No. 12-744

IN THE

Supreme Court of the United States

CONVERGENT OUTSOURCING, INC.,
formerly known as ER Solutions, Inc.,
Petitioner,

v.

ANTHONY W. ZINNI,
Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

DAVID P. HARTNETT
MAUREEN G. PEARCEY
HINSHAW & CULBERTSON LLP
2525 Ponce de Leon Blvd.
4th floor
Coral Gables, FL 33134
(305) 358-7747

DAVID M. SCHULTZ
JOEL D. BERTOCCHI
Counsel of Record
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Suite 300
Chicago, IL 60601
(312) 704-3000
jbertocchi@hinshawlaw.com

Counsel for Petitioner

April 17, 2013

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL BRIEF FOR PETITIONER

Genesis Healthcare Corp. v. Symczyk, No. 11-1059 (U.S.S.Ct. April 16, 2013) (hereinafter "Slip op."), strongly counsels in favor of granting certiorari in this case. In *Symczyk* the majority assumed, without deciding, that "an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot," while noting that the Circuits are in conflict on the point. Slip Op. at 5 and n. 3. That issue is also included within the question presented by the instant petition, which is whether such an offer moots a claim even if it does not include an offer of judgment. While the former and included issue was conceded below in *Symczyk*, it *was* argued below in the instant case and is thus properly presented herein. The various views expressed on the issue in *Symczyk*, and the importance ascribed to it, counsel in favor of granting the instant Petition.

I. WHETHER AN UNACCEPTED OFFER OF FULL RELIEF MOOTS A CLAIM IS AN IMPORTANT QUESTION THAT WAS PROPERLY RAISED IN THIS CASE, WAS ARGUED (BUT NOT DECIDED) BELOW, AND IS THE SUBJECT OF SIGNIFICANT DISAGREEMENT.

In *Symczyk* the Court held that collective action claims brought under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, were properly dismissed after the claims of the individual plaintiff became moot. In so holding, the majority assumed, without deciding, that the individual plaintiff's claims were in fact mooted by the offer to her of all the relief she had requested. Slip op. at 4-5. It did so because the plaintiff had conceded in the District Court and in the Third Circuit that the offer she had received had

mooted her individual claims; as a result of this "waiver," the majority decided that the issue "is not properly before us." Slip op. at 3. The dissenting Justices disagreed, and argued in favor of deciding the case on that ground. Slip op. at 4-5 (Kagan, J., joined by Ginsburg, Breyer and Sotomayor, JJ., dissenting).

The instant Petition presents that important question without the waiver issue that persuaded the majority in *Symczyk* to leave it alone. As explained in the Petition, whether an unaccepted offer of full relief moots a case is a question that is included within the one presented by the instant Petition, which is whether such an offer must include agreeing to an entry of a judgment in order to have that effect. See Pet. at 12 n. 6. The dissenting Justices in *Symczyk* observed that the "premise" that the defendant's offer in that case had mooted the individual plaintiff's claim was "[e]mbedded" within the question the majority decided before going on to address the case on those "embedded" grounds, Slip op. at 1 (Kagan, J., dissenting), while even the majority assumed an answer to the question before pressing on, Slip op. at 5.

Such a question is appropriately considered if it is included within the one that is before the Court and raised below. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982). In this case, unlike *Symczyk*, that question *was* addressed by the parties below. See Pet. at 12 n. 6; Pet App. at 17a n. 8[1]; Joint Brief For Appellants,

---

[1] The Eleventh Circuit initially described the issue as "whether the offer was accepted or rejected." Pet. App. at 17 n. 8. Despite this odd wording, the question that court considered but did not resolve was plainly "whether an offer of full relief,

Zinni v. ER Solutions, Inc., Nos. 11-12413, 11-12931 and 11-12937 (11th Cir), at pp. 13-15. Accordingly there was no concession on or waiver of the issue in the instant case. Rather, the Eleventh Circuit thought it "need not decide" the issue, Pet. App. at 17 n. 8, because, in its view, even an offer of one dollar more than all of the relief available to Respondent was not enough to moot Respondent's claims in the absence of an additional offer of a judgment, Pet. App. at 16a-19a.

As Petitioner and Amici have explained, the Circuits are in conflict on whether an offer of full relief must include a judgment in order to moot a claim. See Pet. 8-19; Reply Brief of Petitioner, at 1-6; see also Brief Of ACA International, DBA International And The National Association of Collection Attorneys As *Amici Curiae* In Support Of Petitioner, at 4-8. There is also disagreement on the included or "embedded" question whether such an offer, if unaccepted or rejected, moots a claim in the first place. As the majority in *Symczyk* observed, "the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." Slip op. at 5 (citations omitted). And although the majority in *Symczyk* did not decide the question, it does appear that there are differences of opinion on the Court itself. Compare Slip op. at 10 ("a full settlement offer addresses plaintiff's alleged harm by making the plaintiff whole") with Slip op. at 3 (Kagan, J., dissenting) ("When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before."). And the issue is also an

---

even if rejected, would be enough to moot a plaintiff's claims." *Id*.

important one, important enough to prompt the dissent in *Symczyk* to advise the Third Circuit to "[r]ethink your mootness-by-unaccepted-offer theory," Slip op. at 4 (Kagan, J., dissenting), and to command the attention of the United States in *Symczyk*, see Brief for the United States as Amicus Curiae Supporting Affirmance, *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059, at 10-15.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID P. HARTNETT
MAUREEN G. PEARCEY
HINSHAW & CULBERTSON LLP
2525 Ponce de Leon Blvd.
4th floor
Coral Gables, FL 33134
(305) 358-7747

DAVID M. SCHULTZ
JOEL D. BERTOCCHI
Counsel of Record
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Suite 300
Chicago, IL 60601
(312) 704-3000
jbertocchi@hinshawlaw.com

Counsel for Petitioner

April 17, 2013