No. 11-1059

In the Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND
ELDERCARE RESOURCES CORP., PETITIONERS

v.

LAURA SYMCZYK

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE NATIONAL CENTER FOR ASSISTED LIVING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the Chamber of Commerce of the United States of America, the American Health Care Association, the National Federation of Independent Business, and the National Center for Assisted Living (collectively, the proposed *amici*) respectfully request leave to submit the accompanying brief as *amici curiae* in support of petitioners Genesis HealthCare Corporation and ElderCare Resources Corp. Consent to file the accompanying brief was granted by petitioners and refused by respondent.

The petition for a writ of certiorari asks the Court to decide 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. That fundamental question of federal law is presented in the context of a putative collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, which establishes nationwide rules related to minimum wages, maximum hours, and overtime pay.

The proposed *amici* have a direct and substantial interest in the issue presented by this case. As membership organizations, the proposed *amici* represent entities that collectively employ millions of individuals in every industry sector and geographic region of the United States. As explained in detail by the accompanying brief, the past decade has witnessed an unprecedented explosion in the number of putative collective actions filed under the FLSA. Such actions have become a popular means for extracting large payments from employers, many of

whom cannot afford litigation on the merits or risk defending themselves at trial given the generous recoveries authorized by the FLSA. Consistent with Supreme Court Rule 37.1's admonition that *amici* should assist the Court by bringing additional relevant information to the Court's attention, the accompanying brief uses recent congressional testimony and statistics compiled by the Administrative Office of the United States Courts to quantify the sharp rise in FLSA litigation and explain its principal causes.

The Court's resolution of the question presented would provide necessary guidance regarding Article III's personal-stake requirement and the mootness doctrine. It has been thirty-two years since the Court issued two closely decided rulings addressing mootness in the context of class actions under Federal Rule of Civil Procedure 23. Since then, lower federal courts have struggled to apply those decisions not only to Rule 23 class actions, but they have struggled to adapt their application to the very different context of putative collective actions under the FLSA. Because the origin of the present disagreement of authority lies in language contained in two of the Court's decisions, only the Court can resolve the issue to provide much-needed certainty and predictability on this important Article III question.

For the foregoing reasons, the Court should grant the proposed *amici* leave to file the accompanying brief.

Respectfully submitted.

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States.[1] An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business. Cases raising significant questions for employers subject to potential class or collective actions are of particular concern to Chamber members. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 760 (2011) (granting review in case where Chamber submitted petition-stage *amicus* brief addressing deference owed federal agency's interpretation of Fair Labor Standards Act); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (addressing standard for class certification in case where Chamber submitted petition- and merits-stage *amicus* briefs).

Amicus curiae the American Health Care Association (AHCA) is the Nation's largest association of

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have consented to the filing of this brief and their written consent has been filed with the Clerk. Respondent has withheld her consent. Counsel of record for petitioners and respondent received notice of *amici*'s intent to file this brief more than ten days before the due date.

long-term and post-acute care providers, representing the interests of nearly 11,000 non-profit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled citizens who live in nursing facilities, subacute centers, and homes for persons with developmental disabilities. AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term and post-acute care provider community.

Amicus curiae the National Federation of Independent Business (NFIB) is the Nation's leading small business advocacy association, representing members in Washington, D.C., and in all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents over 300,000 member businesses nationwide and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. To fulfill that role, the NFIB Legal Center frequently files *amicus* briefs in cases that will affect small businesses.

Amicus curiae the National Center for Assisted Living (NCAL) is a federation of state affiliates representing more than 2,700 nonprofit and for-profit assisted living and residential care communities nationwide. NCAL is dedicated to promoting high-quality, principle-driven assisted living care and services with a steadfast commitment to excellence, innovation, and the advancement of person-centered care.

