluded that a plaintiff's claim generally is rendered moot when a defendant proffers a Rule 68 settlement offer to allow a judgment to be entered against the defendant that—*if* accepted and entered by a court—would fully satisfy the claim. Where, as here, the plaintiff declines to accept such an offer, the offer is a nullity and has no effect on the claim that might have been, but was not, resolved by the proffered judgment. Neither respondent's individual FLSA claim, nor this case more generally, is moot.

A. An Unaccepted Offer Of Judgment Does Not Moot A Plaintiff's Claim

1. To state an Article III "case" or "controversy," a plaintiff must establish that she possessed Article III standing when "the action commence[d]." *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) (*Laidlaw*); see *Davis* v. *FEC*, 554 U.S. 724, 732-733 (2008). Respondent unquestionably had Article III standing to seek damages for petitioners' alleged violation of her FLSA rights. Jurisdiction is therefore presumed to continue, "absent further information." *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993).

A party asserting that a once-live case or controversy has become moot "bears the burden of coming forward with the subsequent events that have produced that alleged result." *Cardinal Chem. Co.*, 508 U.S. at 98. "A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox* v. *Service Employees Int'l Union*, 132

S. Ct. 2277, 2287 (2012) (citation omitted). Judicial relief will not be effectual, for instance, if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980) (citation omitted).

A defendant's unaccepted offer to settle a plaintiff's claim does not render the claim moot, because it does not result in an actual settlement or prevent the court from granting the plaintiff's requested relief. It is "well settled" that "an offer * * * imposes no obligation until it is accepted" and that the offeree's rejection of an offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis Ry.* v. *Columbus Rolling Mill*, 119 U.S. 149, 151 (1886); see, *e.g.*, *Eliason* v. *Henshaw*, 17 U.S. (4 Wheat.) 225, 228 (1819). Rule 68 does not alter that basic background principle. To the contrary, it specifies that "[a]n unaccepted offer is considered withdrawn." Fed. R. Civ. P. 68(b). A defendant's Rule 68 offer to allow entry of an adverse judgment thus has no effect on the plaintiff's claim unless and until the plaintiff accepts it. Rule 68 directs that the clerk "must then enter judgment" for the plaintiff only if the offer *and* the "notice of acceptance" have been filed. Fed. R. Civ. P. 68(a).

The district court's failure to enter the offered judgment for respondent confirms that petitioners' mere offer of settlement, which respondent never accepted and petitioners withdrew, did not extinguish respondent's individual FLSA claim. Respondent never accepted any payment to settle her personal claim, and the district court entered no judgment for respondent satisfying that claim in full. In short, respondent's FLSA claim remains unsatisfied. It is thus difficult to understand

how that unsatisfied damages claim could be deemed "moot" in an Article III sense simply because she did not respond to a settlement offer within 14 days.

2. Several courts of appeals, including the Third Circuit, have nonetheless concluded that a settlement offer that would fully satisfy a plaintiff's claim will render the claim moot, at least when it is the only claim advanced in the action. See, *e.g.*, *Weiss* v. *Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004) (citing *Rand* v. *Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)); *Greisz* v. *Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) (Posner, C.J.); *Zimmerman* v. *Bell*, 800 F.2d 386, 390 (4th Cir. 1986); cf. *Simmons* v. *United Mortgage & Loan Inv., LLC*, 634 F.3d 754, 764-765 (4th Cir. 2011) (only settlement offers that offer judgment can moot a claim). The rationale behind those decisions appears to be that a defendant's "offer[] to satisfy the plaintiff's entire demand" leaves "no dispute over which to litigate," and that "a plaintiff who refuses to acknowledge this loses outright" and must suffer entry of a "judgment against him" because "he has no remaining stake." *Rand*, 926 F.2d at 598. That rationale is flawed.

