IN THE SUPREME COURT OF THE UNITED STATES

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GENESIS HEALTHCARE :

CORPORATION, ET AL., :

Petitioners : No. 11-1059

v. :

LAURA SYMCZYK :

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Washington, D.C.

Monday, December 3, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

RONALD MANN, ESQ., New York, New York; on behalf of Petitioners.

NEAL KUMAR KATYAL, ESQ., Washington, D.C.; on behalf of Respondent.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-1059, Genesis HealthCare v. Symczyk.

Mr. Mann.

ORAL ARGUMENT OF RONALD MANN

ON BEHALF OF THE PETITIONERS

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

The decision of the Court of Appeals deprives the Defendant of the ability to free itself from litigation even when it is willing to pay complete relief to the sole Plaintiff. Thus, as long as the Plaintiff refuses to accept full and complete payment, a putative collective action must continue onward to certification.

JUSTICE GINSBURG: Did that offer include admission of liability, or was it just that it was going to pay the amount of damages requested?

MR. MANN: That's a good question, Justice Ginsburg. Because it was an offer of judgment, if the offer had been accepted, the result would have been a judgment by the Federal Court imposing liability under the statute, under the Fair Labor Standards Act,

on the Defendant, and requiring the Defendant to pay full and complete relief, including costs and attorneys' fees, to the Plaintiffs. So there would have been a judgment of the Federal Court imposing liability under the statute.

JUSTICE GINSBURG: So if -- if there were judgment of liability, then that would be preclusive for all other people similarly situated?

MR. MANN: Well, I think there is rules of issuing claim conclusion that would flow from the judgment, and it would have --

JUSTICE GINSBURG: Well, that -- so the next case is another employee who claims uncompensated work time, and that's brought on behalf of similarly situated people. Then that next case, the employer would be -- would be subject to summary judgment because the liability has been established.

MR. MANN: Well, there would be a variety of fact questions that would have to be resolved to determine the extent of the preclusion from the first judgment. But the rules of issue and claim preclusion would apply, and to the extent those rules call for matters that were comprehended within the judgment to bind, in a later case they would.

I think the way that I would put it, looking

back to Justice Kagan's opinion in the Smith v. Bayer case, it's common for there to be preclusive effect of a judgment in one case against people that are not parties. And this would have been a judgment imposing liability under the Fair Labor Standards Act based on the allegations made in the complaint. And that's --

JUSTICE SOTOMAYOR: Counsel, so what am I to make of your transmittal letter which says, in the offer itself, that -- JA 5556, that Petitioners make clear that the offer of judgment, quote, "was not to be construed as an admission that Petitioners are liable in this action or that respondent has suffered any damage"? What -- what are we to make of that --

MR. MANN: Well, let me --

JUSTICE SOTOMAYOR: -- when you're now claiming that you would have accepted a judgment of liability?

MR. MANN: Well, I don't think that you have to rely on my statements here to say that we would have accepted judgment of liability at that time. The -- the offer itself was a formal offer of judgment on a form promulgated by the trial court.

The offer itself is not an admission of liability. The offer itself is not a judgment against the Defendant. The offer is a statement that, under the

ordinary rules for Rule 68, if -- if they accept the offer, it would be a judgment against our client.

JUSTICE SOTOMAYOR: How did you pick the $7,500?

MR. MANN: That's detailed later in the joint appendix at pages 77 to 79. But, essentially, what our client did is they took the amount of time for breaks during the Respondent's period of employment and offered her full wages for all of the break time, so that whatever amount of break time was appropriately charged for her --

JUSTICE SOTOMAYOR: I see in the -- in the FLSA that it also requires an amount for liquidated damages. Did you include that amount as well?

MR. MANN: Yes, your Honor -- yes, Justice Sotomayor.

CHIEF JUSTICE ROBERTS: Counsel, what if the district court -- this proceeding -- you filed the suggestion of -- of mootness, whatever, and the judge says, okay, I have this suggestion of mootness; I also want to address the certification issue; the mootness argument is scheduled for three months down the road, the certification issue for two months down the road; isn't this just a question of what order the district court wants to address these two issues?

MR. MANN: Okay. So there is two things I want to say about that. The first one is to talk about what happened in this particular case, which is the case that's before the court; and, the second is to discuss the practical consequences of what could have happened in some other case.

So what happened in this case is that it was uncontested that the offer provided complete relief. And so the Respondent suffered a judgment to be entered against her because of the conceded acts of the offer. And at the time that judgment was entered, nothing had been done about certification. At the time the offer was entered -- had made, nothing had been done about certification.

So what we --

JUSTICE GINSBURG: It was not possible for anything to be done about the certification because you moved immediately. The complaint is filed, and then you moved -- then you immediately offered the judgment that you did.

MR. MANN: Well, I think there is two questions to unpack here that -- that are implicit in both what the Chief Justice is commenting on and what you're commenting on, Justice Ginsburg.

One is the question that was presented in

the petition, which is: What is the effect on a collective action if, before certification or any motion for collective process has been determined, the sole plaintiff loses the case.

The second one is: How do you deal with the housekeeping issues of terminating the interest of a plaintiff when there's no longer controversy between the plaintiff and the defendant.

And so --

JUSTICE KAGAN: Well, it seems as though it's more than housekeeping issue that's involved here because -- I mean, I realize that you have an argument about what happens when the plaintiff's individual claims have been fully satisfied, but the plaintiff continues to want to represent other individuals.

But, here, the plaintiff's individual claims have not been fully satisfied. She walked away with nothing. She walked away with no judgment, and she walked away with no $7,500.

And the question is: How can it possibly be that her individual claim was moot?

MR. MANN: Okay. So I think there is two -- again, there's two things to say. One is, we view it as a housekeeping question because it seems to us clear that, if the Defendant no longer wishes to contest

liability and formally offers to pay all of the relief that the person could possibly win in any formal litigation, it has to be the case that the individual's interest is moot.

Now, it might be that the appropriate response is, as is consistent with the Third Circuit, is that the district court should just dismiss the case, because if the person won't take yes for an answer, the Federal Court doesn't need anything further --

JUSTICE GINSBURG: But there is nothing in Rule 68 -- you're basing the -- your position on a rule that provides as the only sanction if the plaintiff continues and gets less than the offer of proof, then the plaintiff has to pay the costs. Rule 68 doesn't say anything about dismissing suits.

MR. MANN: Well, I don't think our position depends on Rule 68 at all for the mootness. Our position for the mootness is that if there's no further controversy about the relief that is created by the cause of action, there's nothing more for the trial court to do --

JUSTICE KENNEDY: Let me ask you this --

CHIEF JUSTICE ROBERTS: Justice Kennedy.