Amici have a significant interest in cases presenting important questions under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, which establishes nationwide rules related to minimum wages, maximum hours, and overtime pay for their members. In its present form, the statute covers more than 130 million workers in every conceivable industry. *See The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?*, *Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce,* 112th Cong. 2 (2011) (statement of Rep. Walberg) (*House Hearing*).

Amici are committed to helping their members comply with all labor and employment laws. However, *amici* also have a significant interest in ensuring that their members are spared the significant burden and expense imposed by lawsuits prosecuted, not by plaintiffs with a personal stake in the outcome as required by Article III, but by lawyers in search of new clients. The decision of the Third Circuit at issue here interprets the Court's Article III jurisprudence and the FLSA to permit exactly that.

As discussed more fully below, putative collective actions under the FLSA have become a popular

means for extracting significant payments from employers large and small, many of whom cannot afford litigation on the merits or risk defending themselves at trial given the generous recoveries authorized by the FLSA. By holding that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has joined the suit, the Third Circuit's decision sacrifices core jurisdictional limitations imposed by Article III in order to reach the policy-driven goal of promoting private enforcement of the FLSA.

SUMMARY OF ARGUMENT

Plenary review of the Third Circuit's decision is warranted for at least two reasons in addition to those set forth in the petition for a writ of certiorari.

First, the petition presents a fundamental question of federal law that only the Court can resolve. It has been thirty-two years since the Court issued two closely decided rulings addressing mootness in the context of class actions under Federal Rule of Civil Procedure 23. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). Lower federal courts have struggled to apply those decisions not only to Rule 23 class actions, but they disagree as to whether the logic of those decisions should apply in the very different context of FLSA collective actions. Unlike Rule 23 class actions, Congress has limited putative collective actions under the FLSA by requiring the filing of formal opt-in notices by any employee wishing to join the suit. Congress also eliminated the right of employees to designate as representative plaintiffs persons who have no personal

stake in the case's outcome. Because the origin of the present disagreement of authority lies in language contained in two of the Court's decisions, only the Court can resolve the issue.

Second, the decision below will harm employers who are presently inundated by a tidal wave of FLSA litigation. In the past decade alone, the number of FLSA suits filed annually has grown by almost 300 percent, affecting nearly every segment of the national economy. Because the FLSA is a strict-liability statute that requires courts to award attorney's fees to prevailing plaintiffs, and because the scope of the FLSA is subject to considerable uncertainty, employers that believe they have complied with the statute in good faith are often forced to settle unmeritorious suits rather than face the risk of catastrophic judgments. The Third Circuit's decision deprives employers of a reasonable means to avoid burdensome FLSA litigation, based primarily on the Third Circuit's policy judgment that further discovery and litigation *might* motivate others to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the case's outcome. Further percolation of the question presented is unnecessary and is unlikely to produce new appellate decisions on point because the FLSA permits plaintiffs wide discretion in deciding where to file suit, which in turn will likely lead to forum shopping whereby all significant new cases are defensively filed in those circuits with less stringent mootness precedent.

Accordingly, the petition should be granted and the judgment of the court of appeals reversed.

ARGUMENT

I. The Petition Presents a Fundamental Question of Federal Law That Only The Court Can Resolve

The origin of the present mootness controversy can be traced to language contained in *Roper* and *Geraghty*, both of which addressed mootness issues in the Rule 23 class action context. As explained below, the majority opinions in *Roper* and *Geraghty* relied on the unique factual circumstances presented in each case to reach narrow conclusions limited to the Rule 23 context. However, despite the significant conceptual differences between Rule 23 class actions and FLSA collective actions, some courts, including the Third Circuit, have misappropriated *Roper* and *Geraghty* for use in the FLSA context. Therefore, plenary review by the Court is warranted.

a. In *Roper*, two credit card holders filed a putative class action against the bank that issued their credit cards. 445 U.S. at 328. In seeking class certification, the cardholders sought to spread the cost of pursuing the litigation amongst the class under the common-fund doctrine. *See id.* at 334 n.6. After the district court denied the cardholders' motion for class certification, the bank tendered an offer of judgment to each named plaintiff that, unlike the offer at issue in this case, did not include attorney's fees. *Id.* at 329. Although the named plaintiffs rejected the offer of judgment, the district court entered judgment in the bank's favor. *Id.* at 330.

