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 THE IMPACT FUND, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, BET TZEDEK, DISABILITY RIGHTS CALIFORNIA, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, PUBLIC ADVOCATES, INC., PUBLIC COUNSEL, THE PUBLIC INTEREST LAW PROJECT, PUBLIC JUSTICE, P.C., AND THE WESTERN CENTER ON LAW AND POVERTY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Can defendants, in a case brought as a collective action under section 16(b) of the Fair Labor Standards Act, render the case moot by making an offer of judgment that is not accepted and that offers relief only to the representative plaintiff?

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The Impact Fund, Asian Law Caucus, Asian Pacific American Legal Center, Bet Tzedek, Disability Rights California, the Lawyers' Committee for Civil Rights Under Law, the Legal Aid Society – Employment Law Center, Public Advocates, Public Counsel, The Public Interest Law Project, Public Justice, P.C., and the Western Center on Law and Poverty ("Amici"), by consent of the parties, submit this brief amicus curiae and respectfully urge this Court to affirm the Third Circuit's decision below.[1]

INTERESTS OF THE AMICI

Amici curiae are public interest organizations representing the interests of workers, consumers, persons with disabilities, and civil rights plaintiffs, particularly those of modest means. Amici advocate for the interests of those who often cannot safeguard their rights without access to the class action device. Amici submit this brief in support of respondent Laura Symczyk to emphasize that the arguments advanced by petitioners Genesis HealthCare Corporation, *et al*., and their amici, if accepted by this Court, would

[1] Pursuant to Sup. Ct. R. 37.6, Amici certify that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only Amici, or their counsel, made a monetary contribution to this brief's preparation and submission. The parties have filed blanket consents to the filing of amicus briefs.

undermine the ability of their clients to vindicate their rights.

The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is a California State Bar Legal Services Trust Fund Support Center, providing assistance to legal services projects throughout the State. The Impact Fund is counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

Asian Law Caucus ("ALC") was founded in 1972 as the nation's first Asian-American legal organization dedicated to defending the civil rights of Asian Americans and Pacific Islander communities. A member of the Asian American Center for Advancing Justice, ALC has a long history of protecting low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. ALC has a strong interest in this case because class and representative actions are key tools that the ALC uses to vindicate the rights of clients and community members who are too vulnerable to bring suit to enforce their rights on their own.

Asian Pacific American Legal Center of Southern California ("APALC") is a nonprofit organization dedicated to advocating for civil rights, providing legal services and education, building coalitions to positively influence and impact Asian

Americans, Native Hawaiians, and Pacific Islanders, and creating a more equitable and harmonious society. As part of its civil rights work, APALC has served hundreds of workers and aided them in bringing claims for unpaid wages and other employment law violations. Since its founding in 1983, APALC has worked on numerous cases and policy initiatives to promote immigrants' rights and workers' rights, including the rights of workers to pursue their claims collectively through the class and collective action mechanisms. APALC is a member of the Asian American Center for Advancing Justice.

Bet Tzedek was established in 1974 and provides free legal services to seniors, the indigent, and disabled persons in Los Angeles County in the areas of housing, benefits, consumer fraud, and employment. Bet Tzedek's Employment Rights Project assists low-wage and immigrant workers through a combination of litigation, legislative and administrative advocacy, and community education. Bet Tzedek clients work in industries marked by low pay and frequent violations of minimum labor standards, and include day laborers, domestic workers, and employees in the garment, construction, car wash, restaurant, and janitorial industries.

Disability Rights California is a nonprofit agency established to protect, advocate for, and advance the human, legal, and service rights of Californians with disabilities. Since 1978, Disability Rights California has provided essential legal services to people with disabilities. In the last year, Disability

Rights California provided legal assistance on more than 24,000 matters to individuals with disabilities. Disability Rights California represents people with disabilities in class actions where the amounts of individual recovery are often too small to make individual litigation economically feasible, but where those amounts matter a great deal to the low-income class members with disabilities.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities, and other disadvantaged populations. Since the passage of the Civil Rights Act of 1964, the Lawyers' Committee has relied on the class action mechanism, embodied in Rule 23 of the Federal Rules of Civil Procedure, as an essential tool for combating unlawful discrimination, particularly in employment.

