No. 11-1059

IN THE
Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Genesis HealthCare Corporation is owned by FC-GEN Acquisition, Inc., which is owned by FC-GEN Acquisition Holding, LLC, which is owned by Health Care REIT, Inc. Of those entities, only Health Care REIT, Inc. is publicly traded.

Petitioner ElderCare Resources Corp. is owned by GHC Ancillary Corp., which is owned by Genesis HealthCare LLC, which is owned by GEN Operations II, LLC, which is owned by GEN Operations I, LLC, which is owned by FC-GEN Operations Investment, LLC. None of those entities is publicly traded.

The lone respondent is Laura Symczyk.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 656 F.3d 189. The opinion of the district court resolving the issues relevant to the petition (Pet. App. 30-44) is unreported. A related order of the district court entering a final judgment (Pet. App. 45-46) also is unreported.

JURISDICTION

The court of appeals entered judgment on August 31, 2011 and denied a timely petition for rehearing on October 20, 2011. Pet. App. 47-48. On December 13, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to

February 17, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the Constitution provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * * ."

29 U.S.C. 216(b) provides, in relevant part:

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

STATEMENT OF THE CASE

1. For several months during 2007, respondent worked as a registered nurse at a facility in Philadelphia that was owned by a subsidiary of petitioner Genesis HealthCare Corporation. In December of 2009, after respondent had ceased working at that facility, she filed suit, alleging that petitioners had violated the Fair Labor Standards Act of 1938 (the "FLSA"), 29 U.S.C. 201, *et seq*., claiming that her employer automatically charged her for meal breaks, without regard to whether she in fact took an uninterrupted break. *See* J.A. 21-31. Although respondent purported to bring the action on behalf of herself "and other similarly situated individuals" (J.A. 21), no other individual ever has joined the complaint. Thus, at all times since the filing of the complaint, respondent has been the sole plaintiff.[1] Pet. App. 3, 6 (opinion of court of appeals noting the absence of other claimants), 42 (opinion of district court noting the same).

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[1] Section 216(b) of the Fair Labor Standards Act does not permit class actions under Fed. R. Civ. P. 23. Rather, under that statute, parties can maintain and join a collective action only by filing written consent with the trial court. Section 216(b) ("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."); *see Hoffmann-La Roche Inc. v. Sper*ling, 493 U.S. 165, 169-74 (1989) (discussing rules for joining actions under Section 216(b)). Thus, for example, the dismissal of an FLSA collective action has no effect on the right of non-joined employees to bring a subsequent suit. *See Cameron-Grant v. Maxim Healthcare Services, Inc*., 347 F.3d 1240, 1248-49 (CA11 2003).

2. On February 18, 2010, petitioners answered the complaint and served an offer of judgment under Fed. R. Civ. P. 68 for $7,500 in alleged unpaid wages, as well as "attorneys' fees, costs and expenses as determined by the Court."[2] J.A. 21-31 (complaint), 55-57 (formal offer of judgment), 77-79 (transmittal letter detailing terms of offer). Respondent did not respond to the offer. Because the offer to pay her claims in full left respondent without an ongoing personal stake in the litigation, petitioners on March 23, 2010 filed a motion to dismiss the case under Fed. R. Civ. P. 12(b)(1). J.A. 64-65.

3. On May 19, 2010, the district court issued a detailed opinion tentatively granting the motion. Pet. App. 30-44. The court started from respondent's concession that the offer fully satisfied her claims. Pet. App. 34. The court also noted the settled rule that an offer of full satisfaction under Rule 68 moots a plaintiff's claim and thus warrants dismissal. Pet. App. 35-36 (citing *County of Los Angeles v. Da*vis, 440 U.S. 625, 631 (1979); *Weiss v. Regal Collections*, 385 F.3d 337, 340 (CA3 2004)).[3] The district court acknowledged that some courts had declined to dismiss collective actions under the FLSA even when a defendant made a full offer of settlement, but pointed out that in all but one of those cases other individuals already had joined the action, or the

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[2] The only relief available to respondent was monetary, as the FLSA does not authorize equitable relief for private plaintiffs. 29 U.S.C. § 216(b); *see Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 921 n.6 (CA5 2008).

[3] Respondent conceded that point in the district court. *See* J.A. 93 ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.").

plaintiff had at least moved for collective process.[4] Pet. App. 38-42. In this case, by contrast, because there were no plaintiffs with unsatisfied claims at the time of the motion to dismiss, and not even a pending motion for collective process, the court concluded that dismissal of the FLSA claim was appropriate. Pet. App. 42-44.