JUSTICE KENNEDY: Let me ask you just this question. Just tell me as a matter of common practice,

do district courts enter judgments against plaintiffs routinely when a full offer of settlement has been made and the defendant just is silent? I mean, does this happen?

I just can't remember seeing a -- but this --

MR. MANN: There's --

JUSTICE KENNEDY: It may be that it's common practice, if the plaintiff doesn't reply and there's an offer that's filed with the court, the court says, I haven't heard anything, I'm going to enter judgment.

MR. MANN: I think -- I think that the courts of appeals have taken a variety of approaches to what I'm characterizing as a housekeeping question of, if there's no further controversy between the plaintiff and the defendant how do we move the case off our docket? One approach which is followed by some of the courts of appeals is that you enter a judgment against the plaintiff, whether they like it or not.

JUSTICE KENNEDY: As a matter of housekeeping, you could --

MR. MANN: In favor of the plaintiff -- you enter a judgment in favor of the plaintiff -- that needs to be clear -- in favor of the plaintiff --

JUSTICE KENNEDY: Right.

MR. MANN: Whether they want a judgment or not, you say: Here's everything you asked for; you must take it.

Another approach is to say, if they're willing to give you everything to which you're entitled and you won't take it, then there's no reason we should continue to adjudicate your case because there's not really a controversy.

JUSTICE KAGAN: Here is what the Court said last in Knox last year, when it said: "What makes a case moot?" It says: "A case becomes moot when it's impossible for a court to grant any effectual relief whatever to the prevailing party."

Now, here the judge says: Okay, is this case moot? Well, it's not moot because I could give -- at the very least, I could give the plaintiff $7500; but, I didn't give the plaintiff $7500, so she still has her claim for at least $7500, regardless of the collective side of this action. I mean, she hasn't been satisfied.

MR. MANN: Okay, so let -- let me respond to that. I think Knox flows naturally from Friends of the Earth, and I think they're both saying exactly the same thing. And the -- what's going on in those cases, and I suppose in the Nike case from last month, is this

general problem of a defendant is faced with a piece of litigation and they no longer wish to contest it.

If the action seeks prospective relief, it's quite difficult, once the case has begun, for the defendant to convince the court that they are going to change their conduct in a way that moots the claim for prospective relief. And this Court's had a series of cases and has often not been convinced of that.

In a case that only seeks retrospective relief, it's somewhat easier to convince the court of that. One way would be to formally offer to pay everything the person could get.

What happened in this case and what's before the Court is simply if that happens. So what happened here is there was an offer that was conceded to be adequate and the plaintiff suffered a judgment to be entered against her on the premise that she had no further claim. And the question is if that interest is gone, which has been conceded at all stages of the litigation until the bottom side briefing on the merits in this Court, what's the consequences for the collective action.

And so what the parties have litigated about, because this was conceded repeatedly over the course of several years, is what happens when that

interest is moot.

Now, we believe that it is correct that a defendant faced with litigation that it does not wish to contest can terminate the litigation.

JUSTICE GINSBURG: What do you do when -- when you have a governing statute that says that an employee may bring suit for and in behalf of himself and other employees similarly situated? Can you use a mere rule, Rule 68, to carve out what the statute authors -- authorizes, that is that the employee can seek relief on behalf of himself and others similarly situated? Mustn't you give a chance for the statutory provision to work, which you didn't. By filing immediately, you didn't allow the normal process of inviting opt-ins to occur.

MR. MANN: I think that the language of the statute, section 216(b) of the Fair Labor Standards Act, provides compelling guidance for the case that the court of appeals ignored.

In this case, because it's under the Fair Labor Standards Act, the very paragraph you're looking at, Congress has opined -- and I'll say it's only an opinion because the lower courts ignored it. But Congress at least has opined as to how you tell when people that are not yet before the court can be treated

as relevant. And the answer is the non-party plaintiffs cannot be part of the case until they formally opt-in --

JUSTICE GINSBURG: Yes, but you have to give the plaintiff an opportunity.

MR. MANN: The statute does not say, if a plaintiff files a case and alleges that other people are similarly situated, the case shall not be dismissed until the court has proceeded to conclusively determine the propriety of certification. It doesn't say that.

JUSTICE GINSBURG: Suppose -- suppose the plaintiff had simultaneously with the filing of the complaint moved to have it preliminarily certified as on behalf of other employees situated; so, instead of having the complaint, which was labelled a collective complaint, separate from a motion for certification, they came together; that the plaintiff filed a complaint and immediately filed a motion for certification and a request to discover the names of other people simply situated.

MR. MANN: I think the answer to that would flow directly from this Court's decision in Geraghty. The first question would be, at the time that the defendant's interest becomes moot who is a party to the case, and the answer would be, well, there's just this one person.

The next question would be, has the district court ruled on certification in a way that could have erroneously caused the mootness? Well, the answer would be no because it became moot not because of an erroneous district court ruling on certification, which was the situation in Geraghty --

JUSTICE GINSBURG: So your answer is it wouldn't make any difference.

MR. MANN: It wouldn't make any difference. What Geraghty turns on, and -- and I encourage you to look at the portion of footnote 11 that -- the last two paragraphs of that footnote that goes over onto page 407, the court emphasizes, all we're saying here, all we're saying here is that if the basis of mootness is an error by the district court and if we later ascertain that error, we will not only correct the error about certification, but we will forgive the mootness that flowed from that error.

In this court case, there's no suggestion that the district court error caused mootness to occur.

CHIEF JUSTICE ROBERTS: Counsel, I don't know that you've answered my question sometime ago, but what -- if the judge can simply order the two determinations in a way that certification is addressed before mootness, does that take care of your problem?

Obviously, if you grant certification, there is an ongoing controversy. And under Roper and Geraghty if you deny certification the relation back doctrine applies.

MR. MANN: I think that -- that those cases provide a way to analyze that situation. So one possibility is that the district judge grants certification at some moment after the plaintiffs filed, and then later in time the sole person who is in the case at that time loses their interest in the case for one reason or another --

CHIEF JUSTICE ROBERTS: Well, there's no doubt that --

JUSTICE SOTOMAYOR: Counsel, I have --

CHIEF JUSTICE ROBERTS: I'm sorry. There's no doubt that that -- in that situation, the case goes forward, right?

MR. MANN: There is doubt in that case. And we would suggest that it's clear that it doesn't go forward.

Under the Fair Labor Standards Act, as opposed to Rule 23, which was at issue in Geraghty, even after the district judge signs an order saying, pursuant to Justice Kennedy's opinion in Hoffman, we should send notices out to see if we can find some new plaintiffs,

if none of those people have yet appeared before the court and signed into the case, there is still only one plaintiff.