The Legal Aid Society – Employment Law Center ("Legal Aid") is a nonprofit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from

traditionally underrepresented communities. Since 1970, Legal Aid has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. Legal Aid often brings cases for low-wage workers as class actions. Legal Aid has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, *see*, *e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an amicus curiae capacity. *See*, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *United States v. Virginia*, 518 U.S. 515 (1996). Legal Aid's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

Public Advocates, Inc. is one of the oldest nonprofit public interest law firms in the nation. Throughout its history, the firm's mission has been to challenge the persistent, underlying causes and effects of poverty and discrimination and to work for the empowerment of the poor and people of color. Among its many strategies, Public Advocates represents clients in class action impact litigation and has an interest in seeing the federal rules, including Rules 23 and 68, properly applied so as not to constrain enforcement of civil rights.

Public Counsel is the largest nonprofit law firm of its kind in the nation. It is the public interest arm of the Los Angeles County and Beverly Hills Bar Associations and is also the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County. Last year, its staff of fifty-nine attorneys and forty-four support staff (including five social workers), together with more than 5,000 volunteer lawyers, law students and legal professionals, directly assisted over 32,000 low-income children, youth, adults, and families, as well as eligible community organizations, and served more than 736,000 children and adults through its Impact Litigation Project. The value of the free legal services that Public Counsel provided during 2011 is conservatively estimated at more than $88 million. Class litigation is a regular part of Public Counsel's litigation docket.

The Public Interest Law Project is a nonprofit state litigation and advocacy support center for California legal services and public interest law programs. Its mission is to provide these local programs with the capacity to engage in law reform efforts that will preserve and increase the rights and economic well-being of indigent and lower-income families in California. One of the services it provides to local programs is the ability to bring class action litigation

when such a strategy presents the best option for advancing or protecting the interests of the program's clients.

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions, and its experience is that the class action device is often the only meaningful way that individuals can vindicate important legal rights.

The Western Center on Law and Poverty is the oldest and largest state support center for all of California's neighborhood legal services programs. The Western Center has frequently represented low income plaintiffs in statewide class actions, such as *Katie A. v. Bonta*, 481 F.3d 1150 (9th Cir. 2007) (Medicaid EPSDT program requires states to assure that children actually receive necessary mental health services) and *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994) (Secretary of HHS's waiver of statutory requirements in approving AFDC cuts is invalid under the APA because of failure to consider harm to recipients). The Western Center's ability to litigate these important cases would be jeopardized if defendants

were able to moot class cases by offering individual relief to named plaintiffs.

SUMMARY OF THE ARGUMENT

Respondent's brief addresses why an unaccepted Rule 68 offer to a named plaintiff does not moot her individual claim or the claims of similarly-situated employees in a collective action brought under the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b). Amici submit this brief to underscore the importance of the well-settled precedent of this Court, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), which rejected the use of an offer of judgment to "pick off" named plaintiffs in a case brought pursuant to Federal Rule of Civil Procedure 23.

Numerous Courts of Appeals have correctly applied *Roper* to preclude defendants from using Rule 68 offers, either before or after the filing of the certification motion, to moot class claims.[2] Consistent with this Court's decisions in *Sosna v. Iowa*, 419 U.S. 393 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), class certification is deemed to relate back to the filing of the class complaint.

[2] *See*, *e.g.*, *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

Thus, the timing of the certification is irrelevant for Article III purposes.

Roper and its progeny reflect the twin goals of protecting the integrity of the class action mechanism and safeguarding the interests of absent class members. Rule 23 establishes a carefully-regulated procedure that permits the named plaintiffs to prepare, under the supervision of the district court, the substantial evidentiary record necessary for the class certification motion. Allowing a defendant to use Rule 68 to artificially manufacture mootness at any stage of the case would disrupt this process and thwart the purposes underlying the class action mechanism.