A majority of the Court held that the bank's offer of judgment did not moot the named plaintiffs' appeal of the denial of their motion seeking class certification. Writing for the majority, Chief Justice Bur-

ger explained that the named plaintiffs retained a personal stake in the outcome of the class-certification question because of their desire to "shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." *Id.* at 336. Noting that a "district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings," the majority believed that to deny the right to appeal under these circumstances would be contrary to "sound judicial administration." *Id.* at 339. Using language that would later appear in this and similar cases, the majority also observed that "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be '*picked off*' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions." *Id.* (emphasis added). *But see Roper*, 445 U.S. at 353 (Powell, J., dissenting) ("I know of no decision by any court that holds that a lawyer's interest in a larger fee, to be paid by third persons not present in court, creates the personal stake in the outcome required by Art. III.").

Geraghty, which was argued and decided the same day as *Roper*, involved a putative class action filed by a prisoner challenging the legality of parole guidelines issued by an agency. 445 U.S. at 393. The district court denied the prisoner's motion for class certification and granted the agency's motion for summary judgment. *Id.* The prisoner appealed but was released from prison shortly thereafter. *Id.* at 394.

A five-Justice majority held that the prisoner's appeal of the denial of his class-certification motion was not moot. *Id.* at 404. Justice Blackmun's majority opinion first determined that a "live" controversy still existed because prisoners who were currently incarcerated and subject to the agency's parole guidelines had filed motions with the Court seeking to be substituted on behalf of the named plaintiff. *Id.* at 396. As for Article III's personal-stake requirement, the majority believed that the mootness doctrine was "flexible" enough that a "proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404. Although he acknowledged that a person seeking to use the class-action device does not possess a legally cognizable interest "in the traditional sense," *id.*, Justice Blackmun believed that the "Federal Rules of Civil Procedure give the proposed class representative the *right* to have a class certified," *id.* at 403 (emphasis added). This "right," the majority believed, was "more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." *Id.*

Justice Blackmun's opinion drew a lengthy dissent from Justice Powell. *Geraghty*, 445 U.S. at 409 (Powell, J., dissenting). Writing on behalf of three other Members of the Court, Justice Powell rejected the notion that mootness was a "flexible" doctrine, believing that the majority's alteration of the doctrine to accommodate "nontraditional" forms of litigation departed from settled law. *Id.* Although he agreed that a live controversy still existed, *id.* at 410,

Justice Powell emphasized the constitutional nature of the personal-stake requirement in concluding that it was no longer satisfied. "Since the question is one of power," Justice Powell explained, "the practical importance of review cannot control. . . . Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. . . ." *Id.* at 411-12. Rejecting the notion that Rule 23 created a "right" to have a class certified if the requirements of the rule were met, *id.* at 421, Justice Powell concluded that, "[i]n any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client," *id.* at 424.

Roper and *Geraghty*, then, were both decided in the context of very unique factual circumstances that are not present in this case. First, and most fundamentally, both cases were Rule 23 class actions. *Roper* relied explicitly on the "objectives" of class actions, while *Geraghty* relied on the representative nature of class actions. FLSA collective actions, by contrast, share neither the same objectives nor the same representational nature as Rule 23 class actions, as discussed in more detail below.

Second, the district courts in *Roper* and *Geraghty* had denied motions for class certification before the issue of mootness arose, threatening the ability of anyone to obtain timely appellate review of what were later determined to be erroneous denials of class certification. In this case, however, respondent never filed a motion for conditional certification.