To the extent the mootness-by-unaccepted-offer theory imposes dismissal as a litigation penalty for persisting with a claim notwithstanding the offer, it is erroneous. If a plaintiff has Article III standing to invoke federal jurisdiction to seek legitimate redress, we are aware of no judicial power to force the plaintiff involuntarily to *accept* a defendant's post-suit settlement offer. Such compulsion would be inconsistent with the basic contract principle of mutual assent. Cf. 1 Restatement (Second) of Contracts § 18, at 53 (1981). And nothing in Rule 68's litigation-cost consequences for a plaintiff who

recovers no more than an unaccepted offer authorizes dismissal of the plaintiff's underlying claim.[1]

The notion that a case is mooted by an offer of complete relief may reflect a reluctance to expend judicial and litigation resources resolving the merits of a claim that the defendant informs the court it will fully satisfy. That legitimate impulse, however, suggests that the court should enter judgment *for* the plaintiff, not against her. The Second Circuit thus has correctly held that a controversy "is still alive" after a plaintiff rejects a settlement offer for full relief, which the plaintiff is "not obliged to take." *McCauley* v. *Trans Union, LLC*, 402 F.3d 340, 342 (2005). Rather than dismiss the live dispute, the Second Circuit concluded, the "better resolution" is simply to enter a "default judgment against [the

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[1] In *Russell* v. *United States*, 661 F.3d 1371, 1374-1375, 1377 (2011), the Federal Circuit accepted the government's argument as appellee that the damages claim of the named plaintiff was rendered moot by the government's tender of a check that—like its payments to thousands of others in the putative class—covered the full amount claimed by the plaintiff (who declined to cash the check). The government relied on Federal Circuit precedent, which the government, after further analysis, has concluded is incorrect.

When a plaintiff timely seeks retrospective relief for a past wrong, the wrong has been completed by the time the claim is filed. Any damages liability therefore is fixed and will continue until the claim is resolved by a judgment or a settlement agreement grounded, like any contract, on mutual assent. Different considerations apply when a plaintiff seeks prospective relief for an ongoing or imminent injury caused by the defendant's challenged actions. If the defendant ceases those actions after the action is filed, it can terminate the underlying injury and associated liability for prospective relief, regardless of the plaintiff's consent. In that "voluntary cessation" context, the claim for prospective relief becomes moot if it is "absolutely clear" that the "allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189-190.

defendant]" for all the relief requested if the defendant has notified the court that it prefers to accept the judgment and avoid litigation. *Ibid.* Other courts have similarly held that plaintiffs do not "lose[] outright when [they] refuse[] an offer of judgment that would satisfy [their] entire demand" and that district courts may then properly "enter judgment[s] for the plaintiffs in accordance with the defendants' * * * offer" of judgment. See *O'Brien* v. *Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009). In other words, if the defendant has "thrown in the towel," there normally is "nothing left for the district court to do except enter judgment" for the plaintiff based on the defendant's "consent[] to its entry," even if the plaintiff does "not consent" to a judgment in his favor. *Chathas* v. *Local 134*, 233 F.3d 508, 512-513 (7th Cir. 2000) (Posner, J.), cert. denied, 533 U.S. 949 (2001).[2]

That is a proper course to follow when further litigation would serve no purpose. "[T]he principle of party presentation [is] basic to our adversary system," *Wood* v. *Milyard*, 132 S. Ct. 1826, 1833 (2012), which rests on the "premise that the parties know what is best for them" and "rel[ies] on the parties to frame the issues for decision," *Greenlaw* v. *United States*, 554 U.S. 237, 243-244 (2008). Courts regularly accept express waivers in litigation. A defendant may elect not to contest liability

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[2] A judgment based on the defendant's consent does not have any future issue-preclusive effect, because the merits are not "actually litigated and determined" and the judgment does not rest on a resolution of the merits. *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (citation omitted); see 1 Restatement (Second) of Judgments § 27 cmt. e, at 257 (1982) (Issue preclusion does not apply "[i]n the case of a judgment entered by confession, consent, or default," absent an agreement that the judgment will have issue-preclusive effect.).

and litigate only the scope of relief. Or a defendant may decide not even to contest relief. If a defendant knowingly chooses to accept an adverse judgment for the full relief sought rather than litigate the merits, a court may rely on that choice and enter judgment upon it. But that did not happen here, and respondent's individual claim therefore remains alive. For that reason, the Court should affirm the court of appeals' reversal of the district court's dismissal of respondent's FLSA claim and its order remanding the case to the district court.