4. On June 24, 2010, after subsequent proceedings (not at issue here or in the court of appeals) in which the district court concluded that it was inappropriate to exercise supplemental jurisdiction over analogous state-law claims,[5] the district court dismissed the case. Pet. App. 45-46.

5. The court of appeals reversed. Pet. App. 1-29. The court acknowledged that the offer of full relief eliminated any legally cognizable interest of respondent in the case. Pet. App. 14 ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.").[6] The court further noted that the lack of a justiciable controversy with the lone plaintiff ordinarily would justify immediate dismissal. The court concluded, however, that it

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[4] Under *Hoffman-La Roche Inc.*, the district court in an FLSA action has the authority to supervise the process of sending notice of an action to potential claimants. *See Hoffman-La Roche Inc.*, *supra*, 493 U.S. at 169-74.

[5] Respondent added those claims by amending the original complaint. *See* J.A. 115-133.

[6] Respondent conceded that point in the court of appeals. *See* J.A. 193 ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation."), 433 (acknowledging that a "plaintiff['s] individual claim is mooted by a defendant's offer of judgment").

would "frustrate the objectives of class actions" to allow a defendant's tender of judgment to "pic[k] off" multiple plaintiffs. Pet. App. 15 (quoting *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)).

The court relied heavily on cases involving class actions under Fed. R. Civ. P. 23. In that context, the court noted, several courts of appeals have held that a case does not become moot when the claims of a class representative become moot, on the theory that the certification of a class "relates back" to the filing of the complaint. In those courts, for purposes of mootness analysis, all members of the class become parties as of the date of the complaint. Under that rule, a class action remains justiciable even after the loss of the claims of the named plaintiffs. Pet. App. 15-20 (citing *Weiss*, *supra*).

The court emphasized concerns that a mootness inquiry "predicated inflexibly on whether any employee has opted in to an action" would make it too easy for employers to dispose of litigation (by paying full satisfaction to all plaintiffs). Pet. App. 23-24. The court also relied heavily on its sense of the "considerations that caution against allowing [settlement offers] to impede the advancement of a representative action." Pet. App. 25-27. Concluding that a contrary decision would "facilitat[e] an outcome antithetical to the purposes behind § 216(b)" (Pet. App. 26), the court permitted the action to go forward (Pet. App. 28-29).

6. Petitioner filed a timely petition for rehearing, which the court of appeals denied without opinion on October 20, 2011. Pet. App. 47-48.

7. Petitioners filed a timely petition for certiorari, which the Court granted on June 25, 2012.

SUMMARY OF ARGUMENT

This case has had no plaintiff with a legally cognizable stake for more than two years, since petitioners offered to pay respondent's claims in full. In the absence of additional claimants, the only individuals who stand to gain from continuing litigation are respondent's counsel and the as-yet unidentified hypothetical claimants. Lacking a "personal" stake, the interests of those non-parties do not create a "Case" within the judicial Power of Article III. A straightforward application of constitutional first principles compels reversal of the decision of the court of appeals.

1. The limitation of the judicial Power to "Cases" in which a plaintiff has a "personal" stake is central to the Constitution's separation of powers and the judiciary's role in our republic. This requirement not only delimits the judicial Power from the authority of the democratic Branches, but also ensures that federal courts exercise their power only over disputes of a traditional form.

2. This case is unusual, because the lone plaintiff's interests admittedly have been lost. Thus, the case is pressed by respondent's counsel, on behalf of hypothetical claimants that they might represent if they ever were located. Neither group provides the requisite "personal" stake to make the case justiciable.

a. The interests of respondent's counsel plainly are insufficient. The interests of bystanders, however sincere or vigorous, are no substitute for a personal stake. Lacking an injury in fact, their interest in the

subject matter is categorically irrelevant. Just as the Court steadfastly has insisted that bounty hunters and interest groups have standing only when they can demonstrate a personal stake, the Court here should reject the efforts of respondent's counsel to maintain this lawsuit without a plaintiff.

b. Nor do the interests of hypothetical claimants provide the requisite stake. The court of appeals solved the problem by exempting collective litigation from the personal stake requirement. But attention to the personal stake requirement structures and guides the analysis of this Court's decisions assessing the justiciability of collective litigation; *Roper* and its companion *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980), are the crucial authorities.