Third, unlike the offer of judgment in *Roper*, it is uncontested that the offer of judgment at issue here afforded respondent complete relief. Pet. App. 43.

b. There are significant conceptual differences between collective actions under the FLSA and Rule 23 class actions. Since its enactment in 1938, the FLSA has allowed employees to sue their employers for violations of the statute. *See* Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)). Due in part to the FLSA's openness to abuse, Congress has narrowed the scope of the statute's private-enforcement scheme over time.

As first enacted, the FLSA allowed private actions to be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, *or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated*." Fair Labor Standards Act of 1938 § 16(b), 52 Stat. at 1069 (emphasis added). As originally enacted, then, FLSA collective actions resembled Rule 23 class actions in their representative nature.

Less than a decade later, however, Congress amended the FLSA, citing concerns over "excessive and needless litigation and champertous practices." Portal-to-Portal Act of 1947, ch. 52, § 1(a)(7), 61 Stat. 84 (codified at 29 U.S.C. § 251(a)(7)). As is relevant here, Congress banned representative actions by deleting the "designate an agent or representative" clause from the FLSA's private-enforcement provision. *Id.* § 5(a), 61 Stat. at 87. To ensure that employees had a say over their own interests and that

suits were not prosecuted by persons lacking a personal stake in the case's outcome, Congress also added a formal opt-in system whereby "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.* (codified at 29 U.S.C. § 216(b)).

As a result of these statutory amendments, putative collective actions under the FLSA are a "fundamentally different creature than the Rule 23 class action." *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (per curiam). For example, the existence of a class under Rule 23 "does not depend in theory on the participation of other class members. Irrespective of whether other class members take any or no role in the action, they are bound by the judgment, whether favorable or unfavorable, unless they affirmatively 'opt out' of the suit." *Id.* at 1248. The opposite is true in the FLSA context because of the statute's opt-in requirement. *Id.* at 1249. Moreover, unlike the situation presented in *Geraghty*, the named plaintiff in an FLSA suit "has no claim that he is entitled to represent other plaintiffs." *Id.*

c. In the thirty-two years since *Roper* and *Geraghty* were decided, the Court has continued to emphasize that an actual, live controversy must exist at all stages of litigation. *See, e.g.*, *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009). The Court, however, has not had occasion to address Article III's personal-stake requirement in class actions with different factual circumstances from *Roper* and *Geraghty*, such as actions in which an offer of judgment provides complete relief to the named plaintiff and no motion

for class certification has been filed. More importantly, the Court has not had occasion to decide whether Congress's elimination of representative FLSA actions and enactment of the opt-in requirement alters the Article III calculus for FLSA collective actions. This is particularly true in this case, where no other employee has opted in to a case brought by a plaintiff whose individual claim is now moot.

The absence of guidance from the Court has resulted in confusion at the federal appellate level regarding how to apply *Roper* and *Geraghty* both in the Rule 23 context and in the context of FLSA collective actions. *Compare Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011) ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."), *reh'g en banc denied*, No. 10-3934 (7th Cir. Jan. 4, 2012); *Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1122-23 (9th Cir. 2009) (holding that a named plaintiff in a putative collective action under the FLSA does not have a "right" to represent other employees analogous to the Rule 23 "right" recognized by Justice Blackmun in *Geraghty*, such that when the named plaintiffs' claims are rendered moot by a settlement and no other employee has filed an opt-in notice, the entire action is moot); *and Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248-49 (11th Cir. 2003) (per curiam) (same), *with Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011) (holding that a rejected offer of judgment for the full

amount of a named plaintiff's individual claim does not moot a putative Rule 23 class action where the offer precedes the filing of a motion for class certification); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011) (same); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919-21 (5th Cir. 2008) (agreeing with the Eleventh Circuit's conclusion regarding the conceptual differences between Rule 23 class actions and FLSA collective actions, but finding the case not moot because, although the defendants' offer of judgment had mooted the named plaintiff's individual claim under the FLSA, the named plaintiff had filed a motion seeking conditional certification).