The risk posed by this litigation tactic is greatest in cases where the class action device is most essential – those involving claims with a monetary value too small to justify an individual federal lawsuit. Suits brought by consumers, civil rights plaintiffs, and low-wage workers frequently involve such negative value claims. The class device is intended to allow such plaintiffs "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). If defendants could effectively prevent such cases from ever reaching the certification stage, by mooting out one representative after another involuntarily, the vindication of important rights will be entirely frustrated.

ARGUMENT

I. A RULE 23 ACTION IS NOT EXTINGUISHED BY THE MOOTNESS OF THE NAMED PLAINTIFF'S INDIVIDUAL CLAIM

In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), the Court held that an unaccepted offer of judgment to the named plaintiffs did not moot a Rule 23 class action. The Court reached this result even though the district court had denied class certification and entered judgment in favor of the named plaintiffs over their objections. *Id.* at 329-30.

Roper identified the range of "interests to be considered when questions touching on justiciability are presented in the class-action context." *Id.* at 331. First, courts must consider the named plaintiffs' interests: "their personal stake in the substantive controversy and their related right as litigants in a federal court" to use Rule 23 class actions as a tool to "pursue their individual claims." *Id.* A separate interest, however, is the distinct "responsibility of named plaintiffs to represent the collective interests of the putative class." *Id*. The Court underscored that class actions implicate "the rights of putative class members as potential intervenors, and the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it." *Id.* While the Court recognized the relevance of these "interrelated" and "diverse" interests in determining the Article III implications in a Rule 23 class action, it resolved the question, in light of the specific facts of

the case, on the basis of the private economic interest of the named plaintiffs in obtaining class certification and thereby sharing costs. *Id.* at 331-32.

Roper emphasized the important role of class actions in enabling plaintiffs to bring cases as "private attorney[s] general" when they normally would be financially precluded from doing so. *Id.* at 338.

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Id. at 339. Allowing class claims to be mooted "simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration." *Id.* Such conduct "frustrate[s] the objectives of class actions" and "invite[s] waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Id.*

In *United States Parole Commission v. Geraghty*, 445 U.S. 388, 404 (1980), the companion case to *Roper*, this Court held that even where the named plaintiff's claim has expired, he can retain a personal stake in representing the class in order to appeal the denial of class certification. The Court explained that

the purpose of the personal stake requirement was "to assure that the case is in a form capable of judicial resolution" with "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id.* at 403. It held that "these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* "The question whether class certification is appropriate remains as a concrete, sharply presented issue." *Id.* Because the named plaintiff in *Geraghty* continued to advocate his right to have a class certified, the personal stake in representing the class sufficed "to assure that Article III values are not undermined." *Id.* at 404.

Roper and *Geraghty* are rooted in this Court's earlier decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), the seminal case concerning the mootness rule in class actions. *Sosna* established that unnamed class members had legal interests separate from that of the named plaintiff, which survived the mooting of her individual claims once the class was certified. *Id.* at 399. The *Sosna* Court explained that class certification should relate back to the filing of the complaint if mootness arises before certification can be achieved:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate

> back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at 402 n.11. This Court clarified further in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), that it was not necessary for a case to present an issue capable of repetition yet evading review to survive the mootness of the named plaintiff's claim. The unnamed class members must, however, have "'a personal stake in the outcome of the controversy'" assuring "'concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" *Id*. at 754-55 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), this Court applied the same reasoning to a case in which class certification had yet to be considered when plaintiffs' claims became moot. There, the named plaintiffs filed their class certification motion after the expiration of their claims.[3] In other words, even though the named plaintiffs' individual

[3] *See* Respondent McLaughlin's Brief on the Merits, *County of Riverside v. McLaughlin*, No. 89-1817, 1990 WL 513119, at *3, *18 (U.S. Dec. 19, 1990) (demonstrating that motion for class certification was filed after expiration of named plaintiffs' claims and nearly "two months after their original complaint was filed"); *see also McLaughlin*, 500 U.S. at 52.