B. A District Court Must Proceed Through The Collective-Action Certification Process Before It May Enter Judgment For A Named Plaintiff On Her Individual Claim Over Her Objection

If, on remand, petitioners re-extend and respondent does not accept an offer of judgment, the district court should follow the procedure identified in *Hoffman-La Roche, Inc.* v. *Sperling*, 493 U.S. 165 (1989), before deciding whether to enter judgment for respondent on her individual claim based on petitioners' consent. In the context of a collective action, Section 216(b) limits a district court's discretion to enter judgment for the named plaintiff on her individual claim over her objection, even if the defendant consents to judgment. A named plaintiff need not accept a settlement that does "not offer[] all that has been requested in the complaint (*i.e.*, relief for the class)," *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring), and Section 216(b) gives an FLSA plaintiff a statutory right to bring a collective action on behalf of herself and others similarly situated. When a plaintiff invokes that right, the district court must first discharge its "managerial responsibility to oversee the joinder of additional parties," *Hoffman-La Roche*, 493 U.S. at 171, before de-

termining whether to enter judgment for the plaintiff on her individual claim.

In the Rule 23 class-action context, this Court has determined that it "would be contrary to sound judicial administration" to permit a defendant "to 'buy off' the individual private claims of [a] named plaintiff[]" who has refused the defendant's settlement offer, if doing so would prevent a full determination of whether the action may proceed on behalf of others. *Roper*, 445 U.S. at 339. "Requiring multiple plaintiffs to bring separate actions, [each of] which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained," would "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement" and "frustrate the objectives of class actions," which enable the streamlined and cost-efficient "vindication of legal rights" by multiple plaintiffs in a single suit. *Id.* at 338-339.

Those considerations apply at least as strongly to collective actions under the FLSA. Congress expressly conferred a "right" on employees to bring a collective action on "behalf of * * * themselves and any other employees similarly situated." 29 U.S.C. 216(b); see *Hoffman-La Roche*, 493 U.S. at 170. That "explicit statutory direction of a single [FLSA] action for multiple [FLSA] plaintiffs" (*id.* at 172) is "designed to serve the important function of preventing [FLSA violations]" by "lower[ing] individual costs to vindicate rights" in a process that allows the "efficient resolution in *one* proceeding of common issues of law and fact." *Id.* at 170-171 (emphasis added). Section 216(b) sets forth Congress's "policy that [FLSA] plaintiffs should have the opportunity to proceed collectively" and, as this Court

has held, the "broad remedial goal of the statute should be enforced to the full extent of its terms." *Id.* at 170, 173.

Section 216(b) therefore vests in district courts the "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Hoffman-La Roche*, 493 U.S. at 171. That responsibility includes the use of "[c]ourt authorization of notice" to potential opt-in plaintiffs, which furthers "the legitimate goal of avoiding a multiplicity of duplicative suits." *Id.* at 172. Although a district court is to exercise sound discretion, it cannot properly discharge that responsibility in a manner that contravenes the statutory policy of giving employees the "opportunity to proceed collectively," *id.* at 170. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (A court cannot exercise its discretion in a way that "override[s] Congress' policy choice."); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) ("discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles'") (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.)). The court should therefore allow the process of proposed collective-action "certification" to proceed in the same manner that it would in the absence of a defendant's settlement offer (by deciding whether to authorize court-approved notice with a designated opt-in period) before deciding whether to enter judgment for the plaintiff on her individual claim over her objection. In other words, "sound judicial administration" requires that the collective-action process proceed unaffected by a defendant's attempt "to 'buy off' the individual private claims of the named plain-

tiffs," because allowing plaintiffs to be "picked off" before the process completes "would frustrate the objectives of [collective] actions" and subvert the intended operation of the FLSA. See *Roper*, 445 U.S. at 339.

If a district court rejects conditional certification before entering judgment for (or against) a plaintiff on the merits, the plaintiff could appeal that ruling once final judgment is entered. See *McElmurry* v. *U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141-1142 (9th Cir. 2007); *Lusardi* v. *Lechner*, 855 F.2d 1062, 1068 (3d Cir. 1988). Such an appeal would be necessary both to vindicate the plaintiff's statutory right to proceed collectively and her right to decline a settlement offer that itself fails to "offer[] all that has been requested in the complaint (*i.e.*, relief for the class)," *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring).

C. This Court Should Determine That Respondent's Individual FLSA Claim Is Not Moot Or, Alternatively, Dismiss The Writ As Improvidently Granted

The court of appeals' analysis began with the premise —derived from its circuit precedent—that a defendant's offer of full relief will generally moot a plaintiff's claim. Pet. App. 14. That Article III premise gave rise to the court's concern that a defendant could unilaterally terminate a collective action by "picking off" the named plaintiff through an offer to pay only her individual claim, and its conclusion that relation-back principles should be invoked to avoid such "undesirable strategic use of Rule 68." *Id.* at 22, 24-26, 28 (citation omitted). Although respondent does not appear to have previously contested the circuit precedent that made that premise obligatory, this Court should resolve that question and hold that an unaccepted offer of judgment does not moot a plaintiff's individual claim.