Even those federal courts that have allowed a named plaintiff to continue a case under circumstances similar to those at issue here have recognized the unsettled nature of the mootness question. For example, the Fifth Circuit expressly acknowledged that the "complex interplay" between offers of judgment and the FLSA's collective-action provision presents "difficult" questions. *Sandoz*, 553 F.3d at 914. Similarly, after surveying the Court's mootness precedent in the class-action context, the Tenth Circuit recently conceded the existence of "tension in the legal concepts that must control our decision here." *Lucero*, 639 F.3d at 1249; *see also* Pet. App. 20 (acknowledging that the district court in this case, which dismissed the case on mootness grounds, had

relied on a "careful analysis" of various courts' efforts to "grapple" with the mootness question).[2]

Legal commentators have also acknowledged the unresolved nature of the Court's mootness jurisprudence following *Roper* and *Geraghty*. *See, e.g.*, 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.94[4][c] at 101-268 (3d ed. 2011) (discussing disagreement of authority as to whether pre-

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[2] Confusion has not been confined to the federal judiciary. State appellate courts, which often look to this Court's mootness jurisprudence for guidance, have been unable to apply *Roper* and *Geraghty* with any consistency. For example, the Supreme Court of Illinois recently rejected a named plaintiff's reliance on *Roper*'s "pick off" language in a putative class action, finding that the action was mooted by the defendant's offer of complete relief prior to the named plaintiff filing a motion for class certification. *Barber v. Am. Airlines, Inc.*, 948 N.E.2d 1042, 1044-47 (Ill. 2011); *see also DeCoteau v. Nodak Mut. Ins. Co.*, 2001 ND 182, ¶ 15, 636 N.W.2d 432, 437 ("When a named plaintiff whose individual claim becomes moot has not even moved for class certification prior to evaporation of his personal stake in the lawsuit, courts uniformly hold the plaintiff may not avail himself of the class action exception to the mootness doctrine."); *Frazier v. Castle Ford, Ltd.*, 27 A.3d 583, 591 (Md. Ct. Spec. App.) (rejecting named plaintiff's reliance on *Roper*'s "pick off" language and concluding that "better reasoned cases support the principle that, if the individual claims of the named plaintiffs are satisfied by settlement or tender of full payment after the filing of the complaint but before the filing of a motion for class certification, the entire action must be dismissed as moot"), *cert. granted*, 33 A.3d 981 (Md. 2011). *But see Jones v. S. United Life Ins. Co.*, 392 So. 2d 822, 823 (Ala. 1981) (relying on *Roper*'s "pick off" language in finding defendant's pre-certification tender of payment to named plaintiff, which mooted her individual claim, did not moot putative class action).

certification offers of judgment moot putative class actions); 13C Charles Allen Wright et al., *Federal Practice and Procedure* § 3533.9.1 at 523 (3d ed. 2008) (expressing dissatisfaction with the Court's mootness precedent in the class-action context); David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 Duke L.J. 781, 791 (2003) (explaining that, without further guidance from the Court, lower courts are "sharply divided over the effect of full offers [of judgment] conveyed before the named plaintiff files the [class] certification motion"); *see also* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562, 621-22 (2009) (arguing that the "judicially developed exceptions to the mootness doctrine cannot be reconciled with the constitutional account of mootness").

Roper and *Geraghty* do not represent exceptions to Article III's case-or-controversy requirement, nor could they given the constitutional basis of that requirement and its personal-stake sibling. At most, *Roper* and *Geraghty* illustrate how those requirements may be applied in the unique factual circumstances presented in those cases. The Third Circuit's decision in this case, however, evidences the fact that the weakening of the personal-stake requirement is not being confined to the narrow factual circumstances confronted by the Court in *Roper* and *Geraghty*. Therefore, this case presents an opportunity for the Court to provide much-needed guidance on a fundamental question of federal law that only the Court can resolve.