I. First, because the offer of judgment vitiated respondent's personal stake, and because the district court had taken no steps toward collective process at the time of the offer of judgment, the interests of the hypothetical potential claimants are not yet legally cognizable. *Roper* turned on the named plaintiffs' continuing obligation to pay attorney fees and expenses, which gave the named plaintiffs a personal stake in continuing litigation not present here. Moreover, the Court's passing suggestion that a too ready willingness to permit defendants to "pic[k] off" plaintiffs might frustrate the objectives of class actions was limited by its terms to cases in which the district court already had ruled on a certification motion.

Because the offer of judgment in this case came before respondent even filed a motion for collective proceedings, the dictum would have no application here even if the Court did credit it. Most telling of all, the opinion in *Geraghty* explicitly limits the relevance of the interests of absent claimants to cases in which the trial court rules on the propriety of class certification *before* the vitiation of the personal stake of the named plaintiff.

Roper and *Geraghty* provide neither authority for ignoring the personal stake requirement nor any basis for finding it satisfied on these facts. Whatever the merits of *Roper* and *Geraghty* on their own facts, the Court's vigorous application of the personal stake requirement in the intervening decades forestalls any extension broad enough to reach this case.

II. Second, because this case arises under the Fair Labor Standards Act, the interests of the hypothetical claimants are even more remote than in class action cases like *Roper* and *Geraghty*. Unlike a class representative in a Rule 23 case, respondent here has no power to join other claimants or otherwise affect their interests; they become parties only by a formal written filing with the district court. Hence, respondent can have no cognizable stake in the potential interests of as-yet unidentified claimants. Even if the case proceeds to a stage where collective process is appropriate, each claimant would join the case separately, and respondent would have no power to bind those who do not appear. Thus, it is even harder to extend *Roper* and *Geraghty* to this case than to a similarly nascent case under Rule 23. The absence of any link between respondent and other hypothetical claimants provides a separate and

independent basis for reversal of the decision of the court of appeals.

ARGUMENT

I. Article III Requires a Personal Stake in any "Case."

Article III, Section 2 of the Constitution limits the federal "judicial Power" to "Cases" and "Controversies." Hence, the judicial Power "cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.'"[7] Straying beyond those boundaries involves the exercise of authority that "is not judicial * * * in the sense in which judicial power is granted by the Constitution to the courts of the United States."[8]

Among other things, the limitation of that Power to Cases and Controversies ensures that federal courts confine themselves to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Responding to the centrality of that concern, the Court's rules for identifying parties with standing turn "on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' and whether the dispute touches upon 'the legal relations

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[7] *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).

[8] *United States v. Ferreira*, 54 U.S. (13 How.) 40, 48 (1852).

of parties having adverse legal interests.'"[9] Although "ambiguity" once plagued the question whether the Court's standing doctrine is compelled by the Constitution "ex proprio vigore," it is now "resolved" that the personal stake requirement is part of the "irreducible minimum" that Article III requires. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464, 471-72 (1982). Thus, the Court decades ago resolutely concluded that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

The personal stake requirement is fundamental to the Court's long-standing conception of the judicial Power. "It requires federal courts to satisfy themselves that 'the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction.'"[10] The baseline requirement of "concrete adverseness," as opposed to mere theoretical interest, is what "sharpens the presentation of issues" appropriately. *Baker v. Carr*, 369 U.S. 186, 204 (1962). "This personal stake is what the Court has consistently held enables a complainant authoritatively to present to

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[9] *Flast*, 392 U.S. at 100-01 (internal citations omitted (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937))).

[10] *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009) (quoting *Warth*, *supra*, 422 U.S. at 498-99 (quoting *Baker*, *supra*, 369 U.S. at 204)) (emphasis of *Summers* Court); *see Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (discussing Article III requirement of a "concrete private interest in the outcome" of litigation).

a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974).

The Court recently underscored the important structural role the requirement serves in separating the powers of the respective Branches:

> This requirement assures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." Where that need does not exist, allowing courts to oversee legislative or executive action "would significantly alter the allocation of power * * * away from a democratic form of government."

Summers v. Earth Island Institute, 555 U.S. 488, 493 (2009) (internal citations omitted) (quoting *Schlesinger*, 418 U.S. at 221; and *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)); *see Sierra Club v. Morton*, 405 U.S. 727, 740-41 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (explaining that the need for a "concrete and personal" injury is "not just an empty formality" and "confines the Judicial Branch to its proper, limited role in the constitutional framework of Government").