1. The question presented in the certiorari petition is whether a collective action becomes moot "when the lone [named] plaintiff *receives an offer* from the defendants to satisfy all of the plaintiff's claims." Pet. i (emphasis added). Because the overall case obviously is not moot if the named plaintiff's personal claim remains live, the question that petitioners framed and the Court granted certiorari to decide necessarily asks two related questions: First, whether respondent's "recei[pt]" of petitioners' "offer" mooted her individual claim on the merits; and second, if it did, whether the collective action as a whole was also rendered moot. The first is a logically "prior question," *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 381-382 (1995), and this Court should resolve it as a necessary "'predicate to an intelligent resolution' of the question presented." *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996).

Indeed, that predicate drove the court of appeals' Article III analysis; its concern that defendants' strategic use of offers of judgment could contravene "the purposes behind [Section] 216(b)" by rendering claims in collective actions "acutely susceptible to mootness" before the certification process could be completed; and its invocation of relation-back principles to address that concern. Pet. App. 26 (citation omitted). It is a close question whether mootness jurisprudence developed for class actions should extend to the collective-action context here. See pp. 29-32, *infra*. The Court should not resolve that more difficult constitutional question without first addressing the more straightforward Article III predicate underlying it. If the Court were merely to assume *arguendo* the mootness of respondent's individual claim, the Court would decide this case on a purely legal assumption about Article III jurisdiction that could

later be "show[n] to be ridiculous, a risk that ought to be avoided," *Lebron*, 513 U.S. at 382. The assumed mootness of respondent's claim is so central to the proper analysis that, if this Court were to decide not to examine it, the United States suggests that the Court should consider dismissing the writ as improvidently granted in order to await a case in which it may decide the entire question without an artificial Article III assumption.

2. Although a respondent generally may make any legal argument in support of the judgment below, *Bondholders Comm.* v. *Commissioner*, 315 U.S. 189, 192 n.2 (1942), this Court normally requires a cross-petition if the court of appeals' judgment would be altered by accepting such an argument, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364-365 (1994), and has "repeatedly expressed th[at] rule in emphatic terms," *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 481 n.3 (1993). Respondent did not file a cross-petition. That omission, however, does not prevent this Court from deciding whether respondent's individual claim was rendered moot by petitioners' offer.

As an initial matter, holding that respondent's individual claim is not moot would not actually expand the court of appeals' judgment. That judgment reversed outright the district court's judgment dismissing petitioner's "FLSA claim," which consisted of her claim on her own behalf and on behalf of other similarly situated employees. Pet. App. 29, 45-46. Moreover, in reversing, the court of appeals extended (*id.* at. 20-26) the logic of its prior decision in *Weiss*, *supra*, which, *inter alia*, recognized that a plaintiff need not accept a settlement offer if "the defendant has not offered all that has been requested in the complaint (i.e. relief for the class)." 385 F.3d at 343 (quoting *Roper*, 445 U.S. at 341 (Rehnquist,

J., concurring)). Apparently drawing on that principle, the court of appeals here concluded that respondents' "Rule 68 offer of judgment would no longer satisfy the claims of everyone," and therefore would not warrant "dismissing the complaint," if the certification process allows the case to move forward with at least one opt-in plaintiff. Pet. App. 29. The court's conclusion that, "[i]f" the request to proceed as a collective action is denied, the offer fully satisfying the individual claim "would moot the action," *ibid.*, is consistent with treating the whole action, including respondent's individual claim, as live until it can be determined whether petitioners' offer would satisfy every claim in the case on remand.

In any event, the Court has, on rare occasions, expanded a court of appeals' judgment in a respondent's favor without a cross-petition without expressly discussing the cross-petition rule. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 325 n.8, 328-329 (1988) (modifying judgment for student respondents by reducing length of suspension triggering protective statute from 30 to 10 school-days); *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446, 477 (1948) (modifying remand order in FLSA class action to allow district court to consider amendments to complaint and further evidence from employee-respondents); *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 518 (1939) (opinion of Roberts, J.) (modifying injunction for respondents to eliminate provisions allowing municipal petitioner to deny public-meeting permits and declaring ordinance void in its entirety). Even if the Court were to conclude, contrary to our submission above, that a determination that respondent's personal claim is not moot would expand the judgment of the

court of appeals, this case presents a rare instance in which a cross-petition should not be required.