claims were no longer viable at the time they filed the motion to certify the class, the district court heard the motion and granted it. This Court approved these actions, finding that the district court "retained jurisdiction indefinitely." *Id.* at 49. "That the class was not certified until after the named plaintiffs' claim had become moot does not deprive [this Court] of jurisdiction." *Id.* at 52.[4]

The "relation back" doctrine follows from this Court's precedents regarding the resolution of Article III questions. The party invoking federal jurisdiction must support each of the standing requirements with the same kind and degree of evidence at the successive stages of litigation as any other matter on which a plaintiff bears the burden of proof. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Therefore, "general factual allegations of injury resulting from the defendant's conduct" will suffice to establish

[4] The named plaintiff must, of course, have Article III standing at the time the suit is initiated. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). However, if jurisdiction and standing are satisfied at the outset of the case, the replacement of a named plaintiff thereafter is treated as a case management issue under Rule 23. "[R]eplacement of a class representative may become necessary if, for example, the representative's individual claim has been mooted or otherwise significantly affected." Fed. Judicial Ctr., Manual for Complex Litigation § 21.26 (4th ed. 2012). "Replacement also may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation." *Id.* The district court has the authority to substitute class representatives in such cases.

Article III standing at the pleading stage, "for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support [a contested] claim." *Id.* (internal quotation marks omitted). If standing is later questioned, the court has jurisdiction to determine its own jurisdiction. *See Rosado v. Wyman*, 397 U.S. 397, 403 & n.3 (1970); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947). In a class action, the interests of the class are presumed to exist from the inception of the case based on the allegations of class-wide injury. The certification motion is the mechanism for determining whether the Rule 23 requisites are satisfied. This Court has recognized that determination of class certification may be " 'logically antecedent' to Article III concerns." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997)). Once the court has certified the class, the existence of a class with a live "Case" or "Controversy" relates back to the filing of the complaint.[5]

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[5] Article III permits courts to bridge similar time gaps during which the continuing existence of a "Case" or "Controversy" may be in question because a party named in the pleadings ceases to exist or loses standing. These circumstances include, for example, the time it takes to substitute an executor or other party with standing when a plaintiff dies; to revive a dissolved corporate party; to substitute a public officer who sues or is sued in an official capacity and subsequently ceases to hold office; or to substitute a new plaintiff with the same or similar claims when the plaintiff loses standing. *See*, *e.g.*, Sup. Ct. R. 35 (relating to substitution of deceased parties and nonabatement of actions

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Under this Court's precedents, then, the timing of a Rule 23 motion to certify the class is not dispositive of the Article III question. When class claims are alleged, federal courts retain jurisdiction over the class controversy and the eventual certification decision "relates back" to the filing of the complaint "to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52; *see Swisher v. Brady*, 438 U.S. 204, 213-14 n.11 (1978); *Sosna*, 419 U.S. at 402.

II. THE CIRCUITS HAVE APPLIED THIS COURT'S PRECEDENTS TO PREVENT THE USE OF OFFERS OF JUDGMENT TO MANUFACTURE MOOTNESS IN RULE 23 ACTIONS

All of the circuits to consider the issue have relied on this Court's precedents in concluding that a Rule 68 offer will not moot a Rule 23 action and that, once achieved, class certification relates back to the filing of the complaint. "[W]here a defendant makes a

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against public officers who die, resign, or otherwise cease to hold office); Fed. R. Civ. P. 25; Fed. R. App. P. 43 (relating to substitution of parties); *see also* Fed. R. Civ. P. 21 (permitting district courts to drop or add parties "at any stage of the action and on such terms as are just"). This Court itself has had occasion to substitute new parties when the standing of the existing parties was in doubt in a case before it. *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (granting motion to substitute parties with Article III standing in view of special circumstances before the Court).

Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint." *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004); *see also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919-21 (5th Cir. 2008) (using "relation back" doctrine in FLSA case).

