No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,
v.
LAURA SYMCZYK,
Respondent.

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1] This case concerns the collective action provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, which permits suits by "any one or more employees for and in behalf of himself or themselves and other employees similarly situated," § 216(b), and the Constitution's case or controversy requirement as it relates to such collective actions. Because a central purpose of the FLSA is to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" on the basis that such conditions "constitute[] an unfair method of competition," § 202(a), the AFL-CIO has a strong interest in the proper interpretation of the FLSA, as well as a correct understanding of the case and controversy requirement as it bears on effective enforcement of

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[1] Counsel for the petitioners and counsel for the respondent have filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

basic workplace rights. For these reasons, the AFL-CIO has routinely filed *amicus* briefs in this Court in cases concerning the proper interpretation of the FLSA and its implementing regulations. *See*, *e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

STATEMENT

The Fair Labor Standards Act requires employers to pay covered employees at least the statutory minimum wage, 29 U.S.C. § 206(a), and a statutory overtime rate of "not less than one and one-half times the regular rate" for hours worked in excess of forty hours in a workweek, § 207(a)(1). The Act permits suits by "any one or more employees for and in behalf of himself or themselves and other employees similarly situated." § 216(b). An individual becomes "a party plaintiff to . . . such action" by "giv[ing] his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Ibid.*

Laura Symczyk, the plaintiff in this case, was employed by Genesis Healthcare Corporation and Eldercare Resources Corporation (collectively, the "defendants") as a Registered Nurse in a health care facility in Philadelphia in 2007. JA 23.

On December 3, 2009, Symczyk filed a class action complaint against defendants in state court in Pennsylvania alleging that defendants violated the Pennsylvania Minimum Wage Act and Pennsylvania Wage Payment and Collection Law by failing to pay

Symczyk and similarly situated employees at defendants' facilities throughout Pennsylvania for statutory overtime wages and wages due for hours worked during meal breaks pursuant to defendants' "Meal Break Deduction Policy." *Symczyk v. Genesis Healthcare Corp.*, Case No. 2:10-cv-01378, docket #1, Exhibit B (state class action complaint) (E.D. Pa.). According to Symczyk's allegations, that policy resulted in an automatic deduction of a 30-minute meal period for every shift worked, without regard to whether an employee actually worked during his or her meal period. *Ibid.*

The next day, Symczyk filed a lawsuit in federal court in the Eastern District of Pennsylvania, alleging that these same facts violated the FLSA by denying the payment of statutory overtime wages. JA 21-31. Symczyk filed her federal complaint as a collective action on behalf of all "similarly situated" workers employed by defendants in Pennsylvania. JA 26-29.

On February 18, 2010, defendants answered Symczyk's federal complaint. JA 44-54. In its answer, defendants denied liability but did not plead as an affirmative defense that the district court lacked subject matter jurisdiction over the case due to the absence of a live case or controversy. *Ibid.*

On the same day, defendants sent Symczyk a Rule 68 offer of judgment for all claims asserted in the federal suit. JA 80-82. In a cover letter, defendants stated that, "[i]n accordance with Federal Rule of Civil Procedure 68, if Plaintiff has not accepted this Offer of Judgment in writing within ten (10) days after service, this Offer of Judgment shall be deemed with-

drawn."[2] JA 79. The letter also stated that "if Plaintiff obtains a final judgment in this matter that is less favorable than this Offer, Genesis will seek to recover all reasonable costs (potentially defined to include fees under the FLSA) incurred after it made this Offer." *Ibid.*

Symczyk did not accept the offer of judgment. As a result, the offer expired, at the latest, on March 4.

In the meantime, on February 22, the district court issued a notice of a Rule 16 pretrial conference in the case. JA 2, docket # 9. Attached to that notice was a notice to counsel concerning the district court judge's pretrial and trial procedures which stated that "[m]otions to dismiss . . . should be filed, whenever possible, before the Preliminary Pretrial Conference," *Symczyk v. Genesis Healthcare Corp.*, Case No. 2:09-cv-05782, docket #9, Supplement #2, at p. 1 (E.D. Pa.), and that the parties were required to inform the court of any "jurisdictional defects" prior to the conference, *id.* at p. 2. On March 8, the district court convened the pretrial conference and issued a scheduling order permitting the parties ninety days for initial discovery "at the close of which Plaintiff will move for conditional certification under § 216(b) of the FLSA." JA 62-63. The scheduling order makes no mention of any jurisdictional defect in the case or

[2] The offer itself stated that it would "remain open until it expires by operation of law, unless otherwise withdrawn by Defendants." JA 81. Thus, despite the reference to 10 days in the cover letter, the apparent intent of the defendants was that the offer would remain open for the 14-day period specified in Rule 68 as amended effective December 1, 2009.

any plan by defendants to file a motion to dismiss, *ibid.*, and the district court later stated that it "was unaware when it issued the Scheduling Order that Defendants had already made Symczyk a Rule 68 offer of judgment," App. 43.