As noted, the question whether respondent's individual claim is moot is subsumed in the question that *petitioners* present and the Court has granted certiorari to review. That broader question presented and the court of appeals' rationale cannot be adequately reviewed without deciding whether petitioners' unaccepted "offer" has mooted respondent's individual claim on the merits. It is especially important for the Court to consider the issue because it concerns the Article III jurisdiction of both the courts below and this Court. That Article III question should not be resolved on the basis of an erroneous predicate legal assumption. And that antecedent issue, which has produced divergent answers in the courts of appeals (see pp. 12-14, *supra*), is itself sufficiently important to warrant this Court's attention.

There is no statutory bar to the Court's deciding that predicate Article III issue, because the Court's cross-petition requirement is not jurisdictional. Congress has authorized this Court to exercise jurisdiction over "*[c]ases* in the court of appeals" "[b]y writ of certiorari granted upon the petition of *any party*." 28 U.S.C. 1254(1) (emphases added). Although this Court as a matter of sound discretion normally limits its review to the "questions set out in the petition, or fairly included therein," Sup. Ct. R. 14.1(a); see *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (per curiam)—a standard that in fact is satisfied in this case—a grant of certiorari under Section 1254 vests the Court with jurisdiction to decide the entire "case[]" as it stood "in the court of appeals." The origins of statutory certiorari jurisdiction and the Court's practice confirm that conclusion.

This Court was "the single tribunal" for final appellate review of "all cases and questions of a Federal nature" until 1891, when Congress passed the Evarts Act, ch. 517, 26 Stat. 826, to create the courts of appeals and relieve this Court's crowded docket. *Forsyth* v. *Hammond*, 166 U.S. 506, 511-512 (1897). Section 6 of the Act, however, preserved this Court's power to control the "litigation in all the Courts of Appeal," *id.* at 514, by authorizing the Court to order "by certiorari" that "any * * * case" pending in a court of appeals "be certified to the Supreme Court for its review and determination with the *same power and authority* in the case as if it had been carried by appeal or writ of error to the Supreme Court." *Id.* at 513 (quoting 26 Stat. 828) (emphasis added). This Court has long recognized that its "*comprehensive and unlimited power*" to "reach out [a] writ of certiorari and transfer the case here for review and determination," *ibid.* (emphasis added), confers the "power to decide the case as it was presented to the * * * Court of Appeals," *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 267 (1910); see *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934), by making the "whole case * * * open to [this Court's] review," *Brown* v. *Fletcher*, 237 U.S. 583, 587 (1915), see *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 382, 385 (1893).[3]

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[3] The question whether the cross-petition rule is jurisdictional is distinct from the question whether the cross-appeal rule is jurisdictional, because, as noted, Congress created the Court's certiorari jurisdiction to vest this Court with discretion to step into the shoes of a court of appeals with the power to decide the case as would that court. The Court has declined to decide whether the cross-appeal rule is jurisdictional. *Greenlaw*, 554 U.S. at 245; cf. *id.* at 255 (Breyer, J., concurring in the judgment) (it is not jurisdictional); *id.* at 256-257 (Alito, J., dissenting) (same).

Congress later amended Section 6's successor to specify that a writ of certiorari confers the "same power and authority * * * as if the cause had been brought [to this Court] by *unrestricted* writ of error or appeal," 28 U.S.C. 347(a) (1925) (emphasis added), in order to confirm the Court's power to review "the entire merits of the controversy, whatever the controversy may be." 66 Cong. Rec. 2919 (1925) (statement of Sen. Cummins). Although text expressly specifying the breadth of the Court's certiorari jurisdiction was omitted when Congress codified Title 28 in 1948, the revision "preserve[d] existing law" and thus "retain[ed] the power of unrestricted review of cases * * * brought up on certiorari." 28 U.S.C. 1254 note; see *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 ("[N]o changes of law or policy are to be presumed from changes of language" in the 1948 codification "unless an intent to make such changes is clearly expressed.").

The Court's sound practice of issuing "order[s] limiting the grant of certiorari" to particular questions thus is not "a jurisdictional bar" limiting the power to decide "questions outside the scope of the limited order" if "necessary for the proper disposition of the case." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981). The Court's power to grant certiorari before judgment by a court of appeals similarly reflects that the grant of certiorari authorizes the Court—as Section 1254(1)'s text indicates—to review the entire "[c]ase[] in the court of appeals."