Thus, the Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have held that a Rule 68 offer of judgment will not moot a case in which a class certification motion is already pending, even if it has not yet been decided. *See Pitts*, 653 F.3d 1081; *Lucero*, 639 F.3d 1239; *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005); *Weiss*, 385 F.3d 337; *Lusardi v. Xerox Corp.*, 975 F.2d 964, 975 (3d Cir. 1992); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1051 (5th Cir. Unit A July 1981); *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir. 1978). The Third, Ninth, and Tenth Circuits have reached the same conclusion in cases where the offer is made so early that the named plaintiff could not be expected to have filed a class certification motion.[6] *Pitts*,

[6] In fact, no Court of Appeals has held that an unaccepted Rule 68 offer can moot the claim of a plaintiff seeking to represent a Rule 23 class. The only appeals court decision finding that a settlement had been accomplished over the plaintiff's refusal

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653 F.3d at 1091-92; *Lucero*, 639 F.3d at 1245-47; *Weiss*, 385 F.3d at 347-48. The Third Circuit followed the same logic in this case, holding that an offer to the named plaintiff in a collective action made before the plaintiff moves for collective certification does not moot a case. Pet. App. 3. Rather, "'[a]bsent undue delay in filing a motion for class certification . . . the appropriate course is to relate the certification motion back to the filing of the class complaint.'" Pet. App. 16 (quoting *Weiss*, 385 F.3d at 348). It correctly observed that the relation back doctrine "has evolved to account for calculated attempts by some defendants to short-circuit the class action process." Pet. App. 18.

These decisions recognize the dangers posed by the defense tactic employed here. Endorsement of that tactic would allow defendants to pay off the few potential class representatives who come forward, retain the gains from presumptively unlawful conduct, and "effectively ensure that claims that are too economically insignificant to be brought on their own would never have their day in court." *Pitts*, 653 F.3d at 1091 (citing *Zeidman*, 651 F.2d at 1050). Allowing offers of judgment to moot class actions prior to certification will "contraven[e] one of the primary purposes of class actions – the aggregation of numerous similar (especially small) claims in a single

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to accept an offer relied on the peculiar provisions of state law that governed an offer made while the case was pending in state court prior to removal. *Damasco v. Clearwire Corp.*, 622 F.3d 891 (7th Cir. 2011); *see* discussion *infra* at pp. 19-21.

action." *Weiss*, 385 F.3d at 345. Moreover, allowing defendants to avoid class treatment would waste judicial resources by encouraging unnecessary litigation. *Id.* at 345 (citing *Roper*, 445 U.S. at 339). As the Seventh Circuit explained in *Susman*, "[i]f the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification." 587 F.2d at 870.

The Courts of Appeals have not "restrict[ed] application of the relation-back doctrine only to cases involving *inherently* transitory claims" since it is the defendant's tactic that threatens to make the class claims transitory in practical effect. *Pitts*, 653 F.3d at 1091; *see also Weiss*, 385 F.3d at 347. Even though such cases are not time sensitive themselves, they are still "'acutely susceptible to mootness' in light of [the defendant's] tactic of 'picking off' lead plaintiffs" with a Rule 68 offer to avoid a class action. *Pitts*, 653 F.3d at 1091 (quoting *Weiss*, 385 F.3d at 347). "[A] claim transitory by its very nature and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review." *Id.*

The Seventh Circuit stands alone in holding that, before a certification motion has been filed, the mooting of the named plaintiff's claim moots the class action. *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011); *see also Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir. 1994). *Damasco* acknowledged the buy-off problem but proposed that plaintiffs "move to certify the class at the same time that they file their

complaint," an impractical and ineffective solution. 662 F.3d at 895-96; *see also supra* note 6.

First, as noted, it is the filing of the class complaint, not the filing of a class certification motion, that has Article III significance under this Court's jurisprudence. Whether mootness of the named plaintiff's claim occurs before or after the motion is filed is irrelevant. Second, requiring the named plaintiff to file the complaint and the class certification motion simultaneously would create unnecessary and disruptive motion practice. A premature class certification motion would in all but the rare case lack the substantial evidentiary foundation necessary to satisfy Rule 23 and would almost invariably fail. Indeed, Rule 23 was amended in 2003 precisely to avoid a too hasty certification process. *See* discussion *infra* Part III.