On March 23, 2010, two weeks into the class certification discovery period, defendants filed a motion to dismiss Symczyk's federal suit, attaching their unaccepted offer of judgment to the motion. JA 64-82. In the motion, defendants stated that: "Even though Defendants' Offer to Ms. Symczyk afforded her all relief she seeks and could obtain in this matter, she never responded, effectively rejecting the Offer. Consequently, Ms. Symczyk no longer has a personal stake or legally cognizable interest in the outcome of this action, a prerequisite to this Court's subject matter jurisdiction under Article III of the United States Constitution." JA 65 (citation omitted).

On March 29, 2010, while class certification discovery continued and the motion to dismiss was still pending, defendants removed Symczyk's state law class action suit to federal court in the Eastern District of Pennsylvania. *See Symczyk v. Genesis Healthcare Corp.*, Case No. 2:10-cv-01378, docket #1. In their notice of removal, defendants claimed that "the State Action is a civil action over which th[e] Court has original federal question jurisdiction under 28 U.S.C. § 1331." *Id.*, docket #1, Notice of Removal, p. 5. Defendants explained that "[m]any of the individuals in the purported class are or were members of a union and subject to one of at least six (6) collective bargaining agreements ('CBAs')" "thus bringing the State Action Complaint under the auspices of §

301 of the L[abor] M[anagement] R[elations] A[ct][, 29 U.S.C. § 185]." *Id.* at pp. 6-7. Although Defendants' notice of removal stated that Symczyk's state case concerned "the exact same facts and conduct" as her FLSA suit, *id.* at p.2 , the district court docketed the removed state law case under a new case number rather than consolidate it with the pending FLSA suit.

On April 13, 2010, while the motion to dismiss in the FLSA case remained pending, the district court entered a Stipulated Order in which Symczyk agreed to voluntarily dismiss without prejudice her removed state law suit and Defendants agreed to permit Symczyk to amend her complaint in the FLSA suit to add her state law class action claims. JA 88-89. The Stipulated Order stated, without explanation, that "[t]he filing of the Amended Complaint will not moot or otherwise affect the Court's consideration or determination of Defendant's [sic] pending Motion to Dismiss." JA 89. On April 23, 2010, Symczyk filed the First Amended Class/Collective Action Complaint, JA 115-133, which pleaded "the Pennsylvania state law claims as a class action pursuant to Rules 23(a) and (b) of the Federal Rules of Civil Procedure," JA 116.

In response to Symczyk's filing of the First Amended Complaint, Defendants did not withdraw, amend, or re-file its motion to dismiss. Moreover, in its reply memorandum in support of its motion to dismiss – filed a week after Symczyk filed her First Amended Class/Collective Action Complaint including the Rule 23 claims – Defendants argued without explanation that "Rule 23 does not apply to this

case," JA 135, even though Rule 23 did apply to the state claims.

On May 19, 2010, the district court "tentatively" granted Defendants' motion to dismiss. Pet. App 43. The district court explained that it had "tentatively concluded that Defendants' Rule 68 offer of judgment moots this collective action, and thus, that this collective action should be dismissed for lack of subject matter jurisdiction." *Ibid.* The Court added that it "would likely decline, in its discretion, to exercise supplemental jurisdiction over Symczyk's claims under Pennsylvania law." *Ibid.* The Court did not mention Defendants' prior claim that Symczyk's state law claims constituted "a civil action over which th[e] Court has original federal question jurisdiction under 28 U.S.C. § 1331" – the basis for the removal of this claim by Defendants to federal court. *Symczyk v. Genesis Healthcare Corp.*, Case No. 2:10-cv-01378, docket #1, p. 5. The Court subsequently made its tentative conclusions final, dismissing Symczyk's FLSA claim with prejudice as moot and remanding Symczyk's state law claims to state court.[3] Pet. App. 45-46.