So in Geraghty, it was important to the Court that when the case got here, although the interest of the named prisoner had been vitiated, there were several people who had filed motions to intervene. And so it appeared that at all times there were other people.

In this case, by contrast, there's every reason to think that after the person's interest was vitiated, there were no other plaintiffs because --

CHIEF JUSTICE ROBERTS: Well, what do you --

JUSTICE SOTOMAYOR: Counsel, can I ask a fundamental question under Rule 68? When I was a district court judge, if parties told me about their settlement discussions I would get quite upset. But, it says explicitly -- explicitly: "Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs."

What authorizes you to use evidence of that offer to argue anything --

MR. MANN: So again --

JUSTICE SOTOMAYOR: -- especially when the statute gives the plaintiff an absolute statutory right

to refuse it at a specific penalty?

What permits you to use it as evidence of anything, mootness, I don't care what you're using it for, except in cost?

MR. MANN: Okay. So I would say two things. The first thing is, of course, the plaintiff did not challenge the use of the offer in the trial court.

The second thing responsive to your question on the merits is, trial courts have considered this question, have generally considered that the offer is admissible by analogy to Rule 408, which deals with settlement discussions more generally, and the Advisory Committee Notes discuss this. And the general idea is the offer is being admitted for a purpose other than to prove the validity or amount of the disputed claim, and so --

JUSTICE KAGAN: This makes no sense to me because if the offer is for judgment, it has to be proof of validity and amount, because at least you have -- you should be able to get a judgment.

MR. MANN: Well, I think that the offer is not being admitted to prove the validity of the plaintiff's claim or the amount of the plaintiff's claim. The offer is being admitted to prove that the plaintiff has no --

JUSTICE KAGAN: But didn't you just tell me that an offer results in an admission of liability and a judgment for a particular amount?

MR. MANN: If the plaintiff accepts the offer, then the district judge will enter offer -- will enter judgment for the plaintiff in the amount of the offer.

The district courts that have considered this have ordinarily concluded that, in cases where the offer is not accepted and the defendant contends that the offer is complete, that the offer can be admitted for the purpose of proving that there is no controversy between the parties, which is distinct from admitting it for the purpose of proving the validity or amount of the claim.

JUSTICE SCALIA: Mr. Mann, could I come back to your response to the question of Knox, the statement in Knox that -- you know, where the court can issue -- can provide no relief, there is -- there is no standing. That -- I would have thought your answer to that is -- is not -- I mean, you -- you answered it on the facts, but that statement was not meant to be exclusive, that that's the only situation in which there -- there is no standing.

It was addressing just the third prong of

our -- of our standing doctrine, namely the prong that where the court can issue no relief, the remedial -- the remedial prong, that one of -- one of the elements of standing is the court has to be able to provide relief. But there are other elements to standing as well, including whether there is injury in fact, and whether the injury is -- you know, springs from the action that is challenged. And those -- those prongs would continue to exist.

I didn't think Knox's statement was meant to be all inclusive, that that's the only -- only way in which standing can be eliminated.

MR. MANN: I think that's correct, Justice Scalia. And so the problem that we face here is the -- the questioning relates to something that was not disputed below. And our position is a relatively simple one, which is that, under the doctrine of mootness, it has to be correct that if there is not a controversy between the plaintiff and the defendant about a cause of action that's authorized by law, then the case is over.

And that was all conceded below. The plaintiff suffered a judgment to be entered against her. She did not challenge that judgment on appeal.

JUSTICE KAGAN: But, Mr. Mann --

JUSTICE ALITO: Can I ask this question?

Does the district court have the authority when an offer of judgment is made to hold a hearing as to whether the offer of judgment actually gives the plaintiff everything that the plaintiff could possibly get under the complaint?

MR. MANN: We think that's the appropriate response. We think that what should happen is that if the defendant makes an offer of judgment and -- and files a motion to dismiss suggesting that it provides complete relief, that if the plaintiff doesn't concede that the case should be dismissed, the district judge should hold a hearing, as the district judge did here --

JUSTICE ALITO: But where -- where does it say that in Rule 68?

MR. MANN: The proceeding isn't under Rule 68.

JUSTICE ALITO: What is it under?

MR. MANN: The proceeding is under Rule 12(b) as a motion to dismiss for lack of jurisdiction because the case is moot.

See, we don't think that it matters that the offer happened to be made under Rule 68. There are obvious --

JUSTICE KENNEDY: Your offer says you hereby offer to allow entry of judgment under Rule 68.

MR. MANN: But we don't think that the mootness of the case flows from Rule 68. The mootness of the case flows from the fact that there is not a dispute between the parties about anything a Federal court can handle.

JUSTICE KENNEDY: But the question from Justice Alito was, what happens; does the court have authority to have a hearing?

MR. MANN: But the court --

JUSTICE KENNEDY: And you said, oh, well, this is not under Rule 68; but, you offered to allow entry of judgment under Rule 68.

And incidentally, you never did follow up and say that you wanted an entry of judgment. You just wanted a dismissal. And that's another point.

MR. MANN: Well, because the plaintiff didn't accept the offer.

One course of action is we make an offer under Rule 68, and the plaintiff says, all right, let's have a judgment under Rule 68, in which case there would be a judgment under Rule 68.

In this case, the plaintiff said, I'm not interested in Rule 68. And we said, all right. Well, now what we see is a cause of action under Federal law Congress has created that specifies certain forms of

relief that are available to the plaintiff. And in this case there are damages, some liquidated damages, some attorney's fees and costs. There is no injunctive or declaratory relief.

And we have a defendant that is willing to give more than you could possibly get if you win.

JUSTICE GINSBURG: Was there attorney's fees in that offer? I thought there wasn't in --

MR. MANN: Yes. Yes, there were. The offer specifically provides for attorney's fees. And even if the offer didn't provide for attorney's fees, they would be avail under Section 216(b) --

JUSTICE BREYER: This, I take it, is a statutory case, not a constitutional case. That is, do you have any constitutional objection if Congress had said in 216(b) that Joe Smith and other people similarly situated to Miss Laura Symczyk have a genuine dispute with the employer, and the way they file their case is Miss Symczyk's case will be deemed to be their case as well, though it ceases to be their case unless they confirm within 60 days of such and such in writing that it is their case.

If Congress passed that statute, there couldn't be a constitutional objection to it, could there?

MR. MANN: Well, I think there could be constitutional objections depending on the details of the statute --

JUSTICE BREYER: No, no, no. You see what I'm driving at?