II. The Third Circuit's Decision Will Further Exacerbate the Significant Burden Placed on Employers by an Ever-Growing Wave of FLSA Litigation

By holding that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has joined the suit, the Third Circuit improperly allowed policy considerations to trump Article III's requirement that a live case or controversy exist at all times for a case to be justiciable. Moreover, the Third Circuit did not give sufficient consideration to the significant public policy considerations counseling against its holding. For example, the Third Circuit's decision deprives employers of one of the only reasonable means to avoid burdensome litigation in the FLSA context—all in the hope that further discovery and litigation *might* motivate others to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the case's outcome. In doing so, the Third Circuit's decision transforms federal courts into roving commissions seeking evidence of potential wrongdoing involving parties not before the court, a result that Article III prohibits.

This is no mere technicality raised in the context of an arcane, rarely asserted statutory cause of action. The past decade has witnessed nothing less than an explosion in FLSA litigation. Statistics published by the Administrative Office of the United States Courts reveal that for the twelve-month period ending March 31, 2001, a total of 1,961 FLSA actions were commenced in district courts throughout the United States. *Federal Judicial Caseload*

Statistics 46 (2001). For the twelve-month period ending March 31, 2011, that number had grown to 7,008—a nearly 300 percent increase. Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 48 (2011); *see also House Hearing* at 29 (charting exponential increase in number of FLSA actions). Between federal fiscal years 2009 and 2010, there was a 13 percent increase in cases commenced under the FLSA, accounting for much of the growth in total federal question filings at the district court level. Administrative Office of the U.S. Courts, *2010 Annual Report of the Director: Judicial Business of the United States Courts* 20 (2011).[3]

Two factors are widely credited with driving the drastic increase in FLSA litigation. First, unlike most federal statutory schemes permitting private enforcement, the FLSA *requires* a district court to award attorney's fees to a successful plaintiff, regardless of the wage amount at issue. *Compare, e.g.*, 29 U.S.C. § 216(b) ("The court in [an FLSA] action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.") (emphasis added), *with* 29 U.S.C. § 1132(g)(1) (allowing district courts discretion to award attor-

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[3] FLSA litigation is now so prevalent that at least one national publisher recently launched a new service dedicated solely to tracking FLSA cases. *See* Press Release, Bloomberg BNA, *Bloomberg BNA Launches FLSA Litigation Tracker* (Jan. 12, 2012) (quoting a senior publishing executive as saying that, "[w]ith all signs pointing to the recent boom in FLSA litigation continuing in the near future, the need for [the new service] has never been more urgent").

ney's fees in private ERISA actions); 33 U.S.C. § 1365(d) (Clean Water Act); *and* 42 U.S.C. § 1988(b) (private actions under various civil rights statutes); *see also* Fed. R. Civ. P. 23(h) (explaining that district courts in certified class actions "may" award attorney's fees if authorized to do so by law or by the parties' agreement). The FLSA's mandatory attorney's fee provision creates a significant financial incentive for plaintiff's counsel to litigate FLSA cases rather than resolve them on reasonable terms. In fact, it is not uncommon for attorney's fees and costs to dwarf the amount of wages at issue in FLSA cases. *See, e.g.*, *Perrin v. John B. Webb & Assocs.*, No. 6:04-cv-399, 2005 WL 2465022, at *5 (M.D. Fla. Oct. 6, 2005) (awarding over $7,700 in attorney's fees and costs even though underlying claim was for wages totaling $270).

Second, the FLSA is a strict-liability statute whose sweep is still largely unresolved. For example, the question whether certain employees are exempt from the statute's requirements has been a hotly contested issue, which has been aggravated by recent shifts in the Department of Labor's interpretation of the statute. *See, e.g.*, *SmithKline Beecham Corp. v. Christopher*, 635 F.3d 383, 390-95 (9th Cir.) (describing regulatory changes promulgated by the Department in 2004 and refusing to give deference to interpretation of same contained in the Department's *amicus* brief), *cert. granted*, 132 S. Ct. 760 (2011). Because the FLSA has no intent element, an employer's good-faith belief that it has complied with the statute serves only as a limited defense if subsequent judicial decisions or regulations interpret the statute differently. *See* 29 U.S.C. §§ 255(a), 260

(providing that employer's intent affects statute of limitations and award of double damages, not attorney's fees).