Symczyk appealed the district court's dismissal of the FLSA claim to the Third Circuit. The court of appeals did not question the district court's conclusion that Defendants' unaccepted Rule 68 Offer of Judgment would moot Symczyk's claim but for the fact that Symczyk filed her original FLSA suit as a

[3] After the district court indicated its tentative decision to dismiss Symczyk's FLSA claim, Symczyk did not oppose the remand of her state claims back to state court. JA 175-76.

collective action.[4] Instead, the Third Circuit reversed the district court on the ground that "[t]he considerations that caution against allowing a defendant's use of Rule 68 to impede the advancement of a representative action [in the Rule 23 setting]" are "equally weighty" in the context of an FLSA collective action. Pet. App. 25. On that basis, the court of appeals held that "[a]bsent undue delay, when an FLSA plaintiff moves for 'certification' of a collective action, the appropriate course – particularly when a defendant makes a Rule 68 offer to the plaintiff that would have the possible effect of mooting the claim for collective relief asserted under § 216(b) – is for the trial court to relate the motion back to the filing of the initial complaint" such that if "at least one other similarly situated employee opts in, then . . . the proffered rationale behind dismissing the complaint on jurisdictional grounds would no longer be applicable." Pet. App. 28-29.

Defendants then filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

This Court cannot reach the merits of this case without first deciding a logically prior issue not decided by the court of appeals or argued by the defendants: whether an unaccepted Rule 68 offer of

[4] Indeed, the Third Circuit stated that, on remand, "[i]f . . . the court finds Symczyk's motion to certify would be untimely, or otherwise denies the motion on its merits, then defendants' Rule 68 offer to Symczyk – in full satisfaction of her individual claim – would moot the action." Pet. App. 29.

judgment deprives a federal court of subject matter jurisdiction, even in a purely individual action, by rendering the plaintiff's claim moot. By the express terms of Rule 68 itself, an offer of judgment that is not accepted by the plaintiff – such as the offer at issue in this case – is considered withdrawn. At that point, the plaintiff stands in precisely the same position vis-à-vis the defendant with regards to damages as she did before the offer of judgment was made. A plaintiff who does not accept a Rule 68 offer of judgment, therefore, retains a concrete interest in the outcome of the case and thus the case is not moot. Because the plaintiff in this case did not accept defendants' Rule 68 offer of judgment, her claim remains a live one.

A defendant *can* attempt to moot an individual plaintiff's claim by unconditionally tendering the amount claimed by the plaintiff directly to the plaintiff or by depositing that same amount with the court. To the extent that such a tender indisputably satisfies the plaintiff's claim, such an unconditional tender would moot at least that individual plaintiff's interest in the case.

Notably, the defendants in this case did not make an unconditional tender to the plaintiff, but instead made a Rule 68 offer of judgment conditioned upon termination of the plaintiff's suit. Thus, whether an unconditional tender to the plaintiff in this case – a case pleaded as an FLSA collective action – would have mooted the case in its entirety is a question not presented here.

There can be no doubt, however, that in a case where such an unconditional tender was made, a dis-

trict court could stay any decision on a defendant's motion to dismiss for lack of subject matter jurisdiction until similarly situated employees are given notice of the pending FLSA lawsuit and a reasonable opportunity to opt in. Any other approach would allow defendants to strategically use moot-and-dismiss tactics to delay, if not prevent, notice being provided to potential party plaintiffs, bleeding value from such plaintiffs' claims as the statute of limitations continues to run and preventing many such claims from ever being filed. Such a rule would undermine Congress' statutory purpose to permit employees to join together in collective actions in order effectively to enforce the requirements of the FLSA and "eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202.

ARGUMENT

The question presented by the petition for certiorari in this case is "[w]hether a case becomes moot . . . when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims." Pet. i. In arguing that this case is moot, the defendants take as a given that the offer they made to the plaintiff mooted her own claim – an argument accepted by the court of appeals – and concentrate on whether the case is nevertheless kept alive by the claims of the "others similarly situated" asserted by the plaintiff's complaint.

We begin by demonstrating that it is beyond dispute that the offer on which the defendants rely did *not* moot even the plaintiff's own claim. That being

so, this case is clearly *not* moot and this Court need not reach the logically subsequent question discussed at length by the defendants in their brief and by the court of appeals below.