In other words, if Congress had explicitly said in 216(b) that the Third Circuit's procedure is the correct procedure for Mr. Joe Smith to bring his case in such circumstances, if they had said that explicitly, is there a constitutional objection; if so, what could it be?

MR. MANN: I think the constitutional issues that proposals like that might raise would flow from the decision in Vermont Agency. And the question has to be whether there is a person before the court --

JUSTICE BREYER: Oh, we know at least, since we are doing -- I looked up a little bit, but Article III is what was a case or controversy in Westminster in 1788 or 1750 or whenever, that in Westminster, in a court of equity, I found at least two instances, a person dies, there is no case with that person, but it remained in equity on the docket until the other person, the estate, came in.

A woman could not bring a case if she was married. She starts as a single person. She gets

married. Lo and behold, the case remains on the docket until her husband comes in. That's not a happy example, but nonetheless it's in point.

Now, I could find nothing the other way, so I thought of the canon of interpretation that equity deems to have been done what ought to have been done, or something like that. Others on the Court -- but the -- the point is that there are instances --

JUSTICE SCALIA: Equity is wonderful.

JUSTICE BREYER: What? Yes.

It remained on the docket in the Westminster courts, even though there was no plaintiff.

So I would ask you again, is there any counter example? Is there any instance from equity or elsewhere where there is a constitutional objection, had they said it, at which point our question is have they said it.

MR. MANN: I think the problem is in that case there is an identifiable person to substitute. In this case, it's not substituting somebody for the plaintiff. It's leaving the Federal --

JUSTICE BREYER: No, no. It's Mr. Joe Smith, if he confirms it in writing.

MR. MANN: The problem in this type of case would be that the Federal proceeding would be moving

along for a substantial period of time with no plaintiffs, and the district judge's role would be simply to assist the plaintiff in trying to find -- plaintiff's counsel in trying to find new plaintiffs.

JUSTICE SCALIA: I'll bet you equity could have considered the husband to have been substituted automatically and could have been considered the estate to have been substituted automatically. That -- that happens when that particular element is eliminated. But there is nothing automatic about discovering some new plaintiff who is out -- we don't know who is out there.

MR. MANN: On that note, I'd like to reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Katyal.

ORAL ARGUMENT OF NEAL KUMAR KATYAL

ON BEHALF OF THE RESPONDENT

MR. KATYAL: Thank you, Mr. Chief Justice and may it please the Court:

I'd like to begin with the question of whether a withdrawn Rule 68 offer could moot a case. It cannot. This Court has said that Article III's case and controversy requirement demands both a plaintiff with a concrete injury and a matter where the Court is fully capable of providing relief.

CHIEF JUSTICE ROBERTS: I'd like to begin with the question of whether or not you waived that argument.

MR. KATYAL: Absolutely, Your Honor.

CHIEF JUSTICE ROBERTS: No -- did you waive it or not?

MR. KATYAL: We did not waive -- we did not waive the -- we did not waive it. We do think that the brief in opposition should have pointed it out absolutely. It was a mistake on our part not to -- not to bring to the Court's attention the impact of an unaccepted Rule 68 offer. However, we do think that this Court can consider that, and the reason for that is that it is an answer to the question presented. Indeed, it is literally the question presented.

Here is the question presented as my friend Mr. Mann wrote it: Whether a court -- "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." And we submit that the answer to that question is no, that the mere receipt of an offer without more cannot possibly moot a case.

CHIEF JUSTICE ROBERTS: Well, that was not the way the case was presented in the body of the

petition and I would suppose, if that were your objection, that it wasn't received, wasn't accepted, we might have heard about that, as you suggest.

MR. KATYAL: And --

CHIEF JUSTICE ROBERTS: And if in fact we thought we were dealing with a case in which the Rule 68 offer was not accepted, we might have thought differently about whether to grant it.

MR. KATYAL: I completely understand that, Mr. Chief Justice. I guess I would say, however, this Court in Lebron confronted a similar situation in which the matter of whether Amtrak was a State actor was not present in the cert papers; indeed, it had been disavowed, as Justice Scalia's opinion for the Court said. Nonetheless, the Court considered it and got into the merits of that question. And we think here actually it's an easier case for the Court to get into than Lebron. Both --

JUSTICE SOTOMAYOR: I have a question for you, counsel.

CHIEF JUSTICE ROBERTS: You rely on the question presented. Your reformulated question doesn't have that feature in it.

MR. KATYAL: It does have the unaccepted offer feature in the question, and of course this

Court's decision in Bray does say that it is the question presented as the Court -- as the Court granted it, that controls.

JUSTICE SOTOMAYOR: Counsel, there is -- from the beginning, you never accepted the offer.

MR. KATYAL: That's exactly right, Justice Sotomayor.

JUSTICE SOTOMAYOR: What you appear to have conceded and -- is that the amount of the offer would settle your personal claim.

MR. KATYAL: I don't quite think we conceded even that. That's a separate matter. That's about what the terms of the offer were, and our first point to you is to say this offer wasn't even accepted. Mr. Mann is waxing nostalgic about an offer that literally has not given Ms. Symczyk a dime. She is as injured today as she was the day she filed her complaint.

JUSTICE KAGAN: What do you think the court should do in that circumstance, where a defendant comes forward and says, I'm willing to satisfy the entire claim? What should happen?

MR. KATYAL: We think that, just like the Solicitor General, we think that in that circumstance it is possible for the court to enter a default judgment and force relief upon the plaintiff. And we think --

JUSTICE KAGAN: Is this under Rule 68 or is this under some inherent authority?

MR. KATYAL: I think it could work either way so long as the forcing happened within the time period of Rule 68. I don't think the court can, like Lazarus, raise this after it has already been withdrawn. The text of Rule 68 says the offer is now dead. If they had, I imagine, moved for the court to enforce that order, enforce that offer and enter a default judgment within the 14-day period, then I think that would have been something that might have been possible to do.

CHIEF JUSTICE ROBERTS: What, what benefit does this -- why are you arguing so much? You will have an entry of judgment in the favor of your client who is, according to you, simply situated to lots of others. Why don't you just, if somebody comes forward, just take them in, go in, you get a check for $7500 or whatever it is, you get attorney's fees, and you can do that as often as you want?

MR. KATYAL: For two reasons, Your Honor. The first is, of course, that is precisely what didn't happen here. Ms. Symczyk has zero, not even the $7500.

CHIEF JUSTICE ROBERTS: Well, I know. But that's the fortuity of the fact that she didn't accept the offer, and we are dealing perhaps with a case on the

record as presented to us where she did accept the offer, if you waive that argument. So assume the case where the offer is accepted.