Regardless of the reason, the practical reality is that putative collective actions under the FLSA impose significant costs on employers of every size and in every segment of the national economy. A review of the Department of Labor's website reveals the staggering breadth and diversity of the FLSA's coverage. *See* U.S. Dep't of Lab., *Topical Fact Sheet Index*, http://www.dol.gov/whd/fact-sheets-index.htm (last visited Mar. 21, 2012) (listing separate FLSA "fact sheets" targeting employers and employees in such diverse industries as agriculture, amusement parks, automobile dealerships, call centers, car washes, construction, daycare, firefighting, grocery stores, home health care, insurance, law enforcement, lodging, lifeguarding, maintenance, manufacturering, nursing, real estate, retail, roofing, state government, transportation, warehousing, and wholesaling).

The FLSA's collective-action device allows plaintiff's counsel to leverage easily a lawsuit involving a single claim into a lawsuit of nationwide scope involving tens of thousands of claims. Once that occurs, the pressure on employers to settle is so great that it is the rare case that produces a trial, let alone an appeal of a final judgment entered after trial. As one witness recently explained in testimony before Congress, "when you look at the threat of these lawsuits and you understand the risks of going to trial, decisions are made on a business level to make payments that are dramatic compromises . . . ." *House Hearing* at 52 (statement of Richard L. Alfred); *see*

also id. at 29 (cataloging recent settlements ranging from $38 million to $135 million in suits brought against employers in the financial-services, insurance, retail, and technology industries).

This phenomenon exists regardless of whether an FLSA violation actually occurred. As the same witness also explained:

> If one were to examine the way a collective action works under the [FLSA], one would quickly see that the risks to employers may be enormous. That doesn't mean that employers did anything wrong. Oftentimes, the analysis is that they did not. The problem is, in a collective action, the case may be what is called conditionally certified at the very beginning of the lawsuit with a very low burden. Almost all cases are. That then triggers legal mechanisms that allow the hundreds, thousands, and more people to join the case.

House Hearing at 51 (statement of Mr. Alfred).

The Third Circuit's decision therefore deprives employers of a reasonable means to avoid burdensome litigation by offering complete relief to the only party before the court claiming injury, all for the policy-based reason of promoting private enforcement of the FLSA. Article III, however, does not permit the continuation of litigation based solely on speculation that further discovery and litigation might generate new cases or controversies involving parties not presently before the court.

Finally, the current disagreement in the circuits promotes forum shopping. The FLSA provides that an employee may file suit in "any" federal court of "competent jurisdiction." 29 U.S.C. § 216(b). This statutory language gives plaintiff's counsel signifi-

cant discretion in choosing where to file suit. This is particularly true of FLSA suits brought against employers that, like the employers here, operate in multiple States. *See* Am. Compl. ¶¶ 1, 12, 19, *Symczyk v. Genesis HealthCare Corp.*, No. 2:09-cv-05782 (E.D. Pa. Apr. 23, 2010) (ECF No. 22) (styling this case as a "nationwide collective action" involving 36,000 employees in thirteen States). Savvy plaintiff's counsel will therefore choose to file suit in those circuits with favorable mootness precedent and avoid those circuits with unfavorable mootness precedent.

As a result, further percolation of the question presented will likely prove of little benefit to the Court, nor is it likely that those circuits that have decided the issue will change course. Further percolation is also unlikely to be of benefit to the Court since the origin of the present controversy lies in statements made by the Court thirty-two years ago in *Roper* and *Geraghty*. Only the Court can resolve such a controversy.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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