Although the plaintiff in this case did not contest before the court of appeals the district court's conclusion that an unaccepted offer of judgment could moot her individual claim, this Court should either resolve that logically prior question or dismiss this case as improvidently granted. If the Court were to reach out to resolve the logically subsequent question presented by the petition in this case without first definitively resolving the preliminary issue of subject matter jurisdiction, it would only further exacerbate the present state of confusion in the lower courts regarding whether an unaccepted Rule 68 offer can moot a claim. *Compare Poteete v. Capital Eng'g, Inc.*, 185 F.3d 804, 807 (7th Cir. 1999) (unaccepted Rule 68 offer does not moot claim), *with Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004) (unaccepted Rule 68 offer does moot claim), *with O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 575 (6th Cir. 2009) (where plaintiff rejects Rule 68 offer, court should nevertheless enter judgment in favor of plaintiff based on that offer).

I. THE DEFENDANTS' EXPIRED OFFER OF JUDGMENT DID NOT MOOT THE PLAINTIFF'S OWN CLAIM FOR BACK WAGES.

The district court in this case entered an order providing that the "Plaintiff's FLSA claim is dismissed with prejudice," Pet. App. 45, based on the court's prior conclusion "that an offer of settlement under

Rule 68, if undoubtedly sufficient to compensate the plaintiff for all damages, will result in dismissal for lack of jurisdiction, regardless of whether the offer is accepted," Pet. App. 35. The district court's dismissal of the plaintiff's FLSA claim based on a withdrawn Rule 68 offer of judgment was contrary to the express terms of Rule 68 itself and to the established law regarding what is required for a tender of payment to moot a claim for money damages.

A. Rule 68 provides that, if the plaintiff "serves written notice accepting the offer, either party may then file the offer and notice of acceptance" and "[t]he clerk must then enter judgment." Fed. R. Civ. P. 68(a). "An unaccepted offer is considered withdrawn . . . ." Fed. R. Civ. P. 68(b). "Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs." *Ibid.* The only consequence of failure to accept an offer of judgment is that "[i]f 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." Fed. R. Civ. P. 68(c). As this Court has explained, "[i]f a plaintiff chooses to reject a reasonable offer," "he [is] not [] allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 356 (1981). But nothing in *Delta Air Lines* or this Court's other precedent suggests that a court can prohibit a plaintiff from taking such a "gamble" at all based on an unaccepted Rule 68 offer of judgment.

The district court quite properly did *not* treat the

offer of judgment as accepted and thus did *not* enter judgment in the plaintiff's favor. Rather, in direct contravention of the terms of Rule 68(b), the district court took into evidence the unaccepted offer. And, having determined that the offer exceeded the amount the plaintiff could expect to recover, the district court entered judgment *in favor of the defendants* dismissing the plaintiff's FLSA claim with prejudice.

There is nothing in Rule 68 that allows a district court to enter judgment for the defendants based on an unaccepted offer of judgment. To the contrary, the Rule expressly states that the district court is not permitted to even receive evidence of the unaccepted offer "except in a proceeding to determine costs," that is, until after the case is complete and judgment has been entered. Fed. R. Civ. P. 68(b). And, the sole consequence stated in the Rule for failure to accept an offer of judgment is that "the costs incurred after the offer was made" will be shifted to the plaintiff if "the judgment that the [plaintiff] obtains is not more favorable than the unaccepted offer." Fed. R. Civ. P. 68(d). Thus, the actions of the district court were directly contrary to the terms of Rule 68.

B. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citations, quotation marks and brackets omitted). At the point the district court dismissed this case as moot, the named plaintiff had

recovered nothing on her FLSA claim, and that remains so to this day. Thus, the plaintiff most certainly had "a concrete interest . . . in the outcome of th[is] litigation," and it was most certainly "[]possible for [the] court to grant . . . effectual relief" were she to prevail. *Ibid.* In short, it is impossible "to see how the plaintiff's claim could become moot if he does not receive any relief." *MacKenzie v. Kindred Hospitals East, LLC*, 276 F. Supp. 2d 1211, 1219 (M.D. Fla. 2003).[5]

"[I]f the defendants wanted to eliminate the issue of the plaintiff's entitlement to [FLSA overtime wages], they went about it in the wrong way. Instead of simply writing h[er] a check, with no strings attached, which would have eliminated the district court's jurisdiction over [the] claim . . . (the claim

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[5] In attempt to avoid this conundrum, the magistrate judge in *MacKenzie* recommended "that the defendant's motion to dismiss [for mootness] be granted to the extent that judgment is entered in favor of the plaintiff in the amount" specified in the defendant's unaccepted Rule 68 offer of judgment. *Ibid.* The Sixth Circuit has agreed that in these circumstances "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *O'Brien*, 575 F.3d at 575. As the Seventh Circuit has observed, this procedure seems highly "irregular." *Poteete*, 185 F.3d at 806.