The personal stake requirement ensures that necessity rather than abstract interest motivates exercise of the judicial Power. *See Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality opinion of Frankfurter, J.) ("[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of

the controverted issue a practical necessity."); *Waite v. Dowley*, 94 U.S. 527, 534 (1877) ("This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it.").

The "personal stake" aspect of the constitutional standing doctrine is inextricably tied to the mootness rules at issue in this case. The law of mootness reflects the requirement that a controversy must exist not only when the case is filed, but must continue throughout the litigation. *Geraghty*, *supra*, 445 U.S. at 397; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 179-184 (2000); *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 447 (2009). Thus, when cases cease to affect "'the legal relations of parties having adverse legal interests,'" they are at that moment moot, because "federal courts are without power to decide questions that cannot affect the rights of litigants in the cases before them."[11] In sum, "[a]n "'actual controversy must be present at all stages of review, not merely at the time the complaint is filed.'"'"[12] In those terms, then, the question before the Court is whether any plaintiff has the personal stake necessary to support Article III adjudication of the dispute.

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[11] *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam) (quoting *Haworth*, *supra*, 300 U.S. at 240-41).

[12] *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (brackets omitted) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974))); *see Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.").

II. The Interests of Non-Parties Do Not Create a Justiciable Controversy Between Petitioners and Those Individuals.

The Court typically considers the "personal" stake requirement in cases in which the parties to the case have an interest the quality of which is debatable. But respondent has never disputed the mootness of her own claim, either in her brief in opposition to the petition in this Court,[13] or in her filings in the courts below.[14] Thus, in contrast to the traditional personal stake cases, the argument here is that a justiciable "Case" exists not because of the interests of the plaintiff, but because of the interests of others that admittedly are not parties. Two groups with some interest in the continuing litigation are apparent: first, the individuals driving the case forward presently, respondent's counsel; and second, the as-yet unidentified hypothetical claimants for whom respondent's counsel claims to act. Neither of those groups can provide the personal interest that Article III requires.

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[13] The brief in opposition's succinct discussion of the merits proceeds on the premise that respondent's claims are moot. First, it concedes that the offer of judgment "provided complete relief on [respondent's] individual claims." Br. in Opp. i (Question Presented). Second, it justifies the decision below by reference to cases holding that a class action does not become moot "just because the named plaintiff's individual claims become moot" or "after the named plaintiff's claims had become moot." Br. in Opp. 6.

[14] *See* J.A. 93 (district court), 193, 433 (court of appeals).

A. The Interests of Bystanders, However Concerned, Do Not Provide the Requisite "Personal" Stake.

The interests of respondent's counsel are easily addressed. The Court repeatedly has emphasized that the interests of bystanders, however sincerely or vigorously motivated, do not provide the *personal* stake that delimits the judicial Power. This is true even when they are parties to the litigation. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), is illustrative. In that case, a private individual (Stevens) brought a *qui tam* action under the federal False Claims Act, 31 U.S.C. 3730, seeking relief for an injury that the United States allegedly suffered from false statements made to it by the Vermont Agency of Natural Resources. *Vermont Agency*, 529 U.S. at 770.

The Court noted the problematic nature of the action under Article III: Stevens brought suit to remedy an injury suffered by the United States; the conduct of the Vermont agency invaded no legally protected interest of Stevens individually. Thus, at first glance, Stevens could have no standing to bring the action. The Court emphasized the irrelevance to the justiciability inquiry of the bounty that Stevens would receive as a successful relator under the False Claims Act: "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency*, *supra*, 529 U.S. at 772. In the same way, the interests of respondent's attorneys – however monetarily concrete or ethically motivated – cannot provide a personal stake once respondent lost a legally cognizable interest in the dispute. "[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for

Article III standing purposes." *Id*. at 773. The only injury in fact in this case is the injury originally alleged by respondent; the monetary interest of respondent's counsel in the litigation thus cannot provide the "personal" stake that Article III requires.

The action in *Vermont Agency* was saved only by the Court's conclusion that the *qui tam* statute at issue there, like similar statutes common for centuries before the drafting of Article III, reflected a valid assignment of a portion of the claim of the United States (the injured party) to Stevens (the relator bringing the *qui tam* action). *Vermont Agency*, *supra*, 529 U.S. at 774-78. There is, of course, no such assignment either in the Fair Labor Standards Act or the record before the Court. *See also* Model Rules of Professional Conduct Rule 1.8(i) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client [except for payment of fees]."); *Sprint Communications Co. v. APCC Services, Inc*., 554 U.S. 269, 306-07 (2008) (Roberts, C.J., dissenting) (discussing common-law prohibitions on champerty and maintenance).