MR. KATYAL: And I think it goes back to what then-Justice Rehnquist said in Roper, because what he said is it's not then just about the individual plaintiff. You can't force an offer onto a plaintiff that doesn't have all -- it doesn't award complete relief, because if you do so it undermines the collective action aspect of the claim.

JUSTICE SCALIA: Well, it undermines the collective aspect if she never brings the suit in the first place. I mean, I must say I'm not terribly impressed by the fact that, you know, if she drops out there is -- there is no collective suit for these other people. There is also no collective suit for these other people if she never appeared in the first place.

I don't know that the law demands that there be a collective suit. If she doesn't bring suit or if she brings suit and is given everything she wants, the case is over unless other people have come in.

MR. KATYAL: Justice Scalia, we think that the Congress has answered that question at least in 216(b) by providing for both the opportunity to file a complaint on her own behalf, as well as for those that

are similarly situated. And so I think that, as Justice Ginsburg said to my friend, if you adopt their rule, essentially you truncate that process and eliminate the ability of people to opt in, in any given situation, and for that reason it's very much -- assuming that we get to this question, that it is very much like Gerstein or Sosna or Roper in that circumstance.

JUSTICE SOTOMAYOR: Mr. Katyal, I'm a little troubled that you have given up or argue that the ability to enter a forced judgment is permissible under Rule 68. There is nothing in that rule that gives the court that power, certainly not stated explicitly or even implicitly, because it talks about an entire procedure of accepting the offer or rejecting it, all of it in the hands of the parties, none of it until the entry of the judgment in the hands of the court and only after the plaintiff has accepted the offer in writing.

So I can't see anything but an inherent power. So, for me, if there is an inherent power, it has to be under a default judgment because the other side is saying, "I give up."

MR. KATYAL: Exactly.

JUSTICE SOTOMAYOR: All right.

MR. KATYAL: That's precisely right.

JUSTICE SOTOMAYOR: Let's go from there, at

least with me, and that may answer an earlier question about an inquest on damages, because that is a part of the requirements for a default judgment, so that if there is a dispute about damages that can be resolved.

But my point is that liability is admitted. Now let's deal with the Chief's question and Justice Scalia's question, which is in what ways is this comparable to a shared cost like what motivated our decision in class actions, that the settlement of one existing plaintiff doesn't settle the collective action. How is this similar to that?

MR. KATYAL: So we think that the corpus of cases that this Court has handled in the class action area such as Geraghty and Gerstein and the like, we don't think that they absolutely control this question. I don't want to say that.

But we think that they set up two principles that help inform the Court's judgment. The first is that when you have circumstances like this, in which a claim has gone away as moot because the named representative of the claim has gone away for one reason or another, there is play in the joints. Essentially, you can have a bridge plaintiff who acts to keep the case alive for purposes of letting the class unfold. That's really what then- Justice Rehnquist was getting

at in his decision in Roper, and we think there is a lot of force to that because otherwise, as Justice Ginsburg mentioned, the collective action mechanism doesn't even get off the ground.

JUSTICE GINSBURG: Well, you don't accept the argument that I suggested, that is Rule 16 -- 216, the Fair Labor Standards Act, in saying that you can commence a suit on behalf of others similarly situated, and implicit in that is that there be some decent interval for you to find similarly-situated people?

MR. KATYAL: We absolutely agree with that and we think that's precisely the problem. And this case illustrates it, Justice Ginsburg, because they -- we filed their complaint and 75 days later they filed their preemptive Rule 68 offer. And now they are coming before the Court and saying something even more radical than I think any court has accepted to my knowledge, which is even filing a class certification motion along with the complaint wouldn't be enough. That is something that would essentially cut the heart out of the collective action mechanism altogether.

JUSTICE GINSBURG: Why didn't -- why didn't you file the motion for certification along with the complaint?

MR. KATYAL: Because the text of 216(b)

provides for two different processes, both the filing of the complaint and then a subsequent opt-in process. I suppose we could have done that. That's what the Seventh Circuit has said to do in a case called Damasco, but this Court's decision in Hoffman-LaRoche says the entire collective action mechanism depends on notice and discovery to find out who those people are, to find out and make sure that they are similarly --

JUSTICE GINSBURG: But you could have done that with the complaint and I don't -- you say you want to get joiners, so why do you have to wait? Why wouldn't you -- why wouldn't the most logical thing be to say, court, we have labelled this a collective action and now we want to start the ball rolling in getting certification.

MR. KATYAL: Your Honor, that is what we did. We asked the district court right after the Rule 68 offer expired, within 4 days, to say: Please set up a class certification process. And that process was then interrupted by their subsequent motion after the Rule 68 offer had expired to say: This case is moot.

CHIEF JUSTICE ROBERTS: It doesn't matter in terms of what the judge is supposed to do with your motion to certify if nobody else is in the case? I mean, isn't that one of the factors.

I don't know if it's even a sort of good-faith pleading if -- if -- you want certification, but there is no nobody else there.

MR. KATYAL: That's precisely, Mr. Chief Justice, why we think the Seventh Circuit rule doesn't make much sense. To come in and to ask for certification before you've conducted the discovery and gotten the names, we think is really not the right way to go.

Rather, I think this Court's decisions in Iqbal and Twombly suggest that you've got to have some good-faith belief before you go and file a motion for class certification. And I'd be very hesitant for this Court to -- to recommend a rule to litigants that says go and file your motion for class certification right away.

This Court, in McLaughlin, I think, essentially said that it's not about the timing of when that motion for certification unfolds. At 500 US 68, the Court said, "The fact the class was not certified until after the named plaintiffs' claims had become moot does not deprive the Court of jurisdiction. We recognize in Gerstein that some claims are so transitory" -- "inherently transitory that the trial court will not even have enough time to rule on a motion

for class certification."

JUSTICE BREYER: Well, you're interpreting -- I think it's true that we're interpreting the statute, and -- and I'm trying to look at what document are we interpreting? Is there a different rule or a different -- what -- what rule?

So I could come back to the statute. And Congress could deprive -- could provide exactly the system that you suggest. I don't see anything unconstitutional about it. But isn't it a little hard to read this statute as providing that mechanism, since what it says is no party shall -- no -- you know, it says what it says in the last two sentences. How do we read that to foresee the mechanism that you're talking about?

MR. KATYAL: Right. I take it this is Mr. Mann's point, that people who aren't yet opted into a class are not parties, and, therefore, the Court can't properly consider them. And I think that's the same exact thing in the class action context, is this question --

JUSTICE BREYER: Well, he says the difference in the class action context is, in the class action context you can consider them there, but there isn't a specific sentence somewhere in a statute which

says no one shall be a party unless he signs in writing.