In any event, entering judgment for the plaintiff is the opposite of dismissing her claim as moot. As the Second Circuit has observed, "[t]he entry of that judgment, remedying the grievance alleged in the [complaint], may have accorded the plaintiff sufficient relief, but it did not render th[e] cause[] of action moot," and it is "error, after granting such relief, to dismiss the . . . cause[] of action as moot." *Alan Guttmacher Institute v. McPherson*, 805 F.2d 1088, 1094 (2d Cir. 1986).

having been fully honored), they conditioned their offer to pay" by making "an offer of settlement," i.e. "a genuine offer of judgment under Rule 68." *Poteete*, 185 F.3d at 807 (citation omitted). In other words, if the defendants wanted to moot the plaintiff's own claim, they should have made an unconditional tender of the amount she was claiming from them and not a Rule 68 offer of judgment. *See Evans v. General Mechanical Corp.*, No. 6:12-cv-229, 2012 U.S. Dist. LEXIS 57715, *2 (M.D. Fla. April 25, 2012) ("FLSA claims are frequently mooted where an employer/defendant tenders 'full payment.'").[6]

"Tender is an offer to perform a condition or obligation coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom tender is made the

[6] Alternatively, defendants could have "confess[ed] to having violated the law," "default[ing] and suffer[ing] judgment to be entered against [them]." *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000). Like a tender that fully satisfies the plaintiff's claims, where "the defendant has . . . thrown in the towel there is nothing left for the district court to do except enter judgment." *Ibid.* *Accord McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005) (stating that a default judgment "would remove any live controversy from th[e] case and render it moot"). Prior to entering a default judgment, the district court "may conduct hearings" to "establish the truth of any allegation by evidence[] or investigate any other matter." Fed. R. Civ. P. 55(b)(2). Where the complaint contains adequate allegations of "other employees similarly situated" to the named plaintiff, the district court should conduct such hearings as are necessary to ensure that the default judgment will not adversely affect the ability of such employees to become "a party plaintiff," 29 U.S.C. § 216(b).

condition or obligation would be immediately satisfied." *Cook v. Talbert*, 216 Ark. 370, 373 (1950) (citation and quotation marks omitted). A proper tender moots a legal claim for a sum of money, because "[a]ny obligation of the defendant to pay to the [plaintiff] the sums sued for . . . has been extinguished by the offer to pay all these sums, and the deposit of the money in a bank [or with the court] which . . . ha[s] the same effect as actual payment and receipt of the money." *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 313-14 (1893).

"The essential characteristics of a tender are an unconditional offer to tender, coupled with a manifested ability to carry out the offer, and production of the subject matter of the tender." *Rothe Development Corp. v. Department of Defense*, 413 F.3d 1327, 1331 (Fed. Cir. 2005) (citation and quotation marks omitted). "[A] mere offer to perform does not suffice." *Ibid.* The defendant must "produce[] the subject matter of the tender, e.g., by providing [the plaintiff] with a . . . check or depositing such a check with the court." *Id.* at 1331-32. And, the tender "must not be made in such manner that the receipt of the money by the [plaintiff] prejudices his claim to a larger amount, either as a discharge or as an evidential admission." 13-67 Corbin on Contracts § 67.7.[7]

[7] Thus, while a tender can moot a plaintiff's case, the factual question remains whether "[a]ny obligation of the defendant to pay . . . the [plaintiff] . . . has been extinguished," *San Pablo & T.R. Co.*, 149 U.S. at 313-14, including the defendant's liability for attorneys' fees and costs.

If the defendants wanted to moot the plaintiff's claim in this case, what they should have done is made an *unconditional* offer to pay the amount claimed by the plaintiff *and* either provided the plaintiff with a check in that amount or deposited a check in that amount with the court for retrieval by the plaintiff. *See* Fed. R. Civ. P. 67. Instead, what the defendants did was to make a conditional offer of judgment that was open for only a specified period of time. The offer was conditioned on the plaintiff accepting a specified amount as "the total amount Defendants shall be obligated to pay" on "all causes of action" asserted by the plaintiff. JA 80. No tender of the offered amount accompanied the offer of judgment. And, the offer had been withdrawn by the time the district court entered its order dismissing the plaintiff's claim as moot. It is certainly not the case that "[a]ny obligation of the defendant to pay to the [plaintiff] the sums sued for . . . has been extinguished by the offer," because the offer here does *not* "have the same effect as actual payment and receipt of the money." *San Pablo & T.R. Co.*, 149 U.S. at 313-14.