To solve this problem, the *Damasco* court suggests a further unworkable solution: once the premature certification motion is filed, plaintiffs should then "ask the district court to delay its ruling to provide time" for discovery. 662 F.3d at 896. In other words, plaintiffs are advised to file a patently inadequate "shell" motion with the complaint, then seek a stay of that motion and, if granted, conduct discovery. Some months later, plaintiffs are to file the "real" motion that will be properly framed based upon the evidence obtained and/or the intervening substantive motions. Elevating form over substance, the *Damasco* approach would strip district courts of the ability to engage in proper case management by requiring them

to conduct the pointless evaluation of a proxy certification motion and the inevitable motion for stay to permit discovery. This "solution" is a prescription for inefficiency and invites a waste of judicial resources.

III. PERMITTING THE USE OF RULE 68 OFFERS PRIOR TO CLASS CERTIFICATION TO CREATE MOOTNESS WOULD FRUSTRATE THE PURPOSES OF RULE 23

The use of a Rule 68 offer as a procedural trump card to moot class claims would undermine the ability of the named plaintiffs and the district court to safeguard the rights of unnamed class members and to manage the case effectively. *See Ortiz*, 527 U.S. at 858 (noting that "Rule 23 requires protections . . . against inequity and potential inequity at the pre-certification stage"). While class members are not bound by the results of the litigation until the class is certified, *Smith v. Bayer*, 131 S. Ct. 2368 (2011), Rule 23 ensures that their interests are protected in the pre-certification period. That task will be made more difficult if a new named plaintiff must step up to represent the class each time defendants' "buy off" tactic is successfully deployed. Eventually, the ranks of those willing to come forward will be exhausted and the harm to the class will remain unremedied. Rule 68 offers to named plaintiffs are, thus, at odds with the purpose and function of Rule 23.

A. Rule 68 Offers Disrupt the District Court's Oversight of the Pre-Certification Period

In making a motion for class certification, plaintiffs are required to marshal the factual record necessary to satisfy Rule 23 prerequisites. The federal rules, and particularly the 2003 amendment to Rule 23(c)(1)(a), establish a process by which district courts actively oversee the litigation during the pre-certification period. Because this period now typically involves discovery and substantive motion practice, the interval between the filing of the complaint and the certification can be quite lengthy. As a result, there will be far more opportunities for mootness to arise "before the district court can reasonably be expected to rule on a certification motion." *Sosna*, 419 U.S. at 402 n.11. Allowing Rule 68 offers to pick off named plaintiffs would present an irreconcilable threat to this well-ordered process and, as this Court recognized in *Roper*, interfere with sound judicial administration.

The certification motion determines the scope of the class, defines the class claims and defenses, and dictates the process for notice to the class. Fed. R. Civ. P. 23(c). Rule 23(d) confers broad authority on district courts to issue orders to "determine the course of proceedings" in a class action. Fed. R. Civ. P. 23(d); *see* Advisory Committee Notes to Rule 23, 1966 Amendments (district courts should "consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and

argument").[7] Significant discovery and pre-trial motion practice, under the supervision of the district court, are typically required before the class certification motion may be filed.[8] Fed. Judicial Ctr., Manual for Complex Litigation §§ 21.133, 21.141, 21.142 (4th ed. 2012).

Rule 23(c), which prescribes the timing of the class certification motion, was amended in 2003 to provide additional time for this pre-certification discovery and motion practice. "The requirement that the court determine whether to certify a class 'as soon as practicable after commencement of an action' [was] replaced by requiring determination 'at an early practicable time.'" Advisory Committee Notes to Rule 23, 2003 Amendments.[9] The Rules Committee decided

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[7] During the pre-certification period, as throughout the litigation, "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

[8] Courts routinely allow a period for jurisdictional discovery and motion practice, even though their jurisdiction is in doubt and may later be found not to exist. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978).