MR. KATYAL: Your Honor, I think nothing turns on their designation as party status or not; rather, the relation-back doctrine, to the extent the Court wants to get into it and deem this offer where we got nothing, somehow they want to deem it against us, but if it does, and wants to get into the relation-back doctrine, I think it would find that it is based on the idea that the cases would otherwise go away, and that you need a bridge plaintiff.

JUSTICE BREYER: Well, why? Why?

MR. KATYAL: And it's a very important reason --

JUSTICE BREYER: Because that's -- why? Why is my question?

MR. KATYAL: The reason for that goes back to this Court's decision in Flast - in Flast, in which it said that in the kinds of cases we're talking about here, it's not as if we're risking a merits judgment in which relief is going to be imposed against one party and possibly trench on the separation of powers.

Rather, the worst that happens if you rule for us, or if you rule for the plaintiffs in those cases, is that the case goes back down on remand to find out whether or not any of those parties can be

identified and come forward. If they do, then you can reach the merits.

But this is a very different separation of powers inquiry than the one -- in the case in controversy inquiry than the one that the Court traditionally handles.

JUSTICE SCALIA: It -- it's hard for me to accept the relation-back doctrine for your purposes when -- when it's clear under the statute that if parties come in beyond the statute of limitations period, they're not in. Their -- their entry is not deemed to relate back to the filing of the original complaint, is it?

MR. KATYAL: It -- for purposes of the statute of limitations, exactly.

JUSTICE SCALIA: For purposes of the statute of -- so you want one relation-back doctrine for the statute and a different one for what we're discussing here.

MR. KATYAL: Absolutely. And we think, actually --

JUSTICE SCALIA: I know you do.

MR. KATYAL: And -- and, Justice Scalia, we think that that statute of limitations argument cuts the other way.

So the statute of limitations provision, which is section 255, says that, "in determining when an act is commenced for purposes of the statute." And so we don't think it bears on the question or not of whether relation back applies.

Much to the contrary, the real worry in the class action context, and, indeed, my friend's opening line is, "These cases are going to linger forever, and the defendants are going to have no tool."

But in the Fair Labor Standards Act context, actually, it's the very reverse because every day counts against the plaintiffs and their counsel. They are incentivized to bring these cases quickly because the clock is literally ticking.

And so you don't have, I think, the same worry that you do in the regular class action context of one plaintiff who can essentially save the day for all of the different -- for all of the different parties.

JUSTICE KAGAN: Mr. Katyal, if we do get to the question that Mr. Mann wants us to raise, you spend a lot of time talking about McLaughlin and talking about Gerstein. Those cases were about prospective relief. You're asking for retrospective relief. Why doesn't that make a difference?

MR. KATYAL: We think that it is a

difference, but we don't think it's enough to change this. And it's for the reasons that then-Justice Rehnquist said in Roper.

Here -- here is what he said. This is at 445 U.S. 341. "The distinguishing feature here is that the Defendant has made an unaccepted offer. The action is moot in the Article III sense only if this Court adopts a rule an individual seeking to proceed as class representative is required to accept a tender of only his individual claims...acceptance need not be mandated under our precedents since the Defendant has not offered all that has been requested in the complaint (i.e., relief for the class), and any other rule...would make the questions unreviewable."

And it's the same point. He is talking there about a retrospective action for damages. The rule that we are seeking here is no different than what then-Justice Rehnquist said in Roper.

JUSTICE KENNEDY: Do we take this case on the premise that you would have objected if a judgment had been entered in your favor for the full amount plus attorney's fees?

MR. KATYAL: I think you should. And this is in response to what Justice Alito had said in the first part of the argument. It is not as if we didn't

ask for a hearing. Absolutely, we asked for a fairness hearing at joint appendix page 110 in the district court, and then again at the Third Circuit.

And what we asked for specifically was review of the contours of the offer. This is at joint appendix page 110. We said, quote -- excuse me, 111, "there has been no review and/or approval by this Court of defendant's offer of judgment to the plaintiff," and for that reason we said, quote, "dismissal is inappropriate at this early procedural juncture."

So this case comes to the Court having asked that particular question about the contours of the offer. We think that an offer that never gave Miss Symczyk anything is one that didn't make her whole, and for that --

JUSTICE ALITO: If I were to -- I'm sorry. If I were to think that the individual plaintiff's claim isn't moot until a judgment is entered into her favor, but that -- but that, that issue, was not preserved, can you give me an analog that I should think about with respect to the second question?

MR. KATYAL: Sure.

JUSTICE ALITO: Should I -- yes.

MR. KATYAL: I think that the best way to think about it is the -- the category of cases from

Geraghty, Gerstein and Swisher suggest that if the -- if you wanted to hold that offer against us, that you would then say, as Judge Sirica did, the relation-back doctrine looks similar enough to the 216(b) context in this specific area. Because, otherwise, the 216(b) collective actions won't work the way Congress intended them to work.

JUSTICE ALITO: Well, should I assume that this is the same -- the case would then be the same as if a default judgment had been entered in your favor for that amount?

MR. KATYAL: I think -- well, it's hard to know how you'd hold that offer against us in that -- and the way in which you did so, I think, informs that second question. And that's part of the reason why we think it is a predicate question.

I suppose that yes, you could say -- one path available is to say it is a default judgment now that is imposed on us, along the lines of the Second Circuit decision; and, if so, then, as the Solicitor General says at pages 15 to 18, the then-appropriate course would have been for the district court to evaluate whether other people could opt into the class using the procedures of Hoffman-LaRoche.

JUSTICE SOTOMAYOR: -- to get the point --

the Court had to evaluate whether the offer actually met your personal damages claim, too.

MR. KATYAL: Oh, absolutely, Justice Sotomayor.

JUSTICE SOTOMAYOR: And what you're saying --

MR. KATYAL: We were proceeding on the hypothetical.

JUSTICE SOTOMAYOR: -- in those pages is the Court didn't even do that.

MR. KATYAL: Exactly. I was proceeding on the hypothetical that -- that for one reason or another, the Court can't reach that question.

And we think Lebron absolutely permits this Court to do so, and we think it's prudent for this Court to reach that question first, because you can side step and avoid what is undoubtedly a very difficult constitutional question about exceptions to Article III mootness and the relation-back doctrine.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

We'll hear from Mr. Yang now.

ORAL ARGUMENT OF ANTHONY A. YANG,

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING RESPONDENT

MR. YANG: Mr. Chief Justice, and may it

please the Court:

Respondent has never been compensated for her individual damage claim, nor has she received a court judgment favorably adjudicating that claim. It follows that her individual claim remains live, as does this collective action.