The Court has been similarly steadfast in rejecting the standing of interest groups of various kinds, even when it was clear those parties would present the issue vigorously. Thus, the Court's "decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976); *see Lujan*, *supra*, 504 U.S. at 563 (explaining even a "special interest" in a subject does not confer Article III standing). The Court has long recognized the

unmanageable consequences of permitting mere "interest" in a subject to displace the personal interest requirement:

> [I]f a "special interest" in this subject were enough to entitle [an interested group] to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by another bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

Sierra Club, *supra*, 405 U.S. at 739-40.

That is not to say that a monetary interest in litigation cannot ensure a vigorous presentation of the issues. It is to say, however, that it does not provide the type of presentation Article III contemplates. As then Judge Scalia once explained:

> Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no "concrete injury in fact" whatever. Yet the doctrine of standing clearly excludes them, unless they can attach themselves to some particular individual who happens to have some personal interest (however minor) at stake.

Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891-92 (1983).

Ultimately, this rule

> preserves the vitality of the adversary process by assuring both that the parties before the court will have an actual, as opposed to professed, stake in the outcome and that "the legal questions presented * * * will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."

Lujan, *supra*, 504 U.S. at 581 (Kennedy, J., concurring) (quoting *Valley Forge Christian College*, *supra*, 454 U.S. at 472). In the absence of a party with a "personal" stake, the dispute cannot be a "Case" within the judicial Power.

B. The Interests of Hypothetical Claimants That Are Not Yet Parties Do Not Provide the Requisite "Personal" Stake.

The court of appeals based justiciability on the interests of the hypothetical future claimants. That analysis involves a fundamental misapplication of the constitutional principles summarized in Point I and a basic misreading of the opinions in *Roper* and its companion *Geraghty*. Two distinct points are salient, either of which warrants reversal of the decision below. The first involves the reasoning of this Court's decisions themselves: neither *Roper* nor *Geraghty* suggests that the interests of potential plaintiffs are made relevant solely by the filing of a complaint. Rather, *Roper* disclaims reliance on those interests entirely and *Geraghty* states that they become relevant only upon the trial court's dis-

position of a motion for class certification.[15] The second is the narrower point that *Roper* and *Geraghty* were both class actions under Rule 23, not actions like this one under the FLSA. Because claimants can join an FLSA action only by an affirmative filing with the Court, treating the interests of absent claimants as dispositive is even more attenuated in the FLSA context than it is in the Rule 23 context.

1. Initiating a Purportedly Collective Action Does Not Create a "Case" Between the Defendants and Hypothetical Claimants.

The most startling aspect of the decision of the court of appeals is its unfounded extension of *Roper*, resting directly on the panel's sense of appropriate policy, without even a gesture in the direction of the "personal stake" requirement. In substance, the court of appeals reasoned from the Court's off-hand observation in *Roper* that "multiple plaintiffs * * * could be 'picked off' by a defendant's tender of judgment" (445 U.S. at 339) to a broad rule that the "personal stake" requirement has no application in collective litigation. Not surprisingly, given the

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[15] Although the brief in opposition relies in passing (Br. in Opp. 6-7) on *Sosna v. Iowa*, 419 U.S. 393 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), those cases have no apparent independent relevance. First, *Sosna* is irrelevant because the dispute here is not "capable of repetition" between the same parties; respondent's employment has been terminated and there is no claim that respondent again will be subject to the conditions that led to this dispute. *Sosna*, 419 U.S. at 399-401; *Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975). Similarly, because there is nothing "inherently transitory" about respondent's action for damages, respondent can draw no support from *Gerstein v. Pugh*, 420 U.S. 103 (1975), or its progeny. *See County of Riverside*, 500 U.S. at 52.

vigor of the Court's long-standing commitment to the personal stake requirement, the opinions in *Roper* and its companion *Geraghty* will bear no such reading.

a. The plaintiffs in *Roper* brought claims against a national bank alleging, among other things, violations of the National Bank Act, 12 U.S.C. 85, 86. The district court denied a motion for class certification, but certified the question for discretionary interlocutory appeal to the court of appeals. After the court of appeals denied the motion for interlocutory appeal, the defendant bank tendered an offer of judgment under Rule 68, which included the maximum amount of damages, legal interest, and court costs. After the plaintiffs declined to accept the offer, the district court entered judgment in favor of the plaintiffs and dismissed the action. *Roper*, *supra*, 445 U.S. at 327-30.