Decisions reflecting the Court's traditional "practice" of requiring a "cross petition for certiorari" likewise do not "deny the *power* of the [C]ourt to review [such] objections" without a cross-petition if the case is properly before it on certiorari. *Langnes* v. *Green*, 282 U.S. 531,

536-538 (1931) (dictum). For that reason, notwithstanding 28 U.S.C. 2101(c)'s jurisdictional period for seeking certiorari, *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007), the Court's rules expressly permit the granting of a cross-petition that would be "jurisdictionally out of time," Sup. Ct. R. 12.5, 13.2, so long as "another party's timely petition for a writ of certiorari is granted," Sup. Ct. R. 13.4. See 445 U.S. 1005, 1007 (1980) (adopting predecessors). The Court has thus repeatedly granted cross-petitions that would have been jurisdictionally untimely as freestanding petitions. See, *e.g.*, *Sawyer* v. *Iqbal*, 556 U.S. 1256 (2009) (No. 07-1150) (petition filed 171 days after denial of rehearing); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (No. 88-214) (167 days); *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988) (No. 87-929) (183 days); *CIA* v. *Sims*, 471 U.S. 159 (1985) (No. 83-1249) (163 days).

II. AN FLSA COLLECTIVE ACTION MAY BECOME MOOT IF THE NAMED PLAINTIFF'S INDIVIDUAL CLAIM BECOMES MOOT

If the Court concludes that petitioners' Rule 68 offer did not moot respondent's personal claim, then the Court need not decide whether an FLSA collective action becomes moot if the named plaintiff's claim becomes moot before another plaintiff opts in. If, however, the Court determines that the offer of judgment mooted respondent's claim, the collective action here may likewise be moot.

It is settled that "an actual controversy must be extant at all stages of review" to sustain Article III jurisdiction. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). A putative class action thus will become moot once "a case or controversy no longer exists between the named plaintiffs and

the [defendants]" unless there is another basis for ongoing jurisdiction. *Board of Sch. Comm'rs* v. *Jacobs*, 420 U.S. 128, 129 (1975) (per curiam). This Court has found an ongoing dispute when (1) the named plaintiff retains a separate financial interest in class certification, see *Roper*, *supra*; (2) the class is deemed to acquire a separate legal status before the named plaintiff's claim became moot, see *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Geraghty*, *supra*; or (3) the claims are "so inherently transitory" that there would not have been enough time to resolve class certification before the named plaintiff's claim expires, see *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). One of those circumstances may apply here.

A. In *Roper*, after the district court denied class certification, it entered judgment for the named plaintiffs over their objection (based on the defendant's offer to pay their individual claims in full) and dismissed the case. 445 U.S. at 329-330. This Court held that the district court's disposition of the named plaintiffs' damages claims had not yet mooted their "individual and private case or controversy." *Id.* at 332-333. The Court reasoned that the named plaintiffs' ongoing "economic interest in class certification" allowed them to appeal the adverse certification ruling and that the case remained live pending "absolute finality of [the] judgment" such that an "appeal of the adverse certification ruling" could proceed, even though the plaintiffs had "prevailed on the merits" and the basis for their appeal (Rule 23) was an ancillary "procedural right" to "assert their own claims in the framework of a class action." *Id.* at 332-334, 340.

The *Roper* plaintiffs had an economic interest in class certification because, the Court concluded, they could seek compensation for attorney's fees and costs in-

curred on behalf of the class if other class members recovered damages. 445 U.S. at 334 n.6, 336, 338 n.9; cf. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 257-258 (1975) (discussing such compensation).[4] That interest in recovering uncompensated costs from potential co-plaintiffs can exist if the court fails to certify a class or collective action, because even if the plaintiff obtains "reasonable" attorney's fees and costs from the defendant for prevailing on her individual claim, her separate expenditures on the "unsuccessful [certification] claim" should be "excluded in considering the amount of a reasonable fee" award. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 435, 440 (1983).

Respondent thus could continue to pursue collective-action certification to recover her distinct expenditures for the collective aspect of this litigation. Moreover, to the extent respondent claims an "incentive award" for advancing collective interests, see *Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 876-877 (7th Cir. 2012), that financial interest should similarly enable respondent to pursue certification. Those questions could be considered by the district court on remand if the Court were to hold that respondent's individual claim on the merits is moot.