More generally, a settlement offer does not moot a claim if it is not accepted. Individual freedom of contract is basic to our legal system, and mutual assent is always a necessary element for any settlement. Rule 68 embodies those principles.

JUSTICE BREYER: How does that differ from an employee who says -- he is annoyed for a variety of reasons at the employer and he sues the employer for his pay, for his pay for the month of October. The employer says: He got his pay; I -- I sent him the check; I mean, he gets it every month. And he says: Yes, but I didn't cash the check.

Is there a case for controversy? He can go sue for his paycheck that he didn't cash?

MR. YANG: Well, if you're -- you're -- I'm not sure what the injury would be in that case.

JUSTICE BREYER: Okay. So why is it any different when the -- the defendant employer says, here's the check.

MR. YANG: Well, there's a difference --

JUSTICE BREYER: And he says: Oh, I didn't cash it.

MR. YANG: This -- this I think speaks somewhat to Justice Scalia's point earlier on, which is there -- there are three elements to Article III standing and it also carries through a bit to mootness.

One is an injury in fact. When we are talking about retrospective claims, there is a past injury. If you get a payment or court redress, it doesn't eliminate the injury. The injury continues to exist. Redressability --

JUSTICE BREYER: Now we have a case if the employer for some reason, a mistake in bookkeeping or something, didn't send the check on time, so it arrived 3 days late. And he says: Ha, I'm not cashing the check; now I can sue him. Right? That's your theory.

MR. YANG: Well, if there is a violation of the Fair Labor Standards Act -- and I'm not sure that that would be a violation of the Fair Labor Standards Act --

JUSTICE BREYER: No, no. He -- he -- it's a contract. You know. He -- he is paid every month, the end of the month.

MR. YANG: Well, if there is a breach of a

contract, that is an injury. And it is a past --

JUSTICE BREYER: Even though the -- the employer gave him the paycheck. He just didn't cash it. Plus the damage is for the 3 days.

MR. YANG: If I can just finish, I think it is a past injury. It is traceable to the defendant, and it is redressable because the requested relief would redress it. There may well be a defense on the merits. It may well be that there was payment. It could -- there could be accord and satisfaction. -

CHIEF JUSTICE ROBERTS: I'm not sure I understand. You think there is a live case, not if he doesn't cash it, but I guess as Justice Breyer was asking, if it's a day late? You -- you said, well, there was a past injury, it was a day late, it -- it, you know, could be redressed by telling him what? Pay him again? Or --

MR. YANG: Well, no. I -- I guess there is a few questions. If they -- if the defendant had played the plaintiff, then you would have what is traditionally known as -- and it's accepted -- you would have accord and satisfaction. It is an affirmative defense in Rule 8(c).

CHIEF JUSTICE ROBERTS: Well, you would also have what's usually known as no injury.

MR. YANG: Well, again, I think it's important to distinguish between injury and something that redresses an injury. Redress of an injury, like a court redress, which is the only question that's relevant in Article III, whether the requested relief from the court would redress the injury. Now --

CHIEF JUSTICE ROBERTS: So you think a court has to go through the whole process of a trial if the check is a day late and the employer says, I'm sorry, here's, you know, whatever the interest is on the check?

MR. YANG: No, certainly not. And this is what -- what we say is the right approach, although it's not a question of mootness: If an employer comes in and throws up their hands in court and says, it's not worth it, I want to forfeit, I want to just pay the judgment -- and -- and by the way, this would not have the issue preclusive effect notwithstanding my friend's statement earlier.

CHIEF JUSTICE ROBERTS: I'm sorry. Could you directly answer my question about --

MR. YANG: The court can simply enter judgment. It can simply enter judgment to -- to stop pointless litigation. That's the normal course, is that if there is a past injury, it's redressable, but the defendant comes in and either says accord and

satisfaction and says that there is no merits claim --

CHIEF JUSTICE ROBERTS: Yes.

MR. YANG: -- or I just give up on the merits --

CHIEF JUSTICE ROBERTS: Or the plaintiff says no -- no standing.

MR. YANG: Well, no. Again, I -- I don't think it's a question of standing because there is two issues going on. Standing has to exist at the beginning of the suit. It's assessed at the date that the complaint is filed.

CHIEF JUSTICE ROBERTS: And -- and, as we've said, at every stage of the litigation.

MR. YANG: Right. That's the -- the mootness inquiry, then. It has to continue to persist throughout the litigation.

Now, the fact that you have had some redress of some sort in the form of a private contract, that doesn't eliminate the past injury, nor does it mean that the court could not, if the court were to give additional damages relief --

CHIEF JUSTICE ROBERTS: So if you're due -- if you're due $100 from your employer, it's a day late, he gives you $100, and he says, well, here's another dollar for interest, that, as you said, doesn't

eliminate the past injury?

MR. YANG: It doesn't eliminate the injury. It might be compensation for the injury. The injury would -- once a past injury occurs, it's there. It's unlike a prospective injury, which can be stopped. When you -- when you seek injunctive relief, you need have to have an imminent on ongoing injury. If the defendant stops, that can eliminate the injury and then you go into questions of voluntary cessation. But with respect to past injury, it's quite different.

Now, I think the possibility of courts wasting their time on this cases is quite small. There is all sorts of incentives for a plaintiff not to bring these suits. There is questions of vexatious litigation. But that's not what we have here. We have in the Fair Labor Standards Act a judgment by Congress that employees are to have a right in the -- to -- to go forward in the collective form.

And as Justice Kennedy's opinion for the Court in Hoffman-LaRoche recognizes, section 216 imposes upon district courts a managerial responsibility to join plaintiffs in an orderly way. And the -- the collective action ties in with other aspects of the Fair Labor Standards Act. The action is designed, as Hoffman-LaRoche says, to serve the important function of

preventing violations. It also says that the -- the collective action is to be enforced to the full extent of its terms. These are judgments that Congress made because they were trying to protect particularly vulnerable employees in our society. These are nonunionized generally, low-wage employees without bargaining power. Congress created liquidated damages in order to provide a strong deterrent for employers to comply with the law. And also --

JUSTICE SCALIA: Mr. Yang, would -- would you continue with what you started speaking to, issue preclusion, because I'm -- I'm also -- I think it's questionable whether there would be issue preclusion on the basis of a judgment issued with the concession of the defendant.

MR. YANG: Yeah. This -- this is page 14, footnote 2 of our brief. Issue -- there might be claim preclusion in that the defendant would not be able to bring other claims associated, res -- traditional res judicata.