When the plaintiffs sought to continue their challenge to the denial of class certification, the question arose whether they could do so despite the loss of their individual claims. Ultimately, the *Roper* Court concluded that the case remained justiciable despite the tender of relief under Rule 68. Unlike the court below, the *Roper* Court organized its analysis around the need to identify a continuing personal stake in the litigation. *Roper*, *supra*, 445 U.S. at 331 ("We begin by identifying the interests to be considered * * * . First is the interest of the named plaintiffs: their personal stake in the substantive controversy * * * ."). The Court then explained that the offer of judgment could not moot the claim of the plaintiffs on the merits "so long as they retained an economic interest in class certification." *Roper*, *supra*, 445 U.S. at 332-33. Because the offer of

judgment did not cover the fees and expenses of the litigation, the possibility that the named plaintiffs could shift "a portion of those fees and expenses" to other class litigants gave the named plaintiffs a continuing "personal stake" in the case. *Id.* at 334 n.6.

After identifying the specific economic interest that the plaintiffs retained notwithstanding the offer of judgment, the Court (per Chief Justice Burger) went on in dicta to discuss the value to the litigation system of permitting an appeal of the district court's ruling on the certification issue. In that context, where the trial court already has ruled on what "is often the most significant decision rendered in * * * class-action proceedings," the Court suggested that it would frustrate the objectives of class actions to permit sequential "pick[ing] off" of the plaintiffs in separate actions to forestall appellate review of a certification ruling. *Roper*, *supra*, 445 U.S. at 339.

Neither the analysis nor the dicta of *Roper* offer any support for the decision of the court of appeals. First, the holding itself turns directly on the continuing economic interest of the plaintiffs, which would have remained even if they had received everything offered by the defendants. As respondent has conceded throughout this litigation,[16] the offer of judgment in this case left respondent with no similarly unsatisfied interest. That concession

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[16] *See* Pet. App. 34 (opinion of district court) ("[Respondent] does not take issue with [petitioners'] assertion that the damages offered exceed any amount of unpaid wages sought."); Pet. App. 4 (opinion of court of appeals) ("[Respondent] did not dispute the adequacy of [petitioners'] offer * * * ."); Br. in Opp. i (Question Presented) ("[T]he [petitioners] made a Rule 68 offer that provided complete relief on [respondent's] individual claims.").

deprives *Roper* of any precedential relevance to the case at hand.

Moreover, even if the Court were inclined to give weight to the discursion about "picked off" plaintiffs, that passage is limited by its own terms to situations (like *Roper*) in which the trial court already had ruled on a class certification motion before the vitiation of the personal stake of the named plaintiffs. The premise of the comment is that a district court's class certification decision is so important that there is an independent interest in obtaining appellate review of it. The conduct that raised the Court's concern was the serial picking off of plaintiffs who had pressed separate cases to final decisions on certification and then were unable to obtain appellate review.

None of that has any relevance to the case before the Court. This case involves a lone plaintiff, who received an offer of judgment promptly in response to the complaint, who had not filed any motion related to collective proceedings, much less put in the effort and expense to press it to a final decision. Because the *Roper* Court founded its opinion directly on the personal stake requirement, it makes no sense at all to read that passage (as the court below did) as jettisoning the personal stake requirement from all collective litigation.

b. The Court's decision in *Geraghty* buttresses that straightforward reading of *Roper*. The sole plaintiff in *Geraghty* challenged the validity of parole release guidelines promulgated by the United States Parole Commission. The mootness problem arose when the plaintiff was released from prison. As in *Roper*, the plaintiff lost his interest in the litigation after the trial court had denied his motion for class certification. *Geraghty*, *supra*, 445 U.S. at 390. As in

Roper, and in contrast to the court below, the Court started from the premise that the case turned on "the application of the 'personal stake' requirement in the class-action context." *Id*. at 397.