B. *Sosna* and *Geraghty* rest on the theory that a class acquires independent legal status at the time of a court's certification order, including a denial of certification corrected on appeal that "relates back" to the date of the

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[4] Although an interest in obtaining an award of attorney's fees and costs is insufficient to permit litigation of the merits, see *Lewis* v. *Continental Bank Corp.*, 494 U.S 472, 480 (1990), *Roper* recognized ongoing Article III jurisdiction to litigate a "collateral" ruling (class certification) in which the court will not "pass[] on the merits." 445 U.S. at 336.

erroneous denial. At that point, unnamed class members will have a live case or controversy that can sustain Article III jurisdiction even if the named plaintiff's personal claim subsequently expires. That rationale does not directly apply to collective actions.

Sosna held that unnamed members of a class "acquire[] a legal status separate from the interest asserted by the [named plaintiff]" "[w]hen the District Court certifie[s]" a class action. 419 U.S. at 399. A case or controversy will therefore exist at all times if the named plaintiff's claim remains live "at the time the class action is certified," and a controversy continues between the "defendant and a member of the [certified] class" after "the claim of the named plaintiff has become moot." *Id.* at 402; see *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 753-756 (1976) (discussing *Sosna*).

Geraghty extended *Sosna* by applying a "'relation back' approach" to permit a named plaintiff challenging the prospective application of parole-release guidelines to appeal the denial of class certification, even though his release from prison during the appeal had mooted his personal claim on the merits. 445 U.S. at 393-394, 397-398. The Court concluded that "at least some members of the [putative] class" the named plaintiff "s[ought] to represent" continued to have a "live" dispute with the defendants, *id.* at 396, and that the plaintiff retained a sufficient "personal stake" in vindicating his "right to have a class certified" to prosecute the class-certification appeal, *id.* at 403-404.

By identifying a live controversy between putative class members and the defendants, *Geraghty* appears to have concluded that the putative members' claims were sufficient to permit a class-certification appeal by the plaintiff, because the appeal would determine whether

the class (and the class claims) should have obtained independent legal status when the district court denied certification, *i.e.*, before the plaintiff's personal claim had expired. *Geraghty* thus "h[e]ld that when a District Court erroneously denies a procedural motion [for class certification], which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial." 445 U.S. at 406-407 n.11. That nunc-pro-tunc rationale of appellate correction, however, would not preserve a case that had already become moot before the challenged ruling. *Geraghty* accordingly stated that "[i]f the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of [the] appellate reversal of that denial still would not prevent mootness of the action." *Id.* at 407 n.11.

The court of appeals concluded that a motion for "conditional certification" could "relate back" to the date of the complaint, Pet. App. 28-29, but that reasoning is insufficient to support its ruling. Unlike a class-certification order, which immediately makes the class a legal entity in the suit, conditional certification results in court-approved written notice to employees who may then decide to opt into the action. See pp. 3-4, *supra*. It does not bring any plaintiffs into the case, because a plaintiff may join a collective action only by filing her opt-in consent. See 29 U.S.C. 216(b), 256(b); pp. 2-3, *supra*. If no additional plaintiff opts in before the named plaintiff's personal claim expires, then without more the action will have already lost its live status.

C. Finally, this Court has deemed claims for prospective relief "capable of repetition, yet evading review" with respect to a non-certified putative class in a "nar-

row class of cases" in which (1) it is "certain that other persons similarly situated" to the named plaintiff will continue to be exposed to the challenged conduct[5] that (2) "is by [its] nature temporary" and may not affect the named plaintiff "long enough" to "certify the class" before his personal claim expires. *Gerstein*, 420 U.S. at 110 n.11; *id.* at 106-107 (pretrial detention for a month or more without judicial probable-cause determination). In such circumstances, the Court has permitted ongoing litigation "after the named plaintiff's claim ha[s] become moot," because the underlying claim is "so inherently transitory" that the trial court would otherwise "not have even enough time to rule on a motion for class certification." *McLaughlin*, 500 U.S. at 51-52 (warrantless detention up to seven days without a judicial probable-cause determination) (citation omitted); see, *e.g.*, *Swisher* v. *Brady*, 438 U.S. 204, 214 n.11 (1978) (juvenile-court procedure for which "the rapidity of judicial review * * * create[d] mootness questions" before the district court "c[ould] reasonably be expected to rule on a certification motion") (citation omitted). Class certification in such cases "can be said to 'relate back' to the filing of the complaint." *Ibid.* (quoting dictim in *Sosna*, 419 U.S. at 402 n.11). Although the question is close, the foregoing logic should not be extended to this case.