[9] An empirical study by the Federal Judicial Center of four federal districts found that, in 75% of the cases, the time from the filing of the complaint to the filing of a motion to certify ranged from 6.5 months to more than 16.3 months. *See* Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-36 (1996).

the change was necessary to reflect "prevailing practice" and "capture[ ] the many valid reasons that may justify deferring the initial certification decision." *Id.*

> Time may be needed to gather information necessary to make the certification decision. . . . [D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. . . . Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel. . . .[10]

Id.

The time needed to prepare the certification motion reflects that "Rule 23 does not set forth a mere

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[10] Thus, local rules that specify a short period in which the plaintiff must file a motion to certify the class are inconsistent with the amended rule's "emphasis on the parties' obligation to present the court with sufficient information to support an informed decision on certification." Manual for Complex Litigation § 21.133; *see also* Federal Judges' Pocket Guide to Class Actions III.A (stating that district courts "should feel free to ignore local rules calling for specific time limits; they appear to be inconsistent with the federal rules and, as such, obsolete").

pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This Court has repeatedly affirmed the need for "actual, not presumed, conformance" with the elements of Rule 23, and directed district courts to "probe behind the pleadings" and conduct a "rigorous analysis" to determine if the elements of Rule 23 have been satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. The class certification inquiry may require an investigation into the underlying merits of the action to ascertain compliance with Rule 23. *Id.* at 2551-52; *see Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184-86 (2011).

To fulfill these requirements, plaintiffs must proffer substantial evidence to satisfy Rule 23 and that evidence will typically be in the control of the defendant (e.g., number of class members, nature of common policy or conduct, extent and nature of class-wide harm). Given the systemic nature of class action claims and the need to identify "common proof" that will determine whether class treatment is warranted, this discovery will often include statistical data or other electronically-stored information. Once the data is obtained, experts may be required to analyze and interpret this data, adding additional time to the

pre-certification schedule for the preparation of reports and the taking of expert depositions.

At the same time, the district court will often hear motions to test the pleadings. *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (holding that district court's dismissal of putative class action at pleading stage was proper). Summary judgment motions brought to challenge the claims of the named plaintiffs also may be heard in advance of motions for class certification. District courts are tasked with managing this process in order to ensure efficient adjudication of class certification and the narrowing of issues.

This oversight will be entirely disrupted if defendants are free to "pick off" named plaintiffs with seriatim Rule 68 offers prior to class certification. In addition to the significant discovery and motion practice ordinarily required in a class action, the district court would oversee the equivalent of a judicial Whac-A-Mole game, hearing successive motions to dismiss based on mootness, followed by motions to amend to add or substitute plaintiffs, followed by discovery from each successor plaintiff, followed by motions for summary judgment against each new plaintiff. In the process, Rule 23 would be effectively stymied.

B. Rule 68 Offers Present a Particular Risk for Small Value Claims

Requiring the district court to address repeated claims of manufactured mootness would be wasteful

and would provide defendants with a procedural cudgel at odds with the purposes of Rule 23. This problem presents the greatest threat to the kinds of cases where class treatment is most warranted, i.e., negative value cases where each individual's claim may be insignificant compared to the cost of litigating it. *See Pitts*, 653 F.3d at 1091 (citing *Zeidman*, 651 F.2d at 1050); *Weiss*, 385 F.3d at 345.

Class actions make it economically possible for injured consumers, civil rights plaintiffs, and low-wage workers to pursue claims for relatively small damage amounts for wrongs that would otherwise go unremedied. This Court has repeatedly recognized that the class action mechanism provides an efficient means to aggregate and redress losses too small to warrant individual litigation. *Amchem*, 521 U.S. at 617 (noting that the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights") (internal quotation marks omitted); *Roper*, 445 U.S. at 339 (explaining that "aggrieved persons may be without any effective redress unless they may employ the class-action device"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (same).

If permitted to do so, defendants will pursue the economically wise course of eliminating a parade of named plaintiffs with small losses, debilitating even the most dedicated advocates, avoiding resolution of the class certification motion on its merits, and

retaining most of the financial gain from their alleged misconduct.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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