Unlike the plaintiff in *Roper*, but like respondent here, Geraghty admittedly retained no personal stake in the litigation. Accordingly, the Court structured its opinion around the possibility that the interests of the absent class members had become sufficiently related to the plaintiff's interest to justify retention of jurisdiction. Thus, the Court first noted its prior holdings that a dispute would remain justiciable despite expiration of the named plaintiff's claim if a class had been certified *before* the claim expired; because certification gave class members a cognizable interest in the case, the loss of the representative's interest would not vitiate the entire litigation. 445 U.S. at 398-99.

The Court then turned to the problem before it – whether to extend those holdings to a case in which certification of a class had been *denied* before the vitiation of the personal stake of the named plaintiff. 445 U.S. at 397-404. Relying on the "flexible character of the Art. III mootness doctrine" (*id*. at 400), the Court concluded that the distinction between cases in which certification was granted and cases in which certification was denied was too narrow to compel dismissal. *Id.* at 401-02. Accordingly, the Court held that the case remained justiciable despite the loss of the plaintiff's interest. *Id.* at 402-04.

To be sure, the "personal stake" that absent class members have in litigation when certification has been denied is considerably more abstract than the personal interest they have when certification has

been granted. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379-80 (2011) (emphasizing that claimants become "parties" only upon certification of a class). Thus, the decision to uphold justiciability in *Geraghty* may seem to press the proper limits of the personal stake requirement. The propriety of *Geraghty* itself is not presented here, however, because (once *Roper* is put to the side) a decision to affirm the court of appeals would require a major extension of *Geraghty*.

This case presents the question whether to extend *Geraghty* to recognize the interests of absent class members when the plaintiff's claim becomes moot before *any* ruling on a motion for collective process (either of a class or under Section 216(b)). Indeed, for respondent to prevail here, the answer would have to be that the interests of the absent individuals in a collective action become relevant at the moment the case was filed: petitioners in this case made the offer of judgment not only before the trial court had ruled on any motion related to collective process, but even before respondent had filed a motion seeking collective process.

Any such extension of *Geraghty* would require the Court to discard the language and reasoning of *Geraghty* itself, in which the district court's prior certification decision is crucial. Three points warrant attention. First, as summarized above, the basis of the decision in *Geraghty* was the narrow distinction between cases in which certification is granted and those in which it is denied. Second, the Court emphasized that its "holding [of justiciability] is limited to the appeal of the denial of the certification motion," *id.* at 404. Third and most telling is the Court's response to Justice Powell's dissenting view that the extension wrought by *Geraghty* decision

would make the judicial process a "vehicle for 'concerned bystanders,'" 445 U.S. at 407 n.11 (quoting 445 U.S. at 413 (Powell, J., dissenting)). Attempting to assuage Justice Powell's concerns, the Court explicitly limited its decision to cases in which the trial court ruled on a certification motion *before* expiration of the plaintiff's claim: "If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action." 445 U.S. at 407 n.11. Each of those qualifications puts this case outside the rule contemplated in *Geraghty*.

The close division of the *Geraghty* Court, the evident concerns of the majority to provide a predictable boundary to the holding of that case, and the difficulty of reconciling the personal stake requirement with the decision below cut against such a broad expansion of *Geraghty*. The only palatable reading of *Geraghty* is the simplest one: (1) the Court limited its decision to cases in which certification was denied before mootness; (2) because respondent's claims became moot before that point, this case is no longer justiciable.

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In sum, because the offer of judgment in this case deprived respondent of any personal stake in the litigation, and because it did so before any district court ruling on the propriety of collective process, the analysis of *Roper* and *Geraghty* provide no support for the decision of the court of appeals. Any extension of those cases to support justiciability in this case would have to reject the language and animating principle of those cases and at the same time ignore the lessons of the personal stake require-

ment that the Court has defended so vigorously. Reversal is the easier and more sensible path.

2. An FLSA Complaint Does Not Create a "Case" Between the Defendants and Hypothetical Claimants.

The basis for the claim in this case also affords a separate, and even simpler, basis for reversing the decision of the court of appeals. As the court of appeals recognized (Pet. App. 20-22), important differences between Rule 23 and the FLSA undermine the plausibility of extending *Roper* and *Geraghty* to FLSA cases like this one. The basic problem is that the representative in a class action represents the interests of absent class members in important ways. By contrast, the plaintiff in an action under Section 216(b) of the FLSA has a much narrower role. The distinction is not technical, but substantive, as Justice Scalia has explained in detail. *See Hoffmann-La Roche Inc.*, *supra*, 493 U.S. at 175-78 (Scalia, J., dissenting) (emphasizing the difference between a class actions and an action under Section 216(b)). And the differences are directly relevant here, because they arise from Congress's intentional choice more than half a century ago to "aboli[sh]" the "representative action" previously available under the FLSA, driven by concerns about "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome," *Hoffmann-La Roche Inc.*, 493 U.S. at 173.