Damage claims like respondent's are not by nature "inherently transitory" because claims for retrospective relief remain live until resolved or settled. The Third Circuit in *Weiss* nonetheless reasoned that a similar analysis should apply if defendants employ the "tactic of

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[5] By contrast, the Court's traditional capable-of-repetition-yet-evading-review doctrine requires a reasonable expectation that the same plaintiff will again be subject to the time-limited action. *Turner* v. *Rogers*, 131 S. Ct. 2507, 2515 (2011).

'picking off' lead plaintiffs with a Rule 68 offer," thus rendering the underlying claims "acutely susceptible to mootness." 385 F.3d at 347 (citation omitted). The court applied that logic here, Pet. App. 26, to disregard the temporal gap between the date on which respondent's personal claim could be deemed moot (because of the unaccepted settlement offer) and the possible future appearance of another plaintiff. That reasoning would have force as a practical matter if its premise that damages claims can be rendered moot by an unaccepted settlement offer were correct. But that premise is clearly wrong, see pp. 10-14, *supra*, and this Court should not give expansive scope to the Judiciary's Article III power simply to mitigate the adverse consequences of the Third Circuit's separate legal error about the Article III effect of a mere settlement offer.

But if the Third Circuit's premise were correct, it would be a difficult judgment whether to extend a capable-of-repetition rationale to this context. Such an extension would reduce the significant potential for frustrating collective actions pursuing legitimate redress for significant violations of statutory rights and avoid the cost on the judicial system of entertaining serial collective-action suits that would be rendered moot by successive offers to pay just an individual claim. Moreover, the specter of such successive short-lived suits parallels the prospect of successively mooted class actions addressed by *Gerstein* and *McLaughlin*, particularly where, as here, respondent alleges a significant class of employees with similar claims.

On balance, however, we conclude that the Third Circuit's theory sweeps too broadly to be in keeping with the Court's "narrow class of cases" addressing inherently transitory claims for prospective relief. Under the

Third Circuit's theory, practically every damages claim advanced in a collective action could be viewed as "acutely susceptible to mootness" if settlement is offered. Yet "the capable-of-repetition doctrine [as traditionally framed] applies only in exceptional situations," *City of L.A.* v. *Lyons*, 461 U.S. 95, 109 (1983), and this Court has not suggested that that stringent standard should be relaxed. Moreover, unlike claims for prospective relief challenging allegedly continuing unlawful conduct, purely retrospective claims address completed harms. The mootness question here thus ultimately concerns the potential for damages claims by employees who have not filed their own action and have not opted into this action, either because they are unaware of it or because they chose not to participate. Those damages claims are not themselves capable of repetition yet evading review.

CONCLUSION

The judgment of the court of appeals should be affirmed or, alternatively, the petition for a writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1254 provides:

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

2. Section 240 of the Judicial Code of 1911, ch. 231, 36 Stat. 1157, as amended (28 U.S.C. 347(a) (1946)), provided in pertinent part:

In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like ef-

fect, as if the cause had been brought there by unrestricted appeal.

* * * * *

3. Section 6 of the Evarts Act (Circuit Court of Appeals Act) of 1891, ch. 517, 26 Stat. 828, provided in pertinent part:

> That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, * * * *
>
> And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

* * * * *

4. 29 U.S.C. 216(b) provides:

> **Damages; right of action; attorney's fees and costs; termination of right of action**
>
> 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 compen-

sation, 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. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

5. 29 U.S.C. 255 provides in pertinent part:

Statute of Limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act * * * , or the Bacon-Davis Act—

> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;
>
> * * * * *

6. 29 U.S.C. 256 provides:

Determination of commencement of future actions

In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act * * * , or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

7. Rule 68 of the Federal Rules of Civil Procedure (as amended effective December 1, 2009) provides:

Offer of Judgment

(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.

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable

time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(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.

8. Rule 68 of the Federal Rules of Civil Procedure, 28 U.S.C. App. at 72 (Supp. II 2008), provided in pertinent part:

Offer of Judgment

(a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. More than 10 days before the trial begins, 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 10 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.

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(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 10 days—before a hearing to determine the extent of liability.

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