That this is so is further demonstrated by the fact that, had the plaintiff desired to accept defendants' offer of judgment at the time defendants filed their motion to dismiss, she could not have done so because that offer had already been withdrawn. At the time the district court dismissed the case, therefore, the plaintiff continued to "have a concrete interest . . . in the outcome of the litigation." *Knox*, 132 S. Ct. at 2287 (citations, quotation marks and brackets omitted).

II. DEFENDANTS SHOULD NOT BE ALLOWED TO USE A MOOT-AND-DISMISS TACTIC TO PREVENT OTHER SIMILARLY SITUATED EMPLOYEES FROM RECEIVING NOTICE AND HAVING AN OPPORTUNITY TO OPT-IN TO AN FLSA COLLECTIVE ACTION AS PARTY-PLAINTIFFS.

We demonstrate in point I that the expired offer of judgment by the defendants in this case did not constitute a tender sufficient to moot the plaintiff's FLSA claim and thus did not provide adequate grounds for the district court to dismiss even the plaintiff's own claim, let alone the entire lawsuit brought on behalf of the plaintiff and "others similarly situated." So that we are not misunderstood, in this section we explain that even if a sufficient tender had been made, the district court, in exercising its "discretion in managing [FLSA] actions," should have stayed any ruling on the motion to dismiss until the other similarly situated employees had been given notice of the pending lawsuit and a fair opportunity to opt-in. *Hoffmann-La Roche*, *Inc. v. Sperling*, 493 U.S. 165, 174 (1989).

A. FLSA "§ 216(b)[] expressly authorizes employees to bring collective [FLSA] actions 'in behalf of . . . themselves and other employees similarly situated.' 29 U.S.C. § 216(b)." *Hoffmann-La Roche*, 493 U.S. at 170. "Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated . . . grant[s] the court [hearing such a lawsuit] the requisite procedural authority to manage the process of joining multiple parties in a manner that is

orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure." *Ibid.*

A district court hearing an FLSA collective action should exercise its "managerial responsibility to oversee the joinder of additional parties" in a manner that ensures "[t]he broad remedial goal of the statute [will] be enforced to the full extent of its terms." *Id.* at 171 & 173. In particular, "it lies within the discretion of a district court," *id.* at 171, managing such a case to refrain from ruling on dispositive motions going to the particular claim of the plaintiff named in the complaint – such as a motion to dismiss on the grounds that the particular claim has been satisfied – until other similarly situated employees identified in the complaint have been given a reasonable opportunity to learn of the pending action and opt-in.

"Congress has stated its policy that [FLSA] plaintiffs should have the opportunity to proceed collectively." *Id.* at 170. This opportunity, "however, depend[s] on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Ibid.* "The collective action process should be able to play out according to the directives of § 216(b) and the cases applying it, to permit due deliberation by the parties and the court on collective action certification." *Nash v. CVS Caremark Corp.*, 683 F. Supp. 2d 195, 199 (D.R.I. 2010) (citation and quotation marks omitted).

As Judge William E. Smith explained in an illustrative case, "allowing Defendants to pick-off named FLSA plaintiffs one-by-one" through the use of "[t]he

moot-and-dismiss tactic" "can hamstring collective actions if allowed." *Ibid.* (citation and quotation marks omitted). *See id.* at 196-97 (citing numerous cases where "courts 'have refused to permit defendants to moot putative FLSA collective actions'"). This is particularly true because the statute of limitations on FLSA claims continues to run on the claim of each similarly situated employee who is not named in the complaint until the filing of the employee's opt-in form. 29 U.S.C. § 256(b). A strategy of "'[p]icking off' § 216(b) plaintiffs" can prevent or, at a minimum, "stall notification to potential 'similarly situated' parties" and thereby "bleed[]value out of a large pool of outstanding FLSA claims," *Nash*, 683 F. Supp. 2d at 200, by allowing the limitations period to run on the claims of potential party plaintiffs.