The mechanism that remains, the action under Section 216(b), is quite unlike a Rule 23 class action. Most obviously, the named plaintiff that initiates the case has no power, alone, to join others to the litigation or to affect their rights before they join.

Rather, no employee can become "a party plaintiff * * * 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." Section 216(b). Hence, until respondent obtains such consent, there is no realistic sense in which petitioners have a controversy with any of those absent employees. Indeed, even if the court decides to proceed collectively, the named plaintiff does not become some sort of representative for a class of similarly situated individuals. Rather, despite the language of "certification" used by the court of appeals (Pet. App. 11-13), the collective aspect in question involves only the court's participation in the process of transmitting notice of the case to still-potential claimants. *See Hoffmann-La Roche Inc.*, *supra*, 493 U.S. at 170-73.[17]

This is a far cry from litigation under Rule 23, in which certification of a class brings absent members into the case without any action on their part. *See Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002) (explaining that class members have an interest in a class action settlement that satisfies Article III standing requirements). Thus, for example, "under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *Devlin*, 536 U.S. at 10-11; *see also* Fed. R. Civ. P. 23(c)(3); Restatement (Second) of

[17] That is not to say that the process necessarily is simple or inexpensive. Ordinarily, the defendant is subjected to considerable discovery in the process of identifying for the plaintiffs the identities of potential claimants to whom notices might be sent. *See, e.g.*, Pet. App. 32-33.

Judgments § 41(1)(e) (1982). Absent claimants in the FLSA context have no similar interest, and respondent has no similar responsibility for them. *See Hoffmann-La Roche Inc.*, 493 U.S. at 177 (Scalia, J., dissenting) (contrasting class-action process with FLSA process).

In the words of Chief Justice Marshall, any possible dispute between petitioners and the still-absent individuals "becomes a case" for purposes of Article III only when "a party * * * asserts his rights in the form prescribed by law," *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) (quoted in *Hoffmann-La Roche Inc.*, 493 U.S. at 175-76 (Scalia, J., dissenting)); *cf. Vermont Agency*, *supra*, 529 U.S. at 773 (explaining that there can be no Article III standing on the part of an assignee until some claim has been assigned).

The court of appeals recognized that Section 216(b) differs in material ways from the class action procedure at issue in *Roper*. It concluded, however, that "actualization of § 216(b)'s purposes" precluded a "mootness inquiry * * * predicated inflexibly" on identifying the personal stake of an employee to the litigation. Pet. App. 23-24. Thus, the court of appeals did not even attempt to identify respondent's personal stake. Rather, it focused entirely on the parallel policy "considerations" (Pet. App. 25) and "objectives" (Pet. App. 28) that motivate Rule 23 and Section 216(b). But as explained above in Point I, those considerations and objectives have no weight in the absence of a plaintiff with a personal stake in the litigation. The mere potential for collective action does not give federal courts a "free pass" to ignore the personal stake requirement.

The court of appeals erred in heedlessly transplanting the policy concerns that drove its decision from a context in which such a personal stake was present (*Roper*) to one where no such personal stake exists. As illustrated above, *Roper*'s discussion of "picked off" plaintiffs appeared in a fact setting in which the plaintiff had a cognizable economic stake in certification of a class and was limited by its terms to cases in which the trial court already had ruled on the question of certification. Whatever the relation between the concerns about "picked off" plaintiffs and the holding in *Roper*, it makes no sense to extend that dictum to cases in which the named plaintiff cannot bind the absent claimants until they take affirmative action to join the case. *See also Smith*, *supra*, 131 S. Ct. at 2381 (emphasizing that a "properly conducted class action, with binding effect on nonparties, can come about in federal courts in just one way – through the procedure set out in Rule 23") (internal quotation marks omitted). There is no coherent basis for treating the existence of a single FLSA plaintiff as creating a "Case" between the defendants and other not-yet identified potential litigants.

In sum, the most direct path to a decision in this case is to hold that the interests of the absent individual have no relevance in the specific statutory framework of Section 216(b). That holding compels reversal of the decision of the court of appeals.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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