But for a judgment entered by a concession, the actual issue is not litigated and necessary to the judgment. And so it's well established that that would not serve any issue preclusive effect, and in fact I think if it did it would put a chill on the ability of

people to settle their disputes through offers of judgment.

So our solution that we provide the Court, we think, is the only solution that provides a practical way to accommodate the very important interests that are at issue in this case.

One, it recognizes the district court's discretion to resolve the case in a sensible way in order to --

JUSTICE KAGAN: So, Mr. Yang, do you think it would be -- I -- I mean, I take the point completely that judgment was rendered against the wrong party here. But if the judgment had been rendered against Ms. Symczyk -- for Ms. Symczyk, but -- but the court had done so prior to looking at the whole class question --

MR. YANG: Right.

JUSTICE KAGAN: -- do you think that that would be an abuse of the court's discretion? Do you think that the court has to look at the class question before rendering judgment for an individual plaintiff?

MR. YANG: In the context of a collective action, yes, because of the congressional policy that gives plaintiffs a right to proceed collectively.

That said, the collective process does not have to be a burdensome one. There are certain small

claim, idiosyncratic claims that a court can simply look at the -- the allegations and say, there are not going to be similarly situated people here.

But when we have an allegation like we have here, which there is a widespread policy of deducting 30 minutes a day, notwithstanding the employer's knowledge that the employers -- employees are working through that lunch break, there is every reason to think that there is a substantial body of -- of employees similarly situated, and it would be an abuse of discretion for the Court not to proceed at least down that road, provide some discovery, facilitate class notice -- as the Court in Hoffman-LaRoche recognizes is the appropriate thing to do under Section 216 -- and at the end of that process, which could be short for some cases, a little longer for some, should be, of course, always exercised in the Court's sound discretion. At the end of the case, if there are more plaintiffs who opt in, then it proceeds as a collective action. If it remains the single plaintiff, the Court might decide to enter judgment.

Now, we don't think that follows, Justice Sotomayor, from Rule 68. It simply follows from the fact that the Defendant is willing to just to pay, to give up. It won't have issue-preclusive effect; it

resolves the dispute: Judgment in the amount of $7,500, attorneys' fees, costs.

JUSTICE SOTOMAYOR: But what you're talking about is imputing into this process a fairness hearing, essentially, to see, by the district court, to determine whether this is a quirky case where you entered a judgment and you don't need collective action or whether or not this is a genuine case that requires joining plaintiffs.

MR. YANG: May I answer the question?

CHIEF JUSTICE ROBERTS: Certainly.

MR. YANG: I don't think it's a fairness hearing. I think what it does is -- it -- it's a question about whether there are people similarly situated, and if there are plaintiffs similarly situated, the case should proceed. If, at that point, the defendant wants to pay everyone, it certainly could do so. But my guess is usually the -- the claims would be litigated general of that.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. YANG: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Mann, you have four minutes remaining.

REBUTTAL ARGUMENT OF RONALD MANN

ON BEHALF OF THE PETITIONERS

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

I think the most useful thing to do is to address the point that Justice Breyer has raised several times because I think it's important to discuss the relationship between what I would call the statutory facts and the constitutional questions that they might raise. And so I do think it's fair in a sense to think about this as a statutory case.

When a plaintiff files suit in a Federal court, often the cause of action rests on a statute that Congress has adopted. Those statutes have a lot of attributes that Congress can control to make it easier or harder for a defendant to make an offer of complete relief.

They can provide for mandatory seeking of attorney's fees, as this one does. They can alter the rules for shifting costs, as perhaps the Fair Debt Collection Practices Act does from last month. They can provide for injunctive or declaratory relief, which makes it basically impossible.

But Congress gets to decide, when they write a statute, whether they want to make it a statute for which it --

JUSTICE BREYER: All right. That's true.

And so what we would be reading into this statute is a relation-back doctrine, which happens every day of the week in class action cases and has historical analogies.

So I understand the difference you're pointing to, but why not read that in? It would be fair, and it would get the job done that Congress sets up in the statute. That's the argument the other way.

MR. MANN: Well, that leads me to the second point I wanted to make, which is exactly what is the constitutional problem. And I think the way to get to it is when my colleague, Mr. Katyal, refers to the worst that happens, well, the worst that happens, I think it's -- it's important to understand what the worst thing is that happens.

The worst thing is -- that happens is the case is on the docket of the Federal district judge, and there is no plaintiff with an interest. And the procedure in the district court is we should spend some time, have some discovery, look around to see if we can find another plaintiff.

And so I think that that's a different problem from how the district court should decide the order of hearing -- of deciding motions. If the problem is --

JUSTICE GINSBURG: Mr. Mann, if this is --

if what Mr. Yang just told us is so, then there would be no issue preclusion because there has been no adjudication of anything. Then it seems to me that this case falls into a classic exception to mootness, which is defendant's voluntary cessation doesn't moot a controversy; and, this controversy is capable of repetition yet evasive review because every time -- so the plaintiff's got this judgment, not preclusive.

The employer continues in the old ways. The plaintiff sues again. This seems to me to fit exactly into that category of cases. If there is no issue preclusion, defendant doesn't have to stop the practice, can continue the practice, and then every time there is a suit say, okay, we'll pay the judgment.

MR. MANN: So I spoke unartfully before. Obviously, there is a difference between claim preclusion and issue preclusion. And what I was attempting to say, unartfully I will agree, was the extent of preclusion will depend on the issues that are actually litigated in the proceeding.

And so I don't --

JUSTICE GINSBURG: But there is nothing litigated when you have --

MR. MANN: Claim preclusion is going to apply because there's a judgment by --

JUSTICE GINSBURG: Claim preclusion, but the claim is, for this period of time I wasn't given the compensation. That's the claim.

MR. MANN: But it is --

JUSTICE GINSBURG: And then there is another period of time, and there is no issue preclusion.

MR. MANN: But in this particular case, there's no further dispute likely to occur between these parties. These -- she no longer works for us. There is no reason to think she is going to work for us again.

The Court has extended the capable of repetition and -- review to class actions in three cases: Gerstein, Riverside, and Swisher. But in those cases, what happened was the plaintiff sought prospective injunctive relief. The case became moot. If the Court has held that those cases were outside of Article III, the result would have been that the defendant could have been engaging in the conduct that allegedly violated Federal law and would never have had to change.

In this case, what happened -- in this case and in the cases like this, what happens is someone seeks purely prospective -- retrospective relief for something, an injury that is complete. Except for their attorneys, she would have received complete relief. We

didn't engage in our conduct any longer.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)