To take a particularly clear example, an FLSA defendant should not be allowed to cut-off the opt-in rights of employees who have already received notice of the pendency of an FLSA collective action by tendering payment satisfying the claims of the named plaintiffs before the other employees have a chance to "make informed decisions about whether to participate." *Hoffmann-La Roche*, 493 U.S. at 170. In those circumstances, a district court surely has discretion to refrain from ruling on the defendant's motion to dismiss the claim of the named plaintiff until there has been a chance for potential plaintiffs with live claims to opt-in. While the post-notice example is particularly compelling, there is nothing in principle that distinguishes the district court's exercise of discretion regarding when to take up a motion to dismiss either before or after a notice has gone out. Here, for example, the defendants

answered the collective action complaint and allowed discovery regarding "conditional certification" to begin before they sought to dismiss the plaintiff's claim as moot.

"[T]he control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), provides district courts with adequate means to avoid this sort of "manipulation of cases," *Nash*, 683 F. Supp. 2d at 199.

"Federal District Courts have an inherent authority to manage their own dockets," and "the Federal Rules of Civil Procedure do not require the federal courts to decide motions in any particular order." *Pine v. Bd. of County Comm'n of Brevard County*, No. 6:06-cv-1551, 2007 U.S. Dist. LEXIS 90305, *17 (M.D. Fla. Dec. 7, 2007). Thus, faced with a motion to dismiss an FLSA collective action on the grounds that the named plaintiff's claim has become moot, a district court has discretion to refrain from immediately reaching that motion in order to allow "[t]he collective action process . . . to play out," *Nash*, 683 F. Supp. 2d at 199, "so that [the other employees similarly situated] can make informed decisions about whether to participate," *Hoffmann-La Roche*, 493 U.S. at 170. Once that process has played out, the district court can determine whether the named plaintiff's claim should be dismissed as moot. If other party plaintiffs with live claims have joined the action, the mootness of the named plaintiff's claim would not be cause to dismiss the entire action. However, if conditional certification is denied or no other party plaintiff joins the action and the named

plaintiff's claim is moot, the entire action should be dismissed.

B. There is an additional reason that employers should not be "allow[ed] . . . to pick-off named FLSA plaintiffs one-by-one" through the use of "[t]he moot-and-dismiss tactic." *Nash*, 683 F. Supp. 2d at 199 (citation and quotation marks omitted). That is that Congress made a considered decision that enforcement of the FLSA was best accomplished by allowing employees to proceed on a collective basis and therefore vested employees with a statutory right to maintain a collective action.[8]

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[8] When Congress adopted the Equal Pay Act in 1963, it incorporated the new guarantee of fairness into the FLSA and thereby extended employees' statutory right to maintain a collective action to enforcement of the guarantee of gender equality. *See* 29 U.S.C. § 206(d). In both houses of Congress, individual members expressed their understanding that the Equal Pay Act would "utilize the present means of enforcement" and extend to "employees who would be entitled to receive equal pay treatment under it the same remedies which are prescribed for workers in relation to minimum wage and overtime payments required by the Fair Labor Standards Act." 109 Cong. Rec. 8916 (1963) (statement of Sen. Randolph); 109 Cong. Rec. 9195 (1963) (statement of Rep. Powell). Similarly, in 1967 when Congress adopted the Age Discrimination in Employment Act, it incorporated by reference section 16(b) and thereby again extended employees' right to maintain a collective action to the enforcement of a new workplace guarantee. *See* 29 U.S.C. § 626(b). The Senate Committee Report on the bill that became the ADEA explained that it "[p]rovides for enforcement of the act in accordance with the powers, remedies and procedures of sections 11(b), 16 (except (a) thereof), and 17 of the Fair Labor Standards Act of 1938." S. Rep. No. 90-723, at 5 (1967).

This Court recognized the unique statutory status of the right to maintain a collective action in *Hoffmann-La Roche*: "The ADEA, through incorporation of § 216(b), *expressly authorizes* employees to bring collective age discrimination actions 'in behalf of . . . themselves and other employees similarly situated." 493 U.S. at 170 (emphasis added). This Court characterized section 16(b) as an "explicit statutory direction of a single ADEA action for multiple ADEA plaintiffs." *Id.* at 172. This Court further made clear that "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Id.* at 170.

The 1947 Portal-to-Portal Act amendments to the FLSA did not alter employees' statutory right to maintain an action "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Rather, the amendments were aimed at nonemployees – principally unions – which had filed actions on behalf of employees under the original FLSA. *See*, *e.g.*, S. Rep. No. 80-37, at 12-25 (1947) (detailing unions' involvement in litigation). The Senate Report, for example, specifically cites the use of forms with which employees designated union officials to represent them in FLSA actions. *Id.* at 17. Thus, the amendments eliminated the language allowing "such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 216(b)). This Court has thus observed that the 1947 amendments "left intact the 'similarly situat-

ed' language providing for collective actions, such as this one." *Hoffmann-La Roche*, 493 U.S. at 173.[9]

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[9] The legislative history of the Portal-to-Portal amendments makes express Congress' intention to fully preserve employees' right to maintain a collective action. Senator Forrest Donnell, chair of the Senate subcommittee that considered the bill, explained on the floor of the Senate that the original section 16(b) provided for "two types of action." 93 Cong. Rec. 2182 (March 18, 1947). "In the first case," Donnell explained, "an employee, a man who is working for the X steel company, can sue for himself and other employees. We see no objection to that." *Id.* "But," Donnell continued, "the second class of cases, namely cases in which an outsider, perhaps someone who is desirous of stirring up litigation *without being an employee at all*, is permitted to be the plaintiff in the case, may result in very decidedly unwholesome champertous situations which we think should not be permitted under the law." *Id.* (emphasis added). *See also* S. Rep. No. 80-37, at 48. The Senate adopted the Committee's bill as explained by Donnell. The Conference Committee, in turn, also accepted the Senate bill's elimination of only the second type of representative action identified by Senator Donnell. The Conference Report emphasized:

"Section 5 of the bill as agreed to in conference amends section 16(b) of the Fair Labor Standards Act of 1938, as amended, by repealing the authority now contained therein permitting an employee or employees to designate an agent or representative to maintain an action for and in behalf of all employees similarly situated. Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the Act." H.R. Rep. No. 80-326, at 13 (1947) (Conf. Report).

See also 93 Cong. Rec. Senate 2085 (March 14, 1947) ("Detailed Comparison of Senate and House Versions"). The full Congress adopted the Portal-to-Portal amendments based on the Conference Committee's explanation that the amendments did not alter employees' right to maintain a collective action.

Congress gave employees the right to bring and maintain a collective action out of concern that many individual employees would be unable to effectively enforce their rights under the FLSA through independent lawsuits. Just three years before enacting the FLSA, Congress enacted the National Labor Relations Act of 1935 granting "employees" a right to representation for purposes of collective bargaining in recognition of the fact that individual employees often lack the knowledge, resources and power to improve their wages, hours and working conditions. 29 U.S.C. §§ 151, 157. As the Third Circuit observed, it was "very likely" that what "Congress had in mind" when adopting FLSA § 16(b) was "that employees, if they wish, can join in their litigation so that no one of them need stand alone in doing something likely to incur the displeasure of an employer. It brings something of the strength of collective bargaining to a collective lawsuit." *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945). Both the NLRA and FLSA § 16(b) thus rested on congressional understanding that collective action is often essential to the enforcement of basic guarantees of workplace fairness.

In specifically vesting employees with a right to maintain a collective action in order to ensure enforcement of the FLSA, the EPA and the ADEA, Congress understood that actions to enforce employment laws must often be brought by current employees who are generally reluctant individually to sue their employer. During the debate over the Portal-to-Portal Act of 1947, which, as explained above, preserved employees' statutory right to maintain collective actions, Senator Olin Johnston made the point:

"Anyone who works in an unorganized mill – and approximately 80 percent of them in my State are unorganized – has a tendency to fear to bring suit while he is working for the meal ticket which he draws from week to week for the support of his wife and children." Cong. Rec. Senate 2371 (March 21, 1947). An individual employee paid below the minimum wage, female employees paid less than men for doing the same work, and senior employees passed over for promotion in favor of younger workers all may be reluctant to enforce their federal statutory rights if they are forced to do so one-by-one as individuals.

This Court itself has recognized, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Indeed, this Court has long recognized that employees "are often induced by the fear of discharge" to accept such substandard conditions. *Holden v. Hardy*, 169 U.S. 366, 397 (1897). Thus, as the Fifth Circuit noted, it is "reasonably presumed" that an employee "might be unwilling to sue individually . . . for fear of retaliation at their jobs." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). It was in large part to address such fear that Congress vested employees with the right to maintain a collective action under FLSA § 16(b). As one district court observed, "plaintiff-employees who proceed collectively [under section 16(b)] can present a united front against an employer, and head off individualized retaliation." *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1139 (D. Nev. 1999).

That is exactly why Congress vested employees, and specifically employees, with the right to maintain a collective action under section 16(b).

Depriving district courts of the discretion to order their own proceedings in order to permit section 16(b) to fulfill its statutory function would directly contravene Congress' intent.

CONCLUSION

The Court should affirm the judgment of the